



Date: January 14, 2020

To: Members of the Durham Planning Commission

Through: Patrick O. Young, AICP, Planning Director

From: Michael Stock, AICP, Senior Planner

Subject: *Unified Development Ordinance* Text Amendment, NPO Process Revisions (TC1800010)

Summary

Text amendment TC1800010 includes revisions to the Neighborhood Protection Overlay (NPO) process, primarily focusing on revisions to process initiation. The proposed revisions were reviewed by the Joint City-County Planning Committee as part of TC1800002, Omnibus Changes 12, and subsequently heard by the Planning Commission. The proposed changes are intended to clarify the request 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. 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 recommendation process. The JCCPC requested three changes to the draft presented to them, which have been added to the attached ordinance under consideration (Attachment A):

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.

Recommendation

The staff recommends approval.

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.

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, 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 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, 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 that 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 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 draft ordinance submitted for the Planning Commission’s consideration (Attachment A).

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.

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

† See Session Law 2019-111.

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Attachment:

Attachment A: An Ordinance to Amend the *Unified Development Ordinance* Regarding the Neighborhood Protection Overlay (TC1800010)- PC Draft

**AN ORDINANCE TO AMEND
THE *UNIFIED DEVELOPMENT ORDINANCE*
REGARDING THE NEIGHBORHOOD PROTECTION OVERLAY (TC1800010)**

WHEREAS, the [Durham Board of County Commissioners/Durham City Council] wishes to amend certain provisions in the *Unified Development Ordinance* (UDO) by making revisions to the Neighborhood Protection Overlay (NPO) process; and

WHEREAS, it is the objective of the [Durham Board of County Commissioners/Durham City Council] to have the UDO promote regulatory efficiency and consistency and the health, safety, and general welfare of the community;

NOW, THEREFORE, be it ordained that Article 2, Review Authority; and Article 4, Zoning Districts of the *Unified Development Ordinance* are amended to make the following changes set forth in the deletions (strikethroughs) and additions (underlining) below:

PART 1

[Amendments to revise the initiation process of a neighborhood protection overlay, and other technical changes]

Sec. 2.2 Joint City-County Planning Committee (JCCPC)

[Paragraphs not listed remain unchanged]

2.2.3 Powers and Duties

C. The JCCPC shall be responsible for review of the Administrative Guidelines established by the Planning Director governing neighborhood meetings pursuant to paragraph 3.2.3, Neighborhood Meeting; ~~the guidelines for establishing Neighborhood Protection Overlays pursuant to paragraph 4.6.2, Establishment of Overlay;~~ the Landscape Manual pursuant to paragraph 9.2.1, Landscape Manual; and the Durham Design Manual.

Sec. 4.6 Neighborhood Protection Overlay (-P)

[Paragraphs not listed remain unchanged]

4.6.1 Purpose

The purpose of the Neighborhood Protection Overlay is to protect ~~and preserve~~ the established character of existing neighborhoods by ~~limiting the flexibility of modifying the standards of~~ underlying base districts in order to more effectively match the density, intensity, or established character of an existing area. ~~The overlay may also be used to establish specific design guidelines that are more detailed than the standards of this Ordinance for use during review of development within the overlay.~~

4.6.2 Establishment of Overlay

A. A petition to establish a neighborhood protection overlay shall not be construed as a complete and accepted zoning map change application. The governing body, as applicable based upon jurisdiction, shall be the approving authority to initiate a neighborhood protection overlay application, and would therefore be the official applicant.

- AB.** A Neighborhood Protection Overlay ~~may only~~shall be established as both a zoning map change in accordance with the requirements of Sec. 3.5, Zoning Map Change, to reflect the boundaries of the designated overlay, and a text amendment in accordance with the requirements of Sec. 3.19, Text Amendment, to codify the standards established within the overlay.
- BC.** Multiple Neighborhood Protection Overlays shall not be designated over any individual property. A property may only be located within one Neighborhood Protection Overlay.
- CD.** The overlay ~~and any associated standards or guidelines~~ shall reflect the prevalent intensity and consistent building design in the neighborhood, to ensure that new development reflects the identifiable physical character of the area. ~~The standards or guidelines proposed for the overlay shall be included with the original petition for designation as defined in paragraph 4.6.3, Modification of Standards.~~
- ~~D. The Planning Director, or designee, shall review any proposed overlay and any associated standards or guidelines to determine their conformity with the requirements of this section. As part of this review, the Planning Department shall hold at least one neighborhood meeting to ensure continued neighborhood support for the request prior to initiating the public hearing process.~~
- ~~E. No review fee shall be required in the establishment of a Neighborhood Protection Overlay.~~

E. Petition Submittal

1. Required Pre-Petition Conference

Prior to submittal of a petition and the required pre-submittal neighborhood meeting, a pre-petition conference with the Planning Director or designee shall be required. The Planning Director or designee may establish deadlines for such conferences.

2. Required Pre-submittal Neighborhood Meeting

After the pre-petition conference and prior to submittal of a petition, a neighborhood meeting shall be held pursuant to paragraph 3.2.3, Neighborhood Meeting. In lieu of those requiring notification pursuant to paragraph 3.2.3C, the following shall be notified:

- a. All officers and/or representatives of any neighborhood association or other neighborhood group established within the proposed boundaries of the neighborhood protection overlay and that is registered with the Planning Department to receive notice.
- b. Each owner of record of property within the proposed boundaries of the neighborhood protection overlay.

3. Submittal

- a. Petitions to initiate the establishment of a neighborhood protection overlay shall be submitted to the Planning Department pursuant to the established submittal schedule for such petitions, and shall utilize the official forms maintained by the Planning Department pursuant to paragraph 3.2.4, Application Requirements, and any other requirements of this section.
- b. In order to be accepted for review, a petition shall provide documentation that demonstrates compliance with the following requirements:
 - (1) The proposed overlay area totals at least 15 acres, excluding right-of-way;
 - (2) The average age of structures within the proposed area is at least 25 years old;

- (3) At least 75% of parcels within the proposed area are developed;
- (4) The required pre-petition meeting was held;
- (5) The required pre-submittal neighborhood meeting was held and performed as required per this section and paragraph 3.2.3, Neighborhood Meeting; and
- (6) The additional documents listed in paragraph c, below, were provided.

c. Additional Submittal Requirements

- (1) A proposed map of the overlay area. The proposed overlay area shall not include properties for which the owners were not notified for the neighborhood meeting.
- (2) A petition of support signed by property owners and residents within the proposed area.
- (3) Documentation of a consistent, identifiable physical character.
- (4) Documentation of historical, social, or other significance applicable to the neighborhood.
- (5) A discussion of specific physical elements or development patterns that are not adequately addressed by the base zoning regulations.
- (6) A plan for neighborhood outreach and overlay development.
- (7) Any other materials the petitioner(s) believe are pertinent to the request.

d. Notification Fees

If required through the adopted fee schedule, mailed notification fees for the governing body meeting shall be required at the time of submittal.

4. Action by the Planning Department

The Planning Director or designee shall review the submittal for completeness and conformance with the requirements of this section, and forward the request to the applicable governing body for its review and determination to initiate the petition. Prior to forwarding to the governing body, the following shall be performed:

- a. Signs shall be placed throughout the proposed NPO area to inform residents of the request; and.
- b. The applicant(s) shall be offered an opportunity to present the request to the JCCPC.

5. Action by the Governing Body

- a. The Planning Department shall perform a mailed notice in accordance with a zoning map change pursuant to paragraph 3.2.5, Notice and Public Hearings, indicating a petition to initiate an NPO has been filed and shall be considered for initiation by the governing body at a specified date and time.
- b. Upon review of provided information, the governing body shall determine whether and when to initiate the designation process for the neighborhood protection overlay. At a minimum, the governing body shall consider the following:
 - (1) That the documents submitted as part of the petition submittal are correct and sufficient.
 - (2) That there is a substantial level of support by residents and property owners. An indicator shall be the petition of support submitted as part of the request, but other indicators may be considered.
 - (3) That there is a historical, social, or other type of significance that the overlay request would aid in preserving.

- (4) That there are consistent and identified physical characteristics and other elements that the base zoning cannot sufficiently address.
- (5) That the parameters of the proposed overlay would be consistent with the Comprehensive Plan and other applicable policies.
- (6) That there are sufficient staffing resources that would not negatively impact approved work program priorities.

c. If the governing body determines an overlay designation process shall proceed, it shall refer the item back to the JCCPC for consideration within the Planning department's work program.

F. If an overlay designation is initiated and overlay development has begun, the Planning Director or designee:

- 1. Shall review any proposed overlay area and associated standards to determine their conformity with the requirements of this section. As part of this review, the Planning Department shall hold at least one neighborhood meeting prior to initiating the public hearing process; and
- 2. May review progress with the governing body prior to the required public hearings to verify continued support for the overlay or to discuss new issues pertinent to the establishment of the overlay.

4.6.3 Modification of Standards

A. A Neighborhood Protection Overlay may allow for the modification of any of the following standards within this Ordinance:

- 1. Restrictions to the use Use regulations in Article 5, Use Regulations (the proposed standards may impose stricter limitations governing uses than allowed by the underlying zoning but shall not permit uses not allowed by the underlying districts);
- 2. District intensity standards in Article 6, District Intensity Standards;
- 3. Site design standards in Article 7, Design Standards;
- 4. Tree protection and tree coverage standards in Article 8, Environmental Protection;
- 5. Landscaping and buffering standards in Article 9, Landscaping and Buffering; or
- 6. Parking standards in Article 10, Parking and Loading; or
- 7. Sign standards in Article 11, Sign Standards.

~~**B.** A Neighborhood Protection Overlay may allow for restrictions on building design or placement details, including scale, mass, materials, and architectural style.~~

~~**Commentary:** North Carolina Session Law SL2015-86 limits the ability to place design or aesthetic regulations upon single-family and two-family residential structures.~~

CB. Any modified standards ~~and regulations~~ applicable within a Neighborhood Protection Overlay shall be expressly set forth in the overlay district at the time of adoption.

~~**4.6.4 Design Guidelines**~~

~~Where appropriate and allowed by State statute, a Neighborhood Protection Overlay may require the application of specific design guidelines in the review of development. Such guidelines shall be established as part of the overlay district at the time of adoption, and implemented through review and approval of site plans pursuant to Sec. 3.7, Site Plan Review, or architectural review pursuant to Sec. 3.23, Architectural Review.~~

PART 2

That the Unified Development Ordinance shall be renumbered, including references, as necessary to accommodate these changes.

PART 3

That this amendment of the Unified Development Ordinance shall become effective *[insert date]*