**CodeNEXT Draft 3**

**Administration and Procedures**

Submitted by Susan Moffat

Former CodeNEXT Advisory Group Member

April 22, 2018

Issues described below are not addressed by the recently released Staff Addendum and Errata. Comments are grouped by subject in the following order: Notice and Appeals; Bar/Nightclub Uses; Nonconforming Uses and Structures; Neighborhood and Small Area Plans; Variances, Waivers and Exceptions; F25.

**A. NOTICE AND APPEALS**

**1. Reinstate 20 day appeal window for board or commission decisions, as provided in current code (23-2I-1030).** In Draft 1, deadlines for appeals of administrative decisions (25-1-182) were shortened from 20 days after decision to 14 or 7 days depending on whether notice of decision is required. Staff acknowledged this was a drafting error and reinstated the 20 day appeal window for administrative decisions, but did not fix the deadline to file an appeal to a board or commission. Draft 3 still reduces this deadline from 20 days to 14, a significant reduction.

**2. Allow contested Minor Use Permits (MUPs) to be appealed to City Council.** Draft 3 ends the appeal process for MUPs at Planning Commission. In contested cases, the final decision should not rest with an unelected body.

**3. As an alternative, send MUP notices to all interested parties with a deadline to reply with objections; if no objections are received, the administrative approval could proceed**. This possibility was discussed with Assistant Attorney Brent Lloyd, who appeared supportive of the concept, but this language has yet to appear in Draft 3.

**B. BAR/NIGHTCLUB USES**

**1. Reinstate existing CUP requirement for late-hours bars and restaurants, including current 200’ parking buffer in proximity to House-Scale Residential Zones.** Current code requires that parking for a late-night bar or restaurant be separated from residential uses of SF-6 or lower by at least 200’. Draft 3 effectively repeals this parking buffer for late-hours bars in MU3B, MU4B, MU5A, MS3A and MS3B, and repeals the parking buffer for late-hours restaurants with or without alcohol sales in MU4B and MU5A. (The effect is unclear on the Micro-Brewery/Micro-Distillery/Winery use, which is proposed as a permitted in many MU and MS zones; if they are, in fact, allowed late-hours permits, they would also be exempt from the parking buffer.)

As anyone who’s spent time in a bar parking lot knows, they can be the scene of activities most would rather not have occurring directly under their bedroom windows, including laughter, yelling, outdoor bodily functions, last-call romances and fights. As CodeNEXT significantly increases alcohol-related zoning in many areas, this is hardly the time to repeal the 200’ parking buffer.

The simplest fix would be to reinstate a CUP requirement for any late-hours use in proximity to House-Scale Residential zones or, alternatively, add a provision to the Use Tables and/or Parking Tables that mandates the 200' parking buffer for late-hours uses in proximity to House-Scale Residential zones.

Details: LDC Section 25-2-808(C) states that any cocktail lounge - now renamed Bar/Nightclub in the draft - or restaurant that requires a late-hours permit from the TABC is a conditional use if Article 10 (Compatibility Standards) apply. This means a CUP is required for these late-night uses if they are proposed in proximity to residential uses (please note that the draft deletes Article 10 so this first trigger is now missing). LDC Section 25-2-808(D) further states that any cocktail lounge or restaurant with a late-hours permit must be in “compliance with the parking area setback described in Section 25-5-146 (Conditions of Approval),” which requires that parking for these late-hours uses “must be separated from a property used or zoned townhouse and condominium residence (SF-6) district or more restrictive by not less than 200 feet” unless the use is located in an enclosed shopping center or the Land Use Commission approves a waiver.

To be clear, Draft 3 retains the parking buffer as a CUP requirement for late-hours bars and restaurants - the problem is that it drops the CUP requirement itself for these uses in many districts.

**2. For clarity and predictability, add a note to all Use Tables stating: “State and local laws do not allow alcohol uses within 300’ of a public school, church or public hospital, regardless of base zoning, without a City Council waiver.”** As currently drafted, CodeNEXT would substantially expand by-right alcohol uses to more areas. Outside investors, unaware of local prohibitions, may naturally assume that if an alcohol use is listed as permitted in a given zone, it will be fine to open a bar or liquor store there regardless of its proximity to a school. Rather than attempting to revise zoning maps to appropriately zone around hundreds of schools, churches or hospitals, please add this simple note to the Use Tables to ensure clarity and predictability for all concerned.

**3. Require a CUP for all alcohol uses in or near residential zoning.** Alcohol uses are likely to have more significant negative impacts on nearby residents and businesses than non-alcohol uses, including inebriated customers, noise, trash, etc. Yet CodeNEXT would greatly expand the areas in which bars and nightclubs would be a by-right permitted use, including late-night establishments in or near residential areas. Draft 3 does reduce the number of alcohol uses allowed through an MUP from previous drafts, but Bar/Nightclub use is still available with an MUP in MU4A (Level 1) and MU3B and MU5A (Level 2), both of which also include residential uses and are currently mapped near single-family residences. Austin has no shortage of bars and, given the potential negative impacts to nearby residents, it is reasonable to provide the opportunity for them to have any concerns addressed before the use is approved.

**C. NONCONFORMING USES AND STRUCTURES**

**1. Clarify that conversion of nonconforming use to conditional use terminates the nonconforming use (23-2G-2050(B)(2)).** Section 23-2G-2050(B)(2) state that conversion of a nonconforming use to a conforming use terminates the nonconformity, but omits conversion to a CUP, which is specifically mentioned in (B)(5). Please revise this to clarify that conversion to a conforming use or CUP terminates the nonconforming use. Alternatively, state explicitly in (B)(5) that conversion to a conditional use terminates the nonconforming use.

**2. Clarify that conversion of a nonconforming use to a conditional use requires the CUP process mandated elsewhere in the code (23-2G-2050(B)(5)).** Draft Section 2G-1050(B)(5) states: “A nonconforming use may be converted to an allowed use or a conditional use for the zone in which the property is located,” but provides no other details as to how that conversion may be achieved. Please add language clarifying that existing CUP process must be used. Also please clarify that this is considered an abandonment of a nonconforming use (see above).

**3. Correct Section 23-2G-1050(C), which still omits current code language that allows only one modification to setback nonconformances**. After this error was raised in Draft 2, Draft 3 Subsection (C)(2) added new language to restrict height to a single modification, but Subsection (C)(3) still does not limit the number of setback modifications. Absent this provision, one could continue adding iteratively to setback nonconformances virtually in perpetuity, defeating the purpose of limiting nonconformances. Assistant Attorney Brent Lloyd believes this error was intended to be corrected in Draft 3, but was inadvertently missed.

**4. Correct Section 23-2G-1070(D) to limit window to 18 months for rebuilding a nonconforming use destroyed by causes beyond the owner’s control, not for simply filing an application.** Draft 3 omits current code language that requires a 12-month window for rebuilding a nonconforming use destroyed by fire or other cause beyond the owner’s control and prohibits expansion of the gross floor area or interior volume. Consultants removed the 12-month deadline completely in earlier drafts because they thought it was too short a deadline for rebuilding. However, Draft 3 now provides that “**an application to replace or rebuilt [sic] the structure is submitted no later than 18 months from the date the original structure was damaged or destroyed**.” This change effectively extends the rebuilding window indefinitely as applications and permits can be renewed repeatedly over an extended period. If the deadline is tied only to the filing of an application, 12 months is more than more than enough time. If the deadline is 18 months, it should be limited to rebuilding, not simply filing an application. In a March meeting, Assistant Attorney Brent Lloyd stated he believed this was a drafting error that could be fixed.

**5. Reinstate current public notice requirement for extensions of development applications** (23-2B-1050).The draft section allows an automatic extension of 1-year expiration period in a case where staff review is not complete, but omits the notice requirement to the public in the current code (LDC 25-1-87) See also 23-2C-1010(B). In November, Assistant City Attorney Brent Lloyd floated the idea of a shorter time length for automatic extensions (3-6 months), after which notice would be required, but Draft 3 still grants a 1 year extension without notice to public.

**D. NEIGHBORHOOD AND SMALL AREA PLANS**

**1. 23-1B-4010(E)**. **Strengthen city-issued Contact Team bylaws template and remove provision allowing individual Contact Teams to amend bylaws**. This section allows Neighborhood Plan Contact Teams to amend their own bylaws, but if bylaws “shall be consistent with the standardized bylaws template” as provided, why allow individual contact teams to change them? The original bylaws template the city provided was generally weak and omitted crucial sections regarding basic functions, such as the authority to place items on the agenda, voting process, quorum, etc., which led to a number of problems cited by the city auditor. In fact, many of the NP issues raised by the city auditor could have been avoided through the use of strong standard bylaws. The revised bylaws template is slightly improved, but could still benefit from additional work. In any case, it makes no sense to allow NPs to change their own bylaws at will.

**2. Add definition of Neighborhood Plan, which is still missing from Draft 3 (23-12A-1030 pg. 21, f**ormerly 23-2M-1030**).** Neighborhood Plans have been the chief planning tool used by the city for roughly two decades, and are referenced in the draft text in various places, yet are still not defined in Draft 3. It makes no sense to provide detailed provisions related to these bodies, without providing even a simple definition of them.

**3. Reinstate section governing creation and responsibilities of Neighborhood Plans and Neighborhood Contact Teams, currently in LDC Section 25-1-805.** Draft 3Section 23-2E-2030 makes detailed provisions for Neighborhood Plan Amendments, repeatedly referencing neighborhood plans and neighborhood plan contact team. Yet Draft 3 completely omits current code language governing the creation and responsibilities of Neighborhood Plans or Neighborhood Plan Contact Teams (LDC Art. 16, Section 25-1-805). For clarity of use, please reinstate this language.

**4. Add Small Area Plans to 23-2E-2 as explicitly referenced elsewhere in Draft 3.** Section 23-1B-1010 states that City Council has authority over all legislative decisions authorized by this Title including amendments to “adopted small areas plans, under Division 23-2E-2” and similar references to small area plans appear in multiple places throughout the draft, often with the cite to Division 23-2E-2. Yet as currently drafted, Section 23-2E-2 itself makes no mention small area plans, only Neighborhood Plans.

Small area plans are a major city planning tool and are obviously intended to be included in this section as evidenced by explicit references elsewhere in Draft 3. Small area plans should also be added to General Terms and Phrases, 23-13A-1.

**E. VARIANCES, WAIVERS, EXCEPTIONS**

**1. Correct Special Exception, Level 1 (Section 23-4B-4030) to retain current code requirements as follows: applies only to structures 25 years old or older; does not provide exceptions for building height or build cover; applies only to structure or portion of structure for which exception was granted and does not run with land.**

Special Exception Level 1 would authorize the Board of Adjustment to “approve a special exception to provide relief for residential properties with longstanding code violations that are minimal in degree and have little to no effect on surrounding areas.”

This special exception appears intended to bring forward the existing special exception for longstanding (25 years) setback nonconformances under LDC Section 25-2-276, which the Council enacted in 2011. However, Draft 3 significantly expands this authority by: creating new exceptions for height and building cover as well as setbacks; creating new exceptions for much more recent structures (10-year-old structures, down from the current 25-year-old threshold); and removing the following limit in current code:

 “25-2-476(C) A special exception granted under this section:

1. applies only to the structure, or portion of a structure, for which the special exception was granted and does not run with the land.”

Please revise to retain crucial provisions in current code.

**2. Consider impact of expanded Board of Adjustment (BoA) waivers on average residents.** While Draft 3 removes some of the most egregious BoA waivers proposed in earlier drafts, the remaining expansion of BoA waivers may create significant hurdles for those unfamiliar with the BoA process or unable to fund a court appeal. BoA does not allow ex parte communication and their hearings are limited and formal, which may not give inexperienced residents the opportunity to fully explain the potential impacts of a case in what will be their only chance to do so.

Further, there is no appeal for a BoA decision unless the aggrieved party can afford to go to court, effectively rendering appeal rights moot for many residents. Please consider these impacts before approving expanded BoA waivers as proposed in Draft 3.

**3. For efficiency and transparency, remove variance/exception option from 23-2A-3050, Residential Development Regulations.** New in Draft 3, Division 23-2A-3 is intended to streamline review processes for smaller residential projects of 1-6 units in order to moderate costs. However, Section 23-2A-3050 would allow an applicant request a variance or special exception from “from any zoning regulation applicable to the proposed development. These would specifically include a variance from the Land Use Commission for a 1-2 unit project or an administrative modification for a 3-6 unit project. In the interests of efficiency and transparency, a streamlined review process should be limited to no variance/exception projects. As currently drafted, this is the equivalent of ordering the daily special and then asking to substitute all the side dishes.

The recently released staff addendum actually doubles down on these exceptions, adding a new Section 23-2A-3060, which would allow an applicant to request a variance or special exception from the Board of Adjustment from any zoning regulation for a project of 1-2 units, and to request a variance from land use commission for projects of 3-6 units.

**4. Cap all administrative modifications for “inadvertent errors” at no more than 2% (Administrative Modifications, 23-2F-2040).** This section, which has been moved and retitled from previous drafts, originally allowed administrative approval of a 10% increase in certain entitlements (height, building coverage and setback) if errors were made ‘inadvertently’ in construction, sparking concerns of abuse and raising questions about illegal delegation of authority under state law. Staff response in October 2017 did not address legality under state law, or the size of the proposed percentage. The Board of Adjustments itself has stated that any proposed adjustment should be limited to 2%, not 10%.

Draft 3 now caps height adjustments at 5%, but building and setback adjustments remain at 10%, which is still too high and opens the door to abuse. Please cap all administrative adjustments for inadvertent errors at no more than 2%.

**H. VALID PETITIONS**

**1. Add Valid Petition definition and process for rezonings (Article 23-2).** Valid petition rights in rezoning cases are established by state law, as are vested rights petitions. Draft 3 provides extensive information about vested rights petitions in 23-K-2, but not one word about Valid Petitions – not even a definition (note that vested rights petitions are generally used by developers, while valid petitions are generally used by area residents seeking to oppose or alter a proposed development). In the interest of fairness, please add subsection for Valid Petitions, including definitions, applicability, procedures, etc., similar to what the draft provides for Vested Rights Petitions in 23-K-2.

**I. F25 (Formerly Title 25)**

**1. Require the final draft specify which of the current Conditional Overlays will be carried over to the F25 Zone (former Title 25).** Subsection 23-4D-8080(B)(1)(e) states it applies to “specifically identified Conditional Overlays” and Subsection (B)(2) states that the director will publish a guide listing all designations in Subsection (C)(1), but neither is available at this time. According to staff, an interactive map containing this information will link to ordinance in final draft. Please ensure this happens.

**2. Clarify how compatibility will be handled between F25 and non-F25 properties, specifically, how does subsection (c) below square with (a) and (b)?**

Draft 3 Subsection 23-4D-8080(C)(2) states that:

(a) properties in F25 Zones are subject to compatibility regulations under former Chapter 25-2, Subchapter C, Article 10(Compatibility);

(b) Residential House Scale Zones shall also trigger old compatibility regulations for properties within an F25 zone; and

(c) properties within an F25 zone that would have triggered compatibility under Article 10 “shall be treated as Residential House-Scale Zones and trigger compatibility regulations established in this Title for properties within Zone established in this Title.”

**3. For F25 properties, clarify whether they are subject to noncompliance/nonconformance provisions in contained in former Title 25 or CodeNEXT.** I am unable to find Draft 3 language specific to noncompliance, but Subsection (C)(1)(a) states that F25 properties are subject to zoning regulations of the “City’s predecessor Land Development Code, Chapter 25-2 Zoning. Chapter 25-2 contains regulations for Nonconforming Uses (Article 7) and Noncomplying Structures (Article 8). This would appear that F25 properties will remain subject to former code regulations, but please confirm.