Modernizing Zoning Variances Background Report
October 31, 2022

Executive Summary
Research on peer cities’ practices, a review of opinions from staff and community stakeholders, and a critical look at the types of variances approved by the Board of Adjustment (BOA) reveal a clear need to re-think and revise the mechanisms for exceptions from Denver’s zoning requirements. The current eligibility and approval criteria for administrative adjustments and variances are too limited or rigid to meet the needs of Denver’s homeowners, residents, and developers today. The added time in process and unpredictability of results indicate a need for a modernization of the exceptions available to applicants. Conclusions of this report are based on surveys of staff and external stakeholders, small-group interviews with staff, research of practices of peer cities, and analysis of recent variance and administrative adjustment cases.

Recommendations fall into two key categories:

- **Changes to the administrative adjustment criteria.** Some categories of adjustment should be expanded to allow for administrative approval. The approval criteria should be modified to respond more specifically to the requests being made.
- **Changes to the variance approval criteria.** Suggestions include reducing the threshold for approval for some requests and adding tailored criteria that better respond to certain types of variance requests.

Problem Statement
There are currently two key methods for applicants to request exceptions from zoning standards: the administrative adjustment, which can be approved by staff, and the variance, which requires approval by the Board of Adjustment. These procedures offer flexibility from zoning standards, but several deficiencies have been identified in the eligibility and approval criteria. The majority of variance applications are based on stating a unique physical condition or circumstance. These circumstances include being an historic property, physical disability of the property owner or occupant, or unique configuration of the property.

In a September 2022 survey, every respondent from a group of community stakeholders (including applicants, developers, attorneys, and subject matter experts) expressed a preference for administrative processes both in the current form and in a potentially expanded future form. Half of the respondents stating that they “rarely or never” prefer using the Board of Adjustment process, with qualitative comments noting the reasons for these choices as the time for processing and unpredictable results. Stakeholders state that the approval criteria do not offer the Board the flexibility to rationalize granting a variance using other approved city plans or policies or basing decisions in what is reasonable. Staff and stakeholders agreed that approval criteria are too rigid for both variances and administrative...
adjustments and identified a need to develop more nuanced approval criteria to meet present day needs and citywide goals. Examples of priorities that are not adequately addressed by the existing procedures and approval criteria include sustainability, affordable housing, infill development, and preservation of existing structures.

A second issue raised by stakeholders and staff relates to the thresholds for eligibility for administrative adjustments. Many minor requests require variances because they cannot be approved administratively. For example, administrative adjustments are available for some building form standards up to certain thresholds (5 to 20 percent, depending on the building form type and setback type). However, even minor requests must meet the same standard variance criteria described above.

Research shows that other cities use broader variance approval criteria than Denver (e.g., where a project faces practical difficulty), more permissive thresholds for administrative approval (such as a base percentage that applies to all numeric standards), and/or tailored standards that are more responsive to specific situations than traditional hardship criteria. This may offer insight into the types of flexibility that could be added to the Denver Zoning Code to address the concerns about the existing approval criteria for administrative adjustments and variances.

Project Objective
The objective of this project is to propose code-based solutions to the problems surfaced during discussions, surveys, and research of other cities' practices. The text amendments that will result from this project will modernize the methods by which zoning code exceptions are requested, processed, and approved.

Current State
Administrative Adjustments
The authority and process for staff-granted administrative adjustments are housed within Article 10 and Article 12 of the Denver Zoning Code. The administrative adjustment provisions in Article 10 are specific to certain design standards, such as requirements for bicycle parking and specific design requirements for vehicle access, and are typically processed concurrently with the plan review. Article 12, Section 12.4.5, contains the specific authority for most administrative adjustments by listing which code standards may be adjusted, by how much, and under what criteria. The most common administrative adjustments allowed under Article 12 are authorized upon evidence of “unnecessary hardship” and compliance with qualifying thresholds and limits stated in the table found in Section 12.4.5.3.A. See Attachment 2 of this document. For example, adjustments to some building setback standards are allowed up to a certain percentage (e.g., a rear setback may be adjusted up to 10%) and other adjustments are only allowed upon demonstrating neighborhood compatibility (e.g., a primary street setback may be adjusted any amount if the result is more compatible with other setbacks on the same block face). Further, to approve an administrative adjustment, staff must find that the review criteria stated in Division 12.4.5.5 (provided in Attachment 2) have been met; those criteria require a finding of the same type of “unnecessary hardship” as defined and established for zoning variances approved by the BOA. Ultimately, this results in an administrative procedure that requires applicants to meet the
same threshold for approval as those taking more extensive, complex, or sensitive requests to the Board of Adjustment for variances. There is one key exception: administrative adjustments found necessary to meet mandates under federal law, including the Federal Fair Housing Act and the Religious Land Use and Institutionalized Persons Act of 2000, do not require a showing of an unnecessary hardship and have specific parameters outlined for approval by the Zoning Administrator.

**Variance**

The procedure for variances allows applicants to request relief from most zoning standards. As stated in the Denver Zoning Code:

> The Board of Adjustment may authorize variances from the terms of this Code pursuant to the charter, subject to terms and conditions fixed by the Board of Adjustment, as will not be contrary to the public interest where, owing to unusual conditions or disability or owing to a property's historic designation, or where a variance would produce a more compatible development, literal enforcement of the provisions of this Code will result in unnecessary hardship.

There are five categories under which a request may meet the definition of “unnecessary hardship”:

- A. Disability
- B. Unusual Physical Conditions or Circumstances
- C. Designated Historic Property or District
- D. Compatibility with Existing Neighborhood
- E. Nonconforming or Compliant Uses in Existing Structures

In addition to fulfilling the criteria in any of the above categories A-E, a variance request must also meet the criteria in Section 12.4.7.6, Review Criteria – Applicable to All Variances. Combined, these variance approval criteria result in two key challenges: First, review criteria are not tailored in any way to reflect the specific type or extent of the variance request; all requests are held to the same high standard of showing unnecessary hardship. Second, there is no relief available when a request for an exception from the code is reasonable based on the circumstances of a case but does not rise to the highly prescriptive “unnecessary hardship.” These challenges are addressed in more detail in the research outlined in this report.

**Common Variance Requests**

**Residential Setback Encroachments**

Within the 125 cases before the Board of Adjustment in 2021, there were 88 requests for setback variances and 66 of those 88 (75 percent) of those were granted by the Board.¹ The overwhelming majority of these setback variances were for residential one- and two-unit properties. These setback encroachments ranged from less than one percent of the required setback up to 100 percent of the setback.

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¹The Board of Adjustment reviewed a total of 125 cases. However, each case can contain multiple requests for variances. Thirty-six individual cases included one or more setback variance requests.
Setback and Degree of Variance Requested (2021)

<table>
<thead>
<tr>
<th>Primary Street</th>
<th>Side Interior</th>
<th>Side Street</th>
<th>Rear</th>
</tr>
</thead>
<tbody>
<tr>
<td>Median Granted*</td>
<td>52%</td>
<td>59%</td>
<td>100%</td>
</tr>
<tr>
<td>Total Granted</td>
<td>7</td>
<td>22</td>
<td>3</td>
</tr>
<tr>
<td>Range of Requests</td>
<td>0.75-100%</td>
<td>3.4-100%</td>
<td>25-100%</td>
</tr>
</tbody>
</table>

*Percentage of encroachment as compared to the size of the required setback.

The table above identifies the frequency of variances by each type of setback. It’s clear that the side interior setback was the most common request at that time. Currently, administrative adjustments are available for all setbacks, but they are limited by building form and context. The AA available for the side interior on most residential building forms is limited to 10 percent, while the median percentage encroachment variance granted by the Board is 59 percent.

The specific reasons for the setback variances requested also provide insight into the current cases that go before the Board: 16 percent of granted setback variances related to additions to existing structures and that number rises to 21 percent for accessory dwelling units (or ADUs). This indicates that there may be an opportunity to remove a barrier to improving and reusing existing structures by allowing staff to approve a greater adjustment to setback requirements than is currently allowed, or by crafting standards that address sheds, storage, or other structures in a more tailored way.

The proportion of granted and denied variance requests also can inform what action should be taken to modify the code requirements for the types of zoning relief. For example, 11 variance requests were made for setback encroachments that were the result of zone lot amendments and every request was granted by the Board. This type of request may be an ideal candidate for a new administrative adjustment, particularly when physical changes are not involved. Similarly, the Board approved 40 percent of setback variances related to pergolas, garages, or other accessory structures in 2021. This indicates that there was not a consistent response to these types of structures and it would be appropriate to continue Board of Adjustment review of these nuanced requests.

“[Bulk Plane/Height Adjustment] Should be allowed for the preservation of an existing structure that will have a bulk plane violation based on a new zone lot line.”

– Staff Comment

Common Issues for Zoning Exceptions
In general, survey responses from staff were supportive of keeping the existing adjustments. The staff that proposed modifications to these adjustments tended to offer similar solutions or raise similar concerns in their comments. Following are the common trends that survey and discussion comments highlighted:

**Pop-Tops:** Staff comments highlight a need for additions to existing structures to have an administrative path to approval or, alternatively, variance criteria that can be used to evaluate additions. The prime example cited is pop-tops, which are full or partial second stories added to existing structures, because they are seen as method for preserving existing buildings. For an existing structure with compliant or nonconforming setbacks to meet current setback requirements, the addition of a second story would result in a wedding cake effect, with the upper story stepped in a greater distance than the first story. The variance requests for these often cites simpler construction and engineering to support the second story or architectural compatibility, neither of which are found in the approval criteria. Further, the research on recent BOA cases also indicates that the degree of exception being requested in these cases is typically relatively minor (i.e., a few feet of encroachment to align the second story with the existing first story).

**“Existing Neighborhood” Definition:** Many comments suggest expanding the area to be evaluated for administrative adjustments when looking at neighborhood compatibility. For example, when establishing a primary street setback, the Zoning Administrator is limited to evaluating the setback pattern on the same face block as the subject property. In many cases it would be appropriate to look at the opposite face block, as well, to determine compatibility. Currently, the standard for evaluating neighborhood compatibility for administrative adjustments is more limited than the standard for variances.

**Setbacks:** Although most staff respondents recommend retaining the existing adjustment(s) for setbacks, multiple respondents suggest expanding the percentages that may be modified with an administrative adjustment (for both primary and accessory structures), which aligns well with the types of variances that were granted by the Board of Adjustment in 2021 and with thresholds seen in other peer cities.

**Landmark Preservation Redundancy:** For variances involving historic structures or districts, there is a requirement that the applicant receive a recommendation from the Landmark Preservation Commission. This means that applicants with historic properties are required to go through two hearings for a variance request. There may be an opportunity to modify the eligibility criteria for certain requests for historic structures that receive a recommendation for approval from the LPC, so that they can go through an administrative process, rather than a second hearing.

**Zone Lot Width and Area:** The minimum zone lot width currently can be reduced by five percent through an administrative adjustment; 25-30 percent of staff respondents suggested that this threshold should be modified (depending on the building form). Most comments on this adjustment suggested increasing the available percentage. These modifications will be further explored in the suggested recommendations. In addition, some comments suggested that an administrative adjustment for minimum zone lot area would be an improvement.
Other City Plans: One comment frequently offered in the staff survey and interviews, is a proposal to modify approval criteria to allow for adjustments to standards based on Blueprint Denver, small area plans, or other adopted City documents. These plans establish a vision for the city or an area and zoning is used as a tool to implement those plans. Allowing new or expanded flexibility through the administrative adjustment and variances procedures will support the implementation of these plans by providing a safety valve in the aspects where zoning regulations have not yet caught up.

Setback adjustments: Staff and external stakeholders identified the limits on eligibility for administrative adjustments to setbacks as a shortcoming. For example, the rear and side street setback adjustments are limited to 10 percent for the most common one and two-unit residential building forms. Setback encroachments are discussed at length in the preceding section and may provide an opportunity for processing more requests through the administrative adjustment, rather than the variance.

Peer Cities Research

A review of more than 20 peer cities reveals that many cities have expanded administrative authority to grant exceptions from zoning standards and some have developed tailored criteria for both administrative adjustments and variances. Generally, many other cities still rely on the “unnecessary hardship” and “unique physical circumstances” that Denver’s variance criteria use. A few key trends stand out as informative for the types of problems that have been identified in Denver:

Administrative adjustment by percentage: The most common difference between Denver and its peers is that many allow for a blanket administrative adjustment of any numeric development standard. In some jurisdictions, this adjustment is as large as 35 percent (Boise, ID). The largest administrative allowance found in a Colorado city was 25 percent, while the Denver Zoning Code limits administrative adjustments to 5 percent in some cases.

Tiered approach for variances and adjustments: Cities such as Bend, Oregon maintain a tiered approach to the noticing, procedures, and approval criteria for granting relief from zoning standards. This tiered system increases the amount of notice required and the threshold for approval with increased complexity or sensitivity of the type of relief requested.

Potential Alternative Variance Approval Criteria, as provided in survey

Preservation of an existing structure to accommodate reasonable continuing use of the structure

Preservation of historic character for non-historic structures on zone lots that contain a historic structure or are within a historic district

Achieving alternative compliance, where the proposed exception meets the stated design or building form intent more than the original code standard

Preservation or creation of affordable housing

Greater flexibility for reducing parking minimums

Economic or financial hardship when no other hardship exists (e.g., it costs too much to fully comply with a zoning standard or the project will yield more financial return with the variance than without)

Relief from code compliance when zoning permits are issued in error by city staff and there is substantial reliance on the error

Reasonable modifications for specialized commercial and industrial building types (e.g., a building needs to house specialized equipment/machinery which requires more-than-typical floor-to-ceiling height that results in a building height violation)
**Tailored Criteria:** When provided, tailored variance criteria are geared toward specific challenges and priorities of the peer cities. For example, Indianapolis had specific provisions for exceptions that would help to prevent flooding, while Boulder, CO offers a variance that specifically allows for accessory dwelling units (ADUs) to be built within setbacks in certain cases where an existing primary structure limits the location of the new ADU. Another clear example of a city putting its priorities into its variance criteria also comes from Bend, OR, where preservation of significant trees is built into variance criteria.

One of the best examples of administrative adjustment approval criteria comes from Chicago: The Windy City offers administrative adjustments that use approval criteria that emphasizes flexibility while seeking to prevent impacts to the character of the surrounding neighborhood. The general criteria even refer to a greater level of flexibility that would promote preservation and rehabilitation of existing structures – this is an issue that was raised often in Denver’s context. In addition to the three simple approval criteria, many of the administrative adjustments include one or two specific standards that speak directly to the impacts of the adjustment being requested. For example, an administrative adjustment may be granted for an upper story addition to an existing building if the addition follows the existing setback of the exterior wall below, which mirrors many requests for residential additions in Denver.

**Conclusion and Recommendations**

**Modifications to Eligibility and Approval Criteria**

In keeping with trends around the country and with the sentiments expressed by survey respondents, the eligibility thresholds for administrative adjustments should be updated to allow for staff approval of more requests.

For both variances and administrative adjustments, tailored criteria would help to focus evaluation of proposals on preventing impacts of proposals, rather than on precise unique circumstances. This would allow for greater flexibility and a more focused approach to evaluating requests from a reasonableness perspective. For example, to be reasonable, the Board occasionally needs to be flexible to grant a request, rather than using a strict reading of whether the criteria has been met. During recent deliberations on variance requests, members of the Board have highlighted frustration that there is no path to approval for reasonable requests that do not demonstrate an unnecessary hardship and that denials of variances could incentivize tearing down existing structures. In keeping with the approval criteria, the Board denied the variance request, but not without multiple Board members expressing some regret that there was not another path to approval.

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**Chicago, Illinois Administrative Adjustment Approval Criteria**

- Allow development that is more in keeping with the established character of the neighborhood, as opposed to development that is in strict compliance with zoning standards;

- Provide flexibility that will help promote rehabilitation and reuse of existing buildings when such flexibility will not adversely affect nearby properties or neighborhood character; and

- Provide limited flexibility for new construction when necessary to address unusual development conditions when such flexibility will not adversely affect nearby properties or neighborhood character.
“I believe that administrative adjustments should be available in more instances that currently require going through the variance process. Administrative adjustments by CPD staff should be preferred in almost all circumstances when noncompliance with a requirement of the zoning code is de minimis (which could also be coupled with expanding the % of non-compliance that staff could deem acceptable), as well as when the noncompliance predates zoning (i.e., homes constructed in the early 20th century).” – External Stakeholder Survey Comment

Operational Implications and Process Changes
A move to re-allocate a substantial number of cases from the Board of Adjustment to staff may require additional staffing to handle the case load. A strategy may be needed to delineate how new administrative adjustments are reviewed and approved. Currently, in many cases, the Zoning Administration Team receives administrative adjustment requests through referral by residential reviewers. However, in some cases, the administrative adjustments listed in Article 10 are processed as a part of the review. A clear, consistent process will be necessary for ensuring consistency across reviews and to avoid inundating residential reviewers with new discretionary responsibilities.

“Variance for hardship is an important ‘safety valve’ for the zoning code. Hardship criteria need to be updated to allow for them to be followed closely while still getting the outcomes we reasonably need. A strict reading of the current variance hardship critters would result in very few variances, even noncontroversial and reasonable ones, being granted. BOA public hearings are also important for the much more rare case of appealing administrative decisions not related to Variance...”

– External Survey Respondent

Notes of Caution
Both staff and external stakeholders raised concerns and offered notes of caution related to changing too much in this project. Many staff members involved in development review and enforcement have identified a concern that if too much flexibility is added to the zoning code, then Denver’s thoughtfully written zoning regulations would be weakened. If this project is to provide the desired increase in flexibility through an administrative process, the eligibility criteria and approval criteria need to be very clear to provide the predictability that both the development community and staff identify as a high priority. One of the key challenges of this project will be to identify areas for improvement where flexibility may be added without undermining the standards that have been developed over the years.

In surveys and discussion, staff expressed also expressed concerns related to the following potential variance criteria proposed:

**Economic/financial hardship**: Some cities around the country allow economic hardship to be used as a rationale for granting a variance. However, staff were generally opposed to this possibility, citing the difficulty in evaluating financial hardship.
Reliance on a permit in error: This suggested new variance criteria was offered as a possible relief valve for those times when a permit has been issued in error and an applicant can demonstrate that they have substantially relied on that erroneous approval to their detriment. This could be an area where a new procedure would help to prevent legal challenges and to resolve issues that come up from time to time. However, one group of supervisors suggested that there would need to be clear guardrails around what could be allowed and raised concerns whether such a path could be abused by a savvy developer.

Charter of the City and County of Denver

The Charter of the City and County of Denver currently includes very specific provisions creating and describing the appointment and powers of the Denver Board of Adjustment, including by what criteria the Board may review and grant variances and exceptions. Having this level of detail in a home rule Charter versus in a city council adopted ordinance is highly unusual, as confirmed in staff’s peer cities research. Because only a vote of the people can amend the Charter provisions, any comprehensive effort to modernize and update the process and criteria for zoning exceptions in the Denver Zoning Code will quickly bump into the narrow purview the Charter created for the Board of Adjustment to grant variances and exceptions. Accordingly, to succeed in modernizing the zoning code’s exceptions process, choice of decision maker (BOA, staff, hearing officer, etc.), and criteria, an amendment to the Denver Charter is necessary.

To this end, Councilwomen Amanda Sandoval and Robin Kniech are preparing a proposal to revise the Denver City Charter to remove extraneous and duplicative language about the creation and appointment of the BOA that is already in the Denver Zoning Code (and Former Chapter 59), and to pave the way for comprehensive updates to the Denver Zoning Code regarding how zoning exceptions should be made, by whom, under what circumstances, and by which specific criteria/standards. The Charter changes are considered by the full Council and then referred to an election ballot for citywide vote; it is expected the proposed Charter changes regarding the Board of Adjustments will appear on the April 2023 ballot. If the Charter changes are approved by Denver voters, only then could a proposed amendment to the Denver Zoning Code (like the changes described in this document) proceed to be heard and decided by the full City Council, after the noticed public hearing required for all zoning code amendments.

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2 These provisions are found in the Denver City Charter, Article III (City Council), Part 2 (Council Powers), Section 3.2.9, Zoning.