MEMORANDUM

To: CPD Development Services Staff
BOA Staff
From: Matthew Seubert for Tina Axelrad, Zoning Administrator
Date: May 1, 2018
Re: Denver Zoning Code Clarification — Initial Assignment of Building Form to Existing Structures and Change of Building Form After Initial Assignment

Initial Assignment of Building Form to Existing Structures
When a development project involves an existing primary or detached accessory structure being modified or altered for the first time under Denver Zoning Code rules (“DZC”), the customer will select, or assign, the applicable building form rules from the building forms allowed in the subject zone district. See DZC, Section 2.4.1.5. In practice, this allows the customer to assign a building form to their existing structure based not only on what is allowed in the zone district, but also what they intend to do with the structure in the future.

Initial Assignment of Building Form by Customer – How Much Compliance with the Chosen Building Form is Required? Answer: None
In the context of assigning the initial building form for proposed development, is the customer bound by any rules for that assignment, other than that the building form must be allowed in the subject zone district? The answer is “no.” Under a customer-assigned initial building form, the existing structure does not need to 100% comply with the chosen building form standards.

Example #1: An existing primary structure was legally constructed in 1965 under Former Chapter 59, and has been continuously maintained and used as a single-unit dwelling. The structure is in an E-TU-B zone district. The current owner wants to enlarge the existing structure and establish a new two-unit dwelling use. The primary structure DZC building forms available to choose from are the Urban House, Duplex, and Tandem House forms. The customer can choose any of these forms, regardless of the structure’s current use or degree of compliance with any of these three forms. Here, even though the structure is currently being used for single-unit dwelling use, and therefore would violate the Duplex form’s use limitation, the owner may choose to apply the Duplex form to the existing structure to most closely accommodate her future development plan to convert the structure to a two-unit dwelling use.

While the existing structure does not need to 100% comply with the initially assigned building form, that means in some cases, with the customer’s full knowledge, the existing structure after development may be deemed “complaint” or “nonconforming” under the DZC, Divisions 12.6 or 12.8, for one or more pre-existing building elements that violate the chosen building form standards.
**Example #2:** An existing primary structure was legally constructed in 1965 under Former Chapter 59, and has been continuously maintained and used as a single-unit dwelling. The structure is in an E-TU-B zone district. The current owner wants to enlarge the existing structure, build a second primary structure behind the existing structure in the rear of the zone lot, and establish a new single-unit dwelling use in the new rear structure. The primary structure DZC building forms available to choose from are the Urban House, Duplex, and Tandem House forms. The customer can choose any of these forms, regardless of the structure’s current use or degree of compliance with any of these three forms. Here, even though the existing structure would most fully comply with the Urban House building form standards as to permitted use and maximum building coverage, the owner may choose to apply the Tandem House form to accommodate her future development plans, even though the choice will result, after development, with the existing structures “compliant” as to the Tandem House’s requirement for maximum building coverage. **Important Note:** Because this is an initial assignment of the Tandem House building form, the owner does NOT need an administrative adjustment or variance prior to development to allow the completed project to exceed the maximum building coverage. Compare this to the result when there is a change in previously assigned building form – see below.

**Example #3:** Ms. Jackson owns an existing residence with an as-yet unassigned building form in an E-TU-B district. Allowed building forms for residential development are the Urban House and Duplex forms. Her existing structure is “compliant” as to the minimum side interior setback (it extends 2 feet into a required minimum 5-foot setback), but is conforming with all other Urban House form standards. However, when Ms. Jackson submits plans for alterations to her existing building to convert it to two units, she chooses the Duplex building form as the structure’s initial form assignment, and demonstrates 100% compliance with all the Duplex form standards, except for the same side interior setback. The noncompliant setback under the Duplex Form is the same dimension/extent as the noncompliant setback under the Urban House form (2 feet into a required 5 foot setback).

When Ms. Jackson submits her alteration plans, does she have to bring the “compliant” side interior setback into conformance with the minimum 5-foot setback? Her plans do not include any changes to the compliant side interior setback and will not increase the extent of the existing setback violation. In this case, because the Duplex form is allowed in the U-TU-B zone district, and a two-unit dwelling is an allowed use, in this initial assignment of building form, she does not need to bring the existing 2-foot encroachment into the side interior setback into full compliance with the 5-foot setback requirement under the newly assigned Duplex form. Nor would she have to correct the side interior setback violation if she had chosen, instead, to assign the Urban House building form to her existing structure. **Important Note:** Because this is an initial assignment of the Duplex building form, Ms. Jackson does NOT need an administrative adjustment or variance prior to development to allow the completed project to violate the side interior setback standard. Compare this to the result when there is a change in previously assigned building form – see below.

**Example #4:** Mr. Ying owns a home with an existing detached garage in the rear of the zone lot. Neither the existing primary nor accessory structure have yet been assigned a building form. The E-SU-D1 district allows the ADU use subject to limitations as well as the Detached ADU building form. Can Mr. Ying permitted assign the DADU building form to his existing garage, or is he restricted to only the Detached Garage form or the Other Detached
Accessory Structure form? Answer: Mr. Ying is not restricted to the Detached Garage form for the initial form assignment. In this case, he can assign the DADU building form to his existing garage.

**Example #5:** A commercial property owner owns an existing building currently used as a drive-thru restaurant on East Colfax Avenue in a U-MS-5 zoned area. No building form has yet been assigned to the existing building. Can she assign the Shopfront building form to the existing structure or is she restricted to one of the Drive-thru building forms? Answer: The owner is not restricted to a Drive-thru building form. She may assign the Shopfront building form to the existing building.

**Are there any Exceptions to the Customer Choosing the Initial Building Form? Answer: Yes**

As a general rule, the City does not pre-assign a building form to existing structures constructed before the adoption of the DZC in June 2010 in the absence of an application for development. There are, however, some important exceptions to this general rule:

1. In an application for a zone lot amendment, CPD staff may assign a building form to an existing structure that will be affected by the zone lot amendment to determine whether the amendment can be approved without creating any new, nonconforming building elements (e.g., setback or bulk).
2. In zoning enforcement actions, CPD staff may need to assign a building form to an existing structure to determine the nature or extent of zoning code violations (e.g., a violation of the permitted use of a detached garage).

When assigning the initial building form to an existing structure in the limited circumstances above, CPD staff will assign the building form that captures as many of the conforming elements of the subject structure as possible, including use. In other words, staff will assign an initial building form that will result in the least amount and/or degree of structural or building form nonconformities under the choice of forms allowed in the subject zone district.

**Change of Building Form After Initial Assignment**

Once a building form is initially assigned to an existing structure, regardless of who assigned it (the customer or CPD staff), a zoning permit or other formal zoning review/determination is required to change or reassign a new building form to that same existing structure.

The general rule is that to change the building form of an existing structure that already has an assigned building form, the customer must show that the existing structure will 100% comply with the new building form standards. If the structure cannot 100% comply with the new building form standards, the customer may choose to seek a zoning variance from the Board of Adjustment if there is an evidenced “unnecessary hardship” according to DZC, Section 12.4.7, Variance.

**Pending 2018 DZC Text Amendment to Clarify the Rules for Change of Building Form (Effective May 24, 2018):**

The 2018 bundle of zoning text amendments will add the following new text to Articles 3-9 in the General Standards provisions in Section 3.3.3.2, 4.3.3.2, 5.3.3.2, and the like, to clarify the rule when a customer proposes a change in an already-assigned building form for an existing primary structure:
“At an applicant’s request, a primary structure with an existing assigned building form may be assigned a different permitted building form if:

1. The structure fully conforms with all applicable standards of the new building form; or,
2. The existing assigned building form is no longer a permitted building form in the applicable zone district.”

The same new text will appear in Articles 3-9 in the General Standards provisions for Detached Accessory Building Form Standards in Section 3.3.4.2, 4.3.4.2, 5.3.4.2, and the like, to clarify the rule when a customer proposes a change in an already-assigned building form for an existing detached accessory structure (e.g., changing from Detached Garage to Detached ADU building form).