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TO: Denver City Council Land Use, Transportation and Infrastructure Committee
FROM: Alek Miller, AICP, Senior City Planner
DATE: April 11, 2023
RE: Modernizing Zoning Variances Text Amendment

Staff Report and Recommendation

Based on the review criteria for text amendments set forth in the Denver Zoning Code (DZC), Section 12.4.11 (Text Amendment), Community Planning and Development (CPD) staff recommends approval of the Modernizing Zoning Variances Text Amendment to the Denver Zoning Code and the Denver Revised Municipal Code.

Summary and Purpose

Overview: The Modernizing Zoning Variances Text Amendment proposes to revise and update regulations for the two major tools available for allowing relief from zoning standards – the administrative adjustment and the variance. Generally, this project aims to streamline the processes for granting relief from zoning standards and to update review criteria to bring them more in line with real-world situations. The project’s overarching goal is to update regulations, some of which are decades old, that perpetuate inequity and reduce affordability. A Planning Board review draft of the proposed text amendment is available on the Community Planning and Development (CPD) website [Text Amendments to the Zoning Code - City and County of Denver \(denvergov.org\)](http://www.denvergov.org/CPD), and is included as a supplement to this staff report.

The proposed text amendment aims to provide greater flexibility in granting relief from zoning standards in the following ways:

- Processing claims based on federal law (such as the American Disabilities Act and Federal Fair Housing Act) as administrative adjustments, rather than variances.
- Allowing approval of a variance or adjustment if the request would result in an increase of income-restricted housing units.
- Addressing minor errors in permitting and construction through an administrative adjustment or variance.
- Expanding the examples of unusual physical conditions or circumstances to support preservation of existing buildings and established trees.
- Updating the eligibility requirements for certain administrative adjustments to allow less impactful changes to be approved at the staff level, rather than to require a Board of Adjustment hearing.
- Allowing the Board of Adjustment to approve a variance when an applicant has relied on a permit issued in error.

The proposed text amendment is the culmination of a two-year effort: The first phase was initiated by Councilwoman Kniech and Councilwoman Sandoval in partnership with Community Planning and Development. In 2021, this effort resulted in an overhaul of the necessary qualifications of Board of Adjustment members, the overall make-up of the Board, and the division of appointments between the Mayor and City Council. After a new slate of Board of Adjustment members was seated in June 2022, the second phase of the project began. While the first phase focused on the qualifications of the Board and *who* approves relief from zoning standards, this second phase focuses on *how* this work is done and the standards by which it's evaluated. The second phase has involved research on trends in variances and administrative adjustments in Denver, a review of peer cities' practices, and surveys and discussions involving staff and stakeholders that most often utilize administrative adjustment and variance procedures.

Purpose: The purpose of this text amendment is to streamline the available procedures for requesting relief from zoning standards and to ensure that eligibility and review criteria are responsive to the needs of Denver today.

Background: Board of Adjustment and the City Charter

The Denver Zoning Code allows for relief from zoning standards through two procedures: the administrative adjustment and the variance. Both procedures require a showing of an 'unnecessary hardship' for approval. The unnecessary hardship has its roots in the Charter of the City and County of Denver – in fact, the role of the Board of Adjustment, the variance procedure, vote thresholds, and the required findings for approval of a variance are all dictated by specific language in the City Charter, which was adopted in the 1920s and has remained largely unchanged since. The 'unnecessary hardship' language can be quite limiting for modern requests. It can be difficult to demonstrate a hardship for minor requests and it can preclude reasonable requests from obtaining approval. With the proposed text amendment, staff proposes to replace the 'unnecessary hardship' with 'justifying circumstances' for approval generally and to expand the specific instances where relief could be justified.

On December 19, 2022, the City Council referred a Charter amendment to the April ballot (Referred Question 2M), which would require that the procedures for appeals, variances and exceptions from the zoning code be addressed in city ordinance, rather than in the Charter. The proposed text amendment is contingent upon approval of this Charter amendment by the voters.

In addition to the proposed Charter amendment and the Denver Zoning Code amendment, this project proposes a "bridge amendment" to the Denver Revised Municipal Code that would allow properties that retain a Former Chapter 59 zoning designation and that contain one- and two-family primary uses to access the administrative adjustment and variance procedures in the Denver Zoning Code.

Process Changes

- **Vote threshold:** Currently, the City Charter requires the vote of 4 of the 5 members of the Board of Adjustment to approve a variance or administrative appeal. Staff was unable to find a peer city with such a high threshold for approval – a simple majority was the typical standard. The proposed text amendment would reduce the vote threshold for approval of a variance from 4 votes to 3 votes. The vote of 4 members would continue to be necessary to overturn a decision made by the Zoning Administrator. Staff believes the higher threshold for overturning an administrative decision is appropriate because it reflects the presumption of correctness afforded administrative decisions found in the code, and because appeals of administrative

decisions can apply to a wide range of decisions, from designation of a primary street setback to a code interpretation or policy decision by the Zoning Administrator.

- **Mandatory pre-application meeting:** Currently, a pre-application meeting is not required for applications for variances. This can sometimes result in zoning violations being left out of an applicant's request for a variance, a basic lack of communication about how the variance process works from beginning to end, and a lost opportunity to best prepare the applicant to make a complete application and public hearing appearance. This new requirement would allow for improved coordination between applicants and CPD staff.
- **Requirement to apply for administrative adjustment before variance:** The proposed text amendment would create a new requirement that any request that falls within the parameters of an administrative adjustment first be submitted to CPD through that procedure, rather than going directly to the Board of Adjustment for a variance. Although this is not a common occurrence, the requirement would ensure consistency in process and offers similar advantages to the mandatory pre-application meeting.
- **Addressing pre-application submittal and expiration of administrative adjustments:** The proposed text amendment clarifies when administrative adjustments can be submitted and provides an expiration date for adjustments approved before formal application for development.
- **Expiration of variances after approval:** A new allowance to request an extension of the approval period for a variance is proposed in Section 12.4.7.

Administrative Adjustment Procedure

The proposed text amendment would change the organization of the administrative adjustments section of the Denver Zoning Code and would introduce new adjustments that would not be required to demonstrate the more typical justifying circumstances, such as neighborhood compatibility or an unusual physical condition or circumstance. Instead, the following administrative adjustments have review criteria that are specific to the circumstance described, which are listed in conjunction with the eligibility requirements and extent of adjustment authorized:

- *Requests for relief necessary to comply with federal law*, such as the Americans with Disabilities Act or Federal Fair Housing Act, are proposed to be moved to the administrative adjustment procedure from the variance section. The purpose of this change is to allow for less processing time and to allow federal and state requirements to be met in a faster time frame, with less expense. In this way, the code will preserve the public hearing before the Board of Adjustment for more complex or impactful requests for relief. Further, a request for relief to comply with federal law is not required to demonstrate an additional justifying circumstance and other findings according to the variance review criteria; the fact that the relief is necessary to comply with federal law is sufficient grounds for approval.
- All requests for *adjustments for historic structures or properties located in historic districts* would be authorized through an administrative adjustment if the Landmark Preservation authority (either staff or the Landmark Preservation Commission) finds that the adjustment would result in a more compatible result than a project that complies with the Code. These adjustments have been relocated from the variance section.

- *Public utility equipment placement* is a new adjustment that allows for equipment necessary for transmission of electricity to be eligible for an adjustment based on utility siting best practices, safe access, and other criteria.
- *Administrative Adjustments for Location Limitations on Certain Zoning Uses* allows adjustment of specific distance and separation requirements and density limits for uses in Article 11. The Zoning Administrator can currently waive or reduce these limitations for certain uses; this change would provide a standard threshold and process for all uses subject to distance/separation and density limits. Individual references to the waiver or reduction would be removed from Article 11 and replaced with this general adjustment. In addition to the 19 uses which currently have this waiver, other Article 11 uses would now be eligible for this adjustment in compliance with this administrative adjustment.
- *Limited tolerance for construction errors* is a new adjustment that allows for correction of construction built not according to approved plans, limited to certain standards and within certain percentages of the requirements. For example, this will allow a 1-foot encroachment through the bulk plane or a 10-25 percent decrease of certain setbacks, provided there is no substantial evidence of bad faith.
- *Alternative Design for Open Space in Large Developments* is an existing administrative adjustment that has been modified to fit the construct of similar adjustments in this section.
- *Administrative Adjustments to Resolve Conflicts Between City Standards* allows the Zoning Administrator to waive the applicability of Section 1.1.3.3.A, Conflicting Provisions, which says that when two standards conflict, the most restrictive standard will apply. This allows the Zoning Administrator to grant an adjustment from a more restrictive zoning standard after weighing the relative benefits gained from the standards in conflict. Further, this administrative adjustment may only be requested by the Manager of CPD.

The proposed text amendment reorganizes the existing administrative adjustment table (in Section 12.4.5.3.A) into two separate tables – one table for the typical one- and two-family residential building forms and one table for all other building forms. This separation aims to improve readability and to allow more information, such as required findings and applicability information to be included alongside the standards. The table has been updated with revised percentages under the ‘Extent of Adjustment’ column that are proposed based on research and past trends. New administrative adjustments are proposed to meet needs that were identified in the research for this project or in comments as part of the drafting, including but not limited to:

- An adjustment for required setbacks of trash enclosures in MS districts
- An adjustment to reduce required parking when necessary for siting of required electric vehicle charging equipment
- New administrative adjustments for zone lot depth and area standards

Review Criteria – Administrative Adjustment and Variance

Since the Board of Adjustment is not limited to certain standards or even certain degrees of change through the variance procedure, the focus of changes to the variance is on the review criteria. The review criteria are proposed to be duplicated in the administrative adjustment section, so that slight

variations can be applied to the two different procedures. Both the administrative adjustment and the variance procedures would have the following review criteria, except for differences as noted below:

- **Neighborhood compatibility:** Currently, for administrative adjustments, staff is limited by the Code to the extent of properties to analyze for neighborhood compatibility. For example, when analyzing changes in the front 65 percent of the zone lot, staff can only consider “any zone lot or primary building on a zone lot which is located on the same face block or the face block across a public street from the subject building.” In some cases, the neighborhood or a more relevant sample of zone lots may extend beyond these boundaries; the proposal to remove the specific limitations on the universe of properties to analyze will allow staff to use their professional judgment to determine the appropriate neighborhood context for each case. The Board of Adjustment can currently determine the appropriate neighborhood for analysis of variances and this flexibility would remain.
- **Unusual physical conditions or circumstances:** This review criterion is proposed to be carried forward as it is today, with the addition of existing, established trees on the property as a new example of an unusual physical condition that may justify an adjustment or variance. The administrative adjustment criterion clarifies that the Zoning Administrator may approve an administrative adjustment when the degree of nonconformity of a compliant element is not increased, and the adjustment does not result in perceptible changes to the bulk, massing, or relationship to the zone lot lines of those elements.
- **Affordable housing:** Affordable housing is a new addition to the review criteria; it would allow approval of an administrative adjustment based on the provision of additional income restricted housing units. The criteria include additional findings related to continued reasonable use and enjoyment of adjacent property, that the purpose of the adjusted standard would still be advanced, and that the adjustment could not be accomplished through any other incentives or mandates in the Code. This language is mirrored in the variance review criteria.

Variance-Specific Review Criteria

Under the proposed text amendment, the Board of Adjustment would have the ability to approve variances for two additional categories of justifying circumstance:

- *Permits issued in error* is proposed to address the situation where an applicant relied on a permit issued by CPD, but which should not have been issued.
- *Limited tolerance for construction errors* mirrors the language found in the administrative adjustment for when an issue occurs in the field, and something is not built to the approved plans. However, the Board’s authority to approve this type of variance would not be limited to certain standards or degrees of violation.
- A set of *general review criteria* are applied to all variance decisions. These required findings are proposed to be maintained in the proposed text amendment with minor revisions. These minor changes would relocate two applicability statements to a more appropriate section, reference an exception that has been added to a previous subsection, and would note that any variance would not impair the reasonable use and enjoyment or development of the subject property, in addition to adjacent property.

Outreach

This project was initiated by Councilwoman Sandoval and Councilwoman Kniech in response to concerns raised by constituents about the current system for granting relief from zoning standards. The outreach conducted in this phase of the project focused on tapping into the expertise in the community and seeking out comments from stakeholders directly involved in the variance and administrative procedures. Below is a summary of the public process for the proposed text amendment:

August 2022	Survey to regular customers and members of development community at Board of Adjustment hearings as well as members of the Board of Adjustment and Planning Board (over 40 recipients). Discussion groups and individual interviews with staff directly involved in administrative adjustments, variance and other review functions.
November 2022	Introduction of project and general direction to Land Use Transportation and Infrastructure City Council committee in conjunction with discussion of proposed charter amendment. Inter-Neighborhood Cooperation (INC) Zoning and Planning group presentation
December 6, 2022	Board of Adjustment Work Session
December 19, 2022	City Council public hearing and referral of Charter amendment to April 2023 election
February 7, 2023	Board of Adjustment Work Session
February 15, 2023	Planning Board Informational Item
March 8, 2023	CPD written notice of the Planning Board public hearing sent to all members of City Council and registered neighborhood organizations
March 15, 2023	Planning Board public hearing: Unanimous recommendation of approval, subject to voter approval of Referred Question 2M, with the following condition: That the Planning Board Review Draft be edited for clarity, correctness, illustrative graphics, section references, and other non-substantive matters as well as any other changes to the Planning Board Review Draft made necessary by such edits.
March 29, 2023	CPD written notice of the Land Use, Transportation and Infrastructure Committee meeting sent to all members of City Council and registered neighborhood organizations

Written comments: Following release of the Public Review Draft on January 24, 2023, the official written public comment period for Planning Board began. The comment period ended on February 27, 2023. Two written comments were received prior to the Planning Board meeting, both in support of the item. Both comments are provided as attachments to this report.

Planning Board Recommendation

At its hearing on March 15, 2023, the 10 present members of the Planning Board unanimously recommended approval of the Modernizing Zoning Variances text amendment.

Review Criteria and CPD Staff Evaluation

The criteria for review of a proposed text amendment are found in Section 12.4.11.4 of the DZC. CPD analyzed the proposed text amendment for compliance with the review criteria stated below and finds that the proposed text amendment satisfies each of the review criteria:

1. Consistency With Adopted Plans

The proposed Text Amendment is consistent with the following adopted plans, strategies and policies:

- *Comprehensive Plan 2040* (2019)
- *Blueprint Denver* (2019)

Denver Comprehensive Plan 2040

The proposed text amendment is consistent with many of the adopted *Denver Comprehensive Plan 2040* strategies, which are organized by vision element.

Equitable, Affordable and Inclusive vision element:

- Equitable, Affordable and Inclusive Goal 3, Strategy B to “Use land use regulations to enable and encourage the private development of affordable, missing middle and mixed-income housing, especially where close to transit.” (p. 29).
- Equitable, Affordable and Inclusive Goal 3, Strategy D to “Develop and promote programs to help individuals and families, especially those most vulnerable to displacement, access affordable housing” (p. 28).
- Equitable, Affordable and Inclusive Goal 8, Strategy D to “Expand the supply of housing accessible to seniors and people with disabilities, including more housing choices for seniors to age in place” (p. 30).

The **Strong and Authentic Neighborhoods** vision element:

- Strong and Authentic Neighborhoods Goal 2, Strategy A to “Enhance collaboration between city agencies to ensure quality design and innovation across the public and private realm.” (p. 34)
- Strong and Authentic Neighborhoods Goal 3, Strategy B to “Ensure city policies and regulations support historic preservation and eliminate barriers in city processes to help all neighborhoods preserve what matters most.” (p. 34)
- Strong and Authentic Neighborhoods Goal 3, Strategy E to “Support the stewardship and reuse of existing buildings.” (p. 34)

Blueprint Denver (2019)

The following *Blueprint Denver* policies provides guidance specific to the Modernizing Zoning Variances text amendment content:

- Land Use and Built Form: General, Policy 3: Ensure the Denver Zoning Code continues to respond to the needs of the city, while remaining modern and flexible. (p. 73)

- Land Use and Built Form: General, Policy 2: Incentivize or require efficient development of land, especially in transit-rich areas.
 - Strategy E: In historic areas, balance efficiency with preservation through strategies that encourage the reuse of structures.
- Land Use and Built form: General, Policy 7: Integrate infrastructure needed to support the community into more areas of the city.
 - Strategy A. Allow low-impact, publicly serving utilities to be located in a greater variety of areas, including residential areas, to strategically serve community.
 - Strategy B. Update the zoning code to recognize shifts in best practices for screening and integration of utilities to minimize their impact on the built environment.
- Land Use and Built Form: Design Quality & Preservation, Policy 2: Ensure residential neighborhoods retain their unique character as infill development occurs.
 - Strategy A. Continue the city’s commitment to existing historic districts and landmarks and use historic designation to preserve the character of an individual structure or district or where there is historic, architectural, cultural, and/or geographic significance.
- Quality-of-Life Infrastructure: Policy 2: Protect and expand Denver’s tree canopy on both public and private property.
 - Strategy D. Strengthen standards to protect trees and explore requirements and/or incentives to mitigate tree loss during redevelopment on both public and private property to help achieve Denver’s tree canopy goal.

2. Public Health, Safety and Welfare

The text amendment furthers the public health, safety and welfare of Denver residents, land owners, businesses, and community members by implementing the city’s adopted plans through regulations that are responsive to current community needs. This proposed text amendment provides greater flexibility to address evolving needs like accessibility, affordable housing, and preservation of existing structures by clarifying and updating the review criteria and procedures for granting relief from zoning standards. In addition, the text amendment will result in more predictable and transparent procedures that will benefit the city, applicants and community members.

3. Uniformity of District Regulations and Restrictions

The text amendment will result in processes and regulations for all use and building form types that are uniform within each zone district. The variance and administrative adjustment procedures will be applied uniformly across zone districts based on review criteria.

Attachments

1. Summary of Proposed Text Amendment
2. LUTI review draft of Modernizing Zoning Variances text amendment
3. Draft Former Chapter 59 bridge amendment