

Is CodeNEXT “Legal”?

Presentation to the Austin Neighborhoods Council,
October 24, 2017



Ps. Sorry for the boring production. I am making it wordy so those who read it later can understand what was said.

Texas Local Government Code § 211.004 requires that zoning regulations be adopted in accordance with the adopted comprehensive plan.

“Section 211.004. COMPLIANCE WITH COMPREHENSIVE PLAN. (a) Zoning regulations must be adopted in accordance with a comprehensive plan”

What have Texas courts said?

- ▶ Texas Local Government Code § 211.004 is a statutory mandate that requires that the comprehensive plan serve as the basis for zoning decisions.
 - ▶ *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284, 294-95 (Tex. App.—Dallas 1989, writ. denied)
- ▶ The City, in adopting zoning regulations, has a duty to follow the long-range master plans and maps that have been adopted by ordinance.
 - ▶ *City of Pharr v. Tippitt*, 616 S.W.2d 173, 176-77 (Tex. 1981)
- ▶ Although some Texas court cases refer to comprehensive plans as advisory in nature, advisory is not synonymous with irrelevant.
 - ▶ *Fernandez v. City of San Antonio*, 158 S.W.3d 532 (Tex. App.-San Antonio, no pet.)
- ▶ No Texas court has ever considered such a blatant disregard for the text and maps of an adopted comprehensive plan, as we have seen in the development of CodeNEXT.

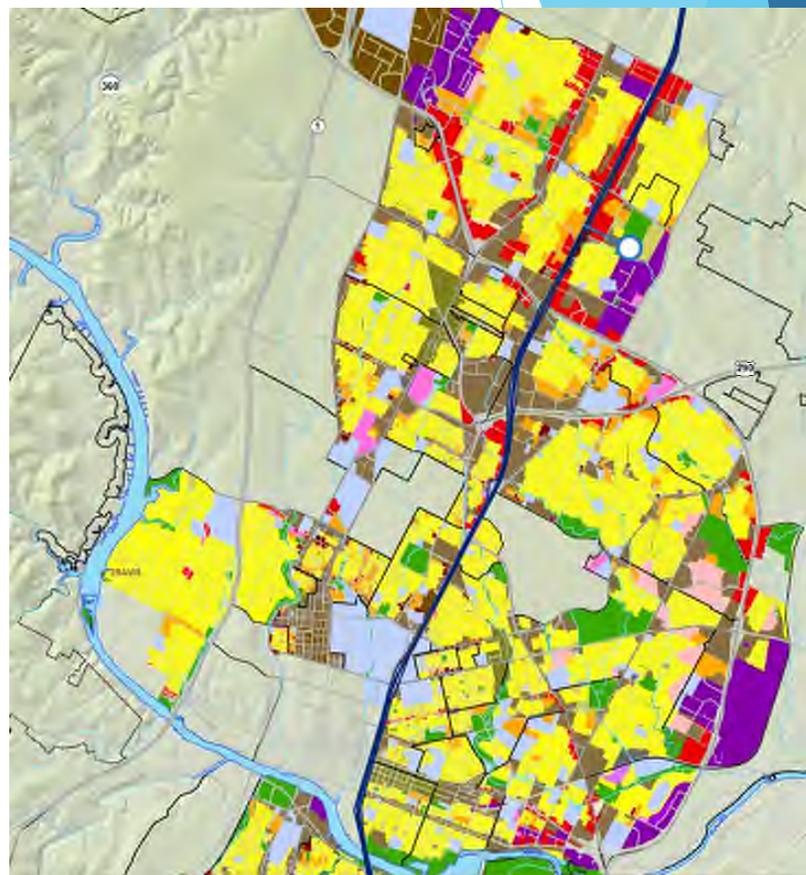
The City's charter also requires that land development regulations, including the zoning map, be consistent with the comprehensive plan.

§ 6. - LEGAL EFFECT OF COMPREHENSIVE PLAN.

Upon adoption of a comprehensive plan or element or portion thereof by the city council, all land development regulations including zoning and map, subdivision regulations, roadway plan, all public improvements, public facilities, public utilities projects and all city regulatory actions relating to land use, subdivision and development approval shall be consistent with the comprehensive plan, element or portion thereof as adopted. For purposes of clarity, consistency and facilitation of comprehensive planning and land development process, the various types of local regulations or laws concerning the development of land may be combined in their totality in a single ordinance known as the Land Development Code of the City of Austin. (*emphasis added*)

CodeNEXT must follow the adopted Comprehensive Plan.

- ▶ The process envisioned by the City Charter could not be more clear.
- ▶ After the adoption of the updated comprehensive plan, Imagine Austin, the City was responsible for ensuring consistency between its development regulations and such comprehensive plan (including all components thereof).
- ▶ For decades, the City has, at least partially, fulfilled this mandate by requiring neighborhood plan amendments when rezoning decisions were proposed in conflict with the Future Land Use Map.
- ▶ CodeNEXT should be no different.
- ▶ CodeNEXT is meant to be an implementation process; not a new planning exercise.



Did the City of Austin follow the guidance and direction of Imagine Austin?

- ▶ NO. Imagine Austin (Page 207) states, “Modifications to the City code and building code should be measured with regard to their ability to preserve neighborhood character, consistency with adopted neighborhood and area plans, impact on affordability, and the ability of existing families to continue to reside in their homes.” CodeNEXT has failed in all of these measures.
- ▶ The zoning map does not follow the Growth Concept Map’s directive to focus development along the corridors and activity centers.
- ▶ Imagine Austin explicitly recognizes that neighborhood plans are integral components of the City’s comprehensive plan, which present “a detailed view based on local conditions” and provide guidance on which “parcels are appropriate for redevelopment.” Page 219.
- ▶ “Where a small area plan exists, recommendations should be consistent with the text of the plan and its Future Land Use Map or equivalent map (if one exists).” Page 220.

Did the City of Austin follow the guidance and direction of the neighborhood plans?

- ▶ **NO**. It is unmistakable that the neighborhood plans were disregarded in their entirety.
- ▶ From calls for reductions in impervious cover to mitigate localized flooding (e.g., Bouldin Creek Neighborhood Plan) to pleas to prevent the influx of additional bars and cocktail lounges (e.g., Govalle/Johnston Terrace Neighborhood Plan), the concerns raised throughout decades of neighborhood planning efforts, representing over 48 neighborhood planning areas, have been overlooked.
- ▶ Both the first and second drafts of the zoning map have proposed zoning districts that are entirely inconsistent with the adopted Future Land Use Maps. Staff has suggested FLUM amendments will follow after adoption of the zoning map. This is **BACKWARDS**.

What can be done now?

- ▶ Pause. Reset. Change Direction.
- ▶ The maps can be simple. We have plans, we just need to follow them.
- ▶ For areas where a neighborhood plan has been adopted, mapping should have been as simple as ensuring consistency “with the text of the plan and its Future Land Use Map or equivalent map (if one exists).”
 - ▶ We need a chart showing how the new zoning categories fit within the FLUM categories.
- ▶ For areas without adopted neighborhood plans, the comprehensive plan directs the City staff to ensure that the zoning map is consistent with Imagine Austin’s Growth Concept Map, which was developed with significant community dialogue and feedback.
 - ▶ The Growth Concept Map should be overlayed onto the zoning map to see where adjustments need to be made.

Other Legal Concerns

- ▶ Rights to Valid Petitions. By using the procedures applicable to an “initial” zoning map, the City will be stripping away rights of interested parties to protest rezonings within 200’.
- ▶ Composition of the Planning Commission. “The planning commission shall have a number of members equal to the number of members on the council plus two (2) additional members, a minimum of two-thirds of the members who shall be lay members not directly or indirectly connected with real estate and land development.” The Planning Commission is well over this limit.
- ▶ Administrative vs. Legislative Decisions. The LOWV has submitted comments highlighting the degree to which authority has shifted to staff discretion. There are some court cases that indicate this could be a problem.

Questions?

- ▶ Additional resources at: <http://www.communitynotcommodity.com/>
- ▶ Please feel free to contact me:
 - ▶ Bobby Levinski, 512-636-7649 or levinski@utexas.edu