



Date: July 13, 2020

To: Wendell Davis, County Manager

Through: Jay Gibson, General Manager

From: Patrick O. Young, AICP, Planning Director

Subject: *Unified Development Ordinance* Text Amendment, Neighborhood Protection Overlay Revisions (TC1800010)

Summary

Text amendment TC1800010 includes revisions to the Neighborhood Protection Overlay (NPO) process, primarily focusing on revisions to NPO process initiation. The proposed changes are intended to clarify the NPO request initiation process, codify existing guidelines, and streamline the process for the governing body to determine whether or not a request for a NPO should be initiated. The proposed revisions were first reviewed by the Joint City-County Planning Committee (JCCPC) as part of TC1800002, Omnibus Changes 12, on August 1, 2018, and subsequently heard by the Planning Commission on October 9, 2018. Per request by the Planning Commission, the revisions were removed from TC1800002 and are proposed as a separate text amendment request.

Staff brought the item back to the JCCPC at its February, 2019 meeting with an additional change to remove the Joint City-County Planning Committee (JCCPC) from the NPO recommendation and prioritization process. The JCCPC requested three changes to the draft presented to them, which have been added to the attached ordinance under consideration (Attachment B) and also considered by the Planning Commission at its public hearing:

1. Post signs within the neighborhood while the NPO application is under consideration for initiation;
2. Allow for the neighborhood to present to the JCCPC prior to the elected body action on initiating the request; and
3. If initiated, refer the item back to the JCCPC for consideration within the Departments' work program.

Recommendation

That the Board of Commissioners approve the attached Ordinance to amend Article 2, Review Authority; and Article 4, Zoning Districts, of the *Unified Development Ordinance*; and approve a consistency statement declaring the request consistent with the Durham *Comprehensive Plan* and that the request is reasonable and in the public interest. Information supporting these recommendations is found within this memo, attached documents, and any information provided through the public hearing.

Background

The NPO is a zoning overlay district developed with the adoption of the UDO in 2006 (Sec. 4.6, Neighborhood Protection Overlay). The overlay allows neighborhoods to craft individualized zoning district regulations “...to protect and preserve the established character of existing neighborhoods.” It is a zoning map change, establishing the boundaries of the NPO district, and a text amendment that establishes the standards for the district. Two neighborhoods have established an NPO: Tuscaloosa-Lakewood in 2008 and Old West Durham in 2018 (Hope Valley submitted a request in 2006 but did not proceed after its first neighborhood meeting).

The procedures to submit a request to initiate the adoption process for an NPO are as follows:

1. Persons interested in an NPO must meet with staff prior to submitting an application (pre-application conferences are required for rezoning requests).
2. Applicants, following guidelines developed by staff and the JCCPC, must submit by June of every year. No fees are currently charged for NPO submittals.
3. Applications are reviewed by staff and forwarded on to JCCPC for additional review and “prioritization”.
4. If a submittal is “prioritized” it can be considered as a work program item to determine if there are adequate staffing and resources available to commence with the project. If it is not “prioritized” then the request can be considered the following year, and if not “prioritized” at that point, the application is withdrawn from consideration. The Old West Durham request was prioritized, but commencement of work on it was pending for a number of years until there were adequate resources available to work on the project.
5. Once it is established as a work program item (the work program is approved every year by the governing bodies), staff provides technical assistance to the neighborhood representatives on developing the boundaries and standards of the district. Based upon experience with Tuscaloosa-Lakewood and Old West Durham, it could take approximately 18 months from commencing work on the NPO to the governing body’s public hearing.

As part of its review of TC1800002, Omnibus Changes 12, the JCCPC was supportive of the proposed revisions, including no minimum percent for property owner consent. The Planning Commission heard TC180002 at its October 9, 2019, meeting and raised concerns about the revisions. Staff, at the request of the Planning Commission, removed the NPO-related text from TC1800002 and indicated the revisions would be brought back as a separate item.

The Planning Department brought the item back to the JCCPC in February 2019 for additional review and comment based upon issues raised by the Planning Commission and requested three additional items noted above. The Planning Commission held its public hearing on January 14, 2020, and recommended approval 9-1. The Planning Commission determined that the Ordinance request is consistent with the adopted *Comprehensive Plan* and that the request is reasonable and in the public interest based on comments received at the public hearing and the information in the staff report. The Durham City Council approved this item at its June 10, 2020, special session.

Issues

Once the Old West Durham NPO was adopted, staff was able to review the process and receive feedback from participants to determine what aspects could be improved. Two primary issues were raised:

1. The initiation process was unclear and not transparent; and
2. There wasn't a minimum property owner percent threshold for the petition.

At the Planning Commission hearing for TC1800002, additional issues were raised:

3. That the proposed process made it more difficult to submit a request (regarding the overall time and that it was politicizing the process at too early a stage); and
4. The requirement that only the governing body can officially initiate an NPO process was contrary to state law.

An unclear, non-transparent, initiation process that can take a long time (items #1 and #3, above). These assertions are all true for the current process. Requiring a request to be "prioritized" by the JCCPC, especially when there is only one NPO request, is confusing to the public and can give the false impression that the request will be immediately worked upon by staff. Having to revisit the request as part of the Planning Department's annual work program development, factoring in resources and other priorities, ultimately frustrates an applicant that would like to see certainty about the request. Additionally, a common complaint heard by staff through the most recent NPO adoption process (Old West Durham) was that people were not aware how the process first got started. There are currently no notification requirements when JCCPC considers requests, which can be more problematic as many months, or years, go by from when the request was "prioritized" and when staff could begin working on it with the neighborhood.

The proposed revisions attempt to address these concerns by providing a clear path for a "petition to initiate an NPO" by requiring a response by the actual approving authority, and removing a process that is confusing, not transparent, and has resulted in months or years of delay that provide little resolution. The revisions:

1. Codify the basic requirements currently found within "guidelines" established by the JCCPC. This removes the need to look at two different sets of standards or guidelines, which often confuses citizens, appointed, and elected officials alike.
2. Remove the JCCPC prioritization process by taking the "petition to initiate an NPO" directly to the governing body for it to determine whether the request should be initiated, and if so, when. This is due to:
 - a. NPO request not being joint jurisdictional, and
 - b. A desire to move the process forward in a timelier manner.The JCCPC would still be involved in determining overall departmental work program priorities, and may review the request prior to the governing body decision to initiate (see *Action by the JCCPC*, below).
3. Clarify the pre-submittal meeting requirement. This is already required but text is added to make it more explicit.

4. Add a neighborhood meeting requirement prior to submitting a request. Although prior NPO requests have performed this, staff sees this as a necessary step to require neighborhoods to engage its residents and property owners at a very early stage.
5. Add notification requirements for the governing body meeting to decide whether or not to proceed with the petition. The meeting is not a public hearing, since the purpose is solely to consider acting upon a neighborhood's request for an NPO, but staff believes a similar notification mail out is prudent to let property owners be aware of the request, in addition to any neighborhood meetings that were held.
6. If a request is initiated by the governing body, explicitly indicate the opportunity for the item to be brought back to the governing body prior to initiating the adoption process with public hearings to address any issues that may have arisen and to verify continued neighborhood support.

Concern regarding the Governing Body requirement to initiate a NPO (item #4, above). This concern was raised at the Planning Commission for TC1800002, asserting that state enabling legislation regarding zoning specifically allows any individual to seek a rezoning or text amendment. After review by the City Attorney's Office, the County Attorney's office, and Planning Department staff, it was determined that the City and County have the authority to determine how zoning boundaries and regulations are established and modified, and that there is no specific statute that requires a city or county to allow any individual to seek any rezoning or text amendment request*. Both Raleigh and Chapel Hill maintain neighborhood protection overlays and ultimately require the "initiation for designation" request to be decided by the governing body.

Furthermore, recent state legislation enacted this past summer restricts the ability to seek rezoning that qualify as "downzoning." In order to down-zone a property, written consent from all subject property owners is required, or it must be initiated by the governing body. The statute considers down-zoning as an action the decreases development density, or reduces the permitted uses of the land.[†]

A minimum percentage of property owners should be applied to petitions (item #2, above). Another comment received by staff and the JCCPC was that petitions should be considered only if a certain number of properties, or property owners, petitioned for the NPO. The guidelines recommend 51% of properties be included within the petition of support, but it is not required. Of the two established NPOs, neither had a petition that met the 51% recommendation.

This aspect was considered by staff and discussed by the JCCPC, and was determined that the ability for the governing body to determine whether a request to establish a NPO should not be limited by a specific percent of a neighborhood, however the percent is to be determined. Agreeing to initiate a NPO, and final action on the NPO rezoning and text amendments, are discretionary actions under the authority of the governing body, which can consider many factors. Staff and JCCPC saw no need to create an artificial limit on this authority, and the JCCPC

* See NCGS 160A-384 for the City, and 153A-343 for the County.

† See Session Law 2019-111.

further stated that just because a petition may not represent a majority of a neighborhood does not make it any more or less worthwhile to consider.

Action by the JCCPC

The JCCPC, at its February 2019 meeting, reviewed and voted to recommend the proposed amendments with the following additional items, which are included in the attached ordinance considered by the Planning Commission (Attachment B).

1. Post signs within the neighborhood while the application is under consideration for initiation;
2. Allow for the neighborhood to present to the JCCPC prior to the elected body action on initiating the request; and
3. If initiated, refer the item back to the JCCPC for consideration within the Departments' work program.

Consistency with the *Comprehensive Plan*; Reasonableness and in the Public Interest. The intent of the proposed amendments is to address concerns raised about the NPO process, specifically regarding the initiation process, which is a reasonable request and in the public interest to review and revise. The amendments would not conflict with *Comprehensive Plan* Policy 2.3.4b, Neighborhood Protection Overlay or Policy 4.3.2b, Neighborhood Protection Overlay Districts, in which both stipulate maintaining an ability to establish NPO districts.

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Attachments:

Attachment A: Statement of Consistency Pursuant to NCGS § 153A-341

Attachment B: An Ordinance to Amend the *Unified Development Ordinance* Regarding the Neighborhood Protection Overlay (TC1800010)

Attachment C: Planning Commission comments