

**Public Process in CodeNext  
Assessments and Recommendations**

October 13, 2017: Below is the League of Women Voters set of assessments and recommendations on Public Process as proposed in Version 1 of CodeNext and submitted to city staff on May 29, 2017.

After Version 2 was released in September, the League presented an evaluation as to whether the new version addressed the concerns expressed in the League’s original letter. This evaluation is highlighted under each item in **yellow**. This evaluation was submitted to city officials October 4, 2017.

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Subsequently, on October 11, 2017, city staff released an overview of the relevant sections of CodeNext (23-1 & 23-2), along with some comments made on changes in these sections between Version 1 and Version 2. A discussion of the staff comments is included below, under each section labelled “Staff Overview” and the League of Women Voters response to the staff comments is labelled “LWV Response.”

It should be noted that the staff document addresses some but certainly not all of the comments submitted by the League and others. It would be extremely useful to have a complete response to all of the public’s comments on administration and procedures in the draft of CodeNext.

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*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 workload 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.)

**V2 Addressed Issue** – Changed to give authority to Council to create the Appeals Board and to determine how members are selected.

Note however that the added language is not highlighted in the new text whereas in other places added language is highlighted, thus removing any ability to trust that one can scan the new version for added language by checking for highlights. This makes a 6-week public review period for a 1300 page document even more untenable.

**Staff Overview:** Staff notes that “Panels can be useful for resolving more complex matters that are too time-consuming to consider by the full Board during regular meetings devoted to more typical variance applications.”

**LWV Response:** Due to the fact that the Appeals Panel would be problematic with some Districts left with no representation, if this is left as is and Council should decide to consider creating such a panel, an assessment should be made as to how “time-consuming” appeals are in reality before moving forward. No evidence has been provided to suggest that on average, an appeal is any more time-consuming than a variance.

### **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.

### **V2 Partially Addressed Issue**

Language has been changed to remove underlined “...director shall, to the greatest extent possible, ensure compliance with the notice requirements...” which removes what could be a blanket waiver of complying. However, the fact that “Failure to receive notice does not invalidate...[formal actions]” continues to be problematic. If the public has a right to know about a hearing, application etc., and the city does not give notice to the public, then legal action to invalidate an approval should be allowed.

**Staff Overview:** Staff notes that “One public comment recommended deleting language in Section 23-2C-2010 (Notice Required) specifying that failure to receive notice is not grounds for invalidating a decision, except to the extent required by state law. Staff recommends keeping this language, which is consistent with similar provisions found in other development codes.”

**LWV Response:** Staff’s rationale for this clause, basically that other jurisdictions do it, does not, on balance, outweigh the fairness issues and the public’s right to know that were raised above by the League. The League stands by its recommendation.

### **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.

### **V2 Did Not Address Issue**

Staff should be willing to at least reach out and explain if in fact the City mail room is not a depository.

**Staff Overview:** Staff did not address this issue.

**LWV Response:** The League continues its request for clarification.

### **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.

### **V2 Did Not Address Issue**

**Staff Overview:** Staff did not address this issue.

**LWV Response:** The League stands by its recommendation.

### **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.

### **V2 Did Not Address Issue**

**Staff Overview:** Staff noted that "One public comment recommended eliminating Section 23-2D-2030 (Change of Location of Public Hearings), which provides flexibility for staff to relocate public hearings to a nearby location if the originally scheduled location is unavailable. This provision, which exists in current Code, is rarely used, but is important to retain in order to preserve the City's ability to meet deadlines specified by law or avoid delays that may compromise the City's interests."

**LWV Response:** Given the reasons for the allowance that have been provided, the League recommends that a change in location of public hearings be limited to cases where the hearing must proceed "order to meet deadlines specified by law or to avoid delays that may compromise the City's interests."

### **23-2F-1010(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.

## V2 Addressed Issue

A requirement for public notice and hearing has been added in 23-2F-1030(C) and 23-2F-1040. The question of advisability of exemptions should be discussed as a policy matter.

**Staff Overview:** Staff did not address this issue but it did response to the recommendation to reinstate the requirement.

**LWV Response:** The League appreciates the correction but also continues its call for a robust policy discussion of whether the expanded special exceptions are advisable, with careful consideration of consequences.

### 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 25-1-182.)

**Recommendation:** Reinstate current timing

## V2 Partially Addressed Issue

20 days has been reinstated for an appealable decision for which no notice is required. The shortened period of 14 days remains for board and commission decisions and administrative decisions for which notice is required.

**Staff Overview:** Staff notes that "The deadlines established in this section are generally consistent with current Code." More generally, they note that "...detailed and thoughtful public comment was provided on Article 23-2I. Staff is continuing to evaluate potential changes in response to comments and will likely include further revisions in Draft 3 to address particular concerns."

**LWV Response:** The League appreciates the correction in Version 2 for appeal of an administrative decision for which no notice is required, and the staff's continued review of comments in this section. However, the League continues its call for reinstatement of the 20 day timeline for other administrative decisions. Community volunteers have limited capacity for participation and attention to these sometimes technically complex issues. In addition, it should be noted that in general CodeNext is calling for significantly more administrative decisions, so this existing, greater time period of 20 days becomes even more important.

### 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.

## V2 Did Not Address Issue

Note: there is one change in this section: “responsible director” has changed to just “director.” Elsewhere, the reference is to “responsible director” or a particular department director. This is likely just an editing error but it points to a valid concern with process, that inadvertent errors may have been made and absent a comprehensive, diligent review, many unintended elements will be introduced into law.

**Staff Overview:** Staff notes that “Another concern was that Section 23-21-2030 makes the “meeting to resolve issues” optional, rather than mandatory. In staff’s experience, parties to an appeal often have intractable positions. Staff cannot force parties to meet and the Code should not impose that obligation.”

**LWV Response:** Staff’s view that parties often have “intractable positions” as a reason to delete this requirement is unfortunate. There is plenty of precedent of parties resolving issues prior to an appeal hearing. In addition, there is nothing in the current code language (see below) that suggests the staff would have to “force” parties to meet (as staff implied) and the current Code does not impose any obligation to meet. That is a misreading of the current code language. The approach in the current Code is important because it foresees the possibility of reaching consensus and ensures a process is available to reach that consensus. The League stands by its original recommendation to reinstate the current code.

Current Code § 25-1-186 - MEETING TO RESOLVE ISSUES. If requested by an interested party, the responsible director shall schedule a meeting to discuss and attempt to resolve the issues raised by an appeal of an administrative decision. The responsible director shall notify all interested parties of a meeting scheduled under this section. All interested parties may attend the meeting.

### **23-21-3050(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.

### **V2 Did Not Address Issue**

**Staff Overview:** Staff did not address this issue.

**LWV Response:** The League stands by its recommendation to reinstate the current code requirements.

### **23-21-1050(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.

### **V2 Did Not Address Issue**

**Staff Overview:** Staff did not address this issue but notes that this section of CodeNext is “...largely consistent with existing provisions of the Land Development Code...”

**LWV Response:** This is a place where CodeNext is *not* consistent with existing provisions. The League stands by its recommendation to reinstate the current code requirements and notes that the lack of notice as recommended is in direct contradiction to the corrective action taken by Council in 2008.

### **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 tolled; 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.

### **V2 Did Not Address Issue**

**Staff Overview:** Staff did not address this issue.

**LWV Response:** The League stands by its recommendations.

## **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 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.

**Recommendation:** 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.>

**V2 Did Not Address Issue**

Although V2 did expand its application to duplexes and removed reference to residential uses that do not exist in CodeNext.

**Staff Overview:** Staff's notes have clarified that this section was crafted to be similar to existing Code 25-1-365 although notes that several elements have changed.

**LWV Response:** The League appreciates that information provided in the Staff Overview. The technicalities of the changes in this revised authority are complex. The League maintains and highlights its original recommendation that this should be subject to robust public discussion, including consideration of the approach that is settled on for a "safe harbor" clause that has been subject to community concern in CodeNext and the added Board of Adjustment authority for various special exceptions.

**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.

## V2 Did Not Address Issue

**Staff Overview:** Staff merely summarizes this section and does not address the issues raised by the League.

**LWV Response:** The League stands by its concerns and recommendation.

### 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. >

## V2 Provides Some Improvements and Introduces a Concern

Improvements: Various requirements that promote positive design have been removed from allowable modification under alternative minimum compliance: shaded sidewalk and sidewalk spacing; for large sites (>5 acres) block area and length, width of sidewalk and tree spacing.

New Concern: Allows uniform flood lighting of facades. This introduces dark skies concerns, and raises the question of how the listed criteria for approval could ever be met.

**Staff Overview:** Staff provides a summary of this section.

**LWV Response:** Given that the CAG has been disbanded, the League recommends that this section be reviewed and discussed by the Design Commission and the Environmental Commission.

### 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.

## V2 Did Not Address Issue

Note that the V1 language was reformatted but the content is the same.

**Staff Overview:** Staff does not address this issue and notes that "CodeNEXT largely retains the limitations applicable to nonconforming structures under current Code."

**LWV Response:** The League stands by its recommendation and concerns. In fact CodeNext does not retain several limitations in the current Code regarding satisfaction of current parking requirements or other elements that ensure that parking requirements are not increased when dealing with nonconforming uses/structures. See e.g., 25-2-963(B)(3)(b) and several sections in 25-2-947.



### **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

#### **V2 Did Not Address Issue**

**Staff Overview:** Staff does not address this issue and notes that “CodeNEXT largely retains the limitations applicable to nonconforming structures under current Code.”

**LWV Response:** The League is not aware of existing code that allows the administrative approval of a change from one nonconforming use to another. The League stands by its concerns and recommendation

### **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.

#### **V2 Did Not Address Issue and Incorporates Additional Issues of Concern**

The only change to this section was to remove the 14 day requirement to allow for comment on a MUP application and replaces it with a time period set by the Director.

This concern is heightened by the broadly expanded entitlement on properties across the city to allow bars and nightclubs, including those with outside seating and late hours (a different topic of conversation which will need to be had at a policy level) which in some zoning categories are allowed with just an MUP.

**Staff Overview:** The Staff Overview was not meant to cover Section 23-4B and thus this issue of concern is not addressed.

**LWV Response:** The League stands by its recommendation and concerns.

### **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.

#### **V2 Did Not Address Issue**

**Staff Overview:** Staff provides a summary of this section and provides examples of when it may be needed.

**LWV Response:** While some situations may not raise issues that the Council should take up when incomplete provisions are encountered, others may and the League recommends that CodeNext reference those situations and require staff to initiate a process for Council to address them.

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.

**V2 Did Not Address Issue**

**Staff Overview:** The Staff Overview was not meant to cover Section 23-4B and thus this issue of concern is not addressed.

**LWV Response:** The League stands by its recommendation and concerns.

**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.

**V2 Addressed issue**

Public notice and hearings for special exceptions were added in 23-2F-1030(C) and 23-2F-1040.

**Staff Overview:** The Staff Overview was not meant to cover Section 23-4B and thus this issue of concern is not addressed.

**LWV Response:** The League stands by its recommendation and concerns.

**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.

**V2 Did Not Address Issue**

**Staff Overview:** The Staff Overview was not meant to cover Section 23-4B and thus this issue of concern is not addressed.

**LWV Response:** The League stands by its recommendation and concerns.

**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.

**V2 Addressed Issue**

V2 has gone back to calendar days (contrary to their corrective note for V1) and the numbers have generally been reinstated.

**Staff Overview:** Staff has noted their corrective action, defaulting to calendar days.

**LWV Response:** The League appreciates this correction.