

Board of Adjustment for Zoning Appeals

CITY AND COUNTY OF DENVER



2019 Year End Report



Austin Keithler, Writer/Editor
Justin Gumo, Research/Graphics

INTRODUCTION

This Annual Report presents a summary of the activities of the Board of Adjustment for Zoning Appeals from January 1, 2019 through December 31, 2019.

BACKGROUND

The Board of Adjustment for Zoning Appeals exists to review provisions of the Denver Zoning Ordinance and to give relief from the strict requirements of the ordinance if certain conditions are met.

When Denver passed its first Zoning Ordinance in 1925, the Board of Adjustment also acted as a zoning agency, combining its review functions with the granting of zoning permits. When the Zoning Ordinance was changed in 1956 to Chapter 59 of the Revised Municipal Code, the Board of Adjustment was defined solely as an appeals board and was completely separated from the Department of Zoning Administration. The status of the Board as a body independent of the permitting functions of the Zoning Code was maintained when Zoning Administration became part of Community Planning and Development in the early 1990's. However, the 2010 Denver Zoning Code reinstated the Board's authority to approve permits in limited instances.

At this time, the Board of Adjustment is an independent agency of the City and County of Denver. Although the Board members are appointed by the Mayor, its decisions are quasi-judicial and may be reviewed only by courts of record, not by another City agency or review board. The Board is supported by a staff that has varied in size from six people to its current total of three staff members.

2019 ACCOMPLISHMENTS

Office Modernization Project and Records Management Project: The Board's staff continues to upgrade the Board's office processes after the 2012 adoption of the Office Modernization Project and Records Management Project. At this time, the Board's staff has digitized records between 2008 and 2019. The Board's staff has developed a workflow to incorporate scanning new cases within 3 weeks of a final decision. In addition to the new case files, the Board's staff continues to scan older case files on an as needed basis, with files dating back to the 1930's available upon request.

Process Improvement Implementation: Database Implementation and Key Performance Indicator (KPI)

Implementation: Following the 2016 Auditor's Report, the agency has worked with tech services to update the database. The Board of Adjustment currently maintains the case database through Salesforce, and is working to incorporate new features to better track the efficiency of the department. In 2018, the Board's staff worked with Technology Services to better incorporate the Key Performance Indicators identified in 2017, to ensure that we are recording useful data and incorporating this information into the office workflow. In 2019, staff has worked to improve processes to ensure that KPI goals are met to better serve the public.

BOARD RESPONSIBILITIES AND COMPOSITION

The Board meets weekly on Tuesdays, typically starting at 9:00 A.M. and ending at 11:30 A.M. In addition to attendance at weekly hearings of cases, Board members' duties may include site visits to properties, commenting on proposed Code sections, approval of minutes from previous hearings produced by the Board's staff, and personnel review of employees. On occasion, the Board will hold special seminars or meetings.

There are seven Board members: five regular members and two alternates. Five members constitute a full board, with the alternates sitting in when a regular member is absent. A quorum of three members is adequate to hear a case but cannot grant relief: four affirmative votes are required under the Zoning Code. The Mayor appoints all Board members with the aid of the office of Boards and Commissions. The regular Board members have five-year staggered terms, as provided by the Zoning Code. The terms of the two alternates may vary from one to five years because the Zoning Code does not require a specific length of time for their appointment.

The regular Board members hold officer elections for a Chair and Vice-Chair each year. The elections occur in February every year and the positions run for a one year period.

BOARD MEMBERS AND STAFF

2019 Board

- **Penny Elder, Chair of the Board. Feb. 2018 – Feb. 2019. Re-elected Feb. 2019 – Feb. 2020**
Appointment Term: February 2016 – February 2021

- **Jim Keavney, Vice-Chair/Member of the Board. Feb. 2018 – Feb. 2019. Re-elected Feb. 2019 – Feb. 2020**
Appointment Term: Aug. 2016 – Feb. 2022
- **Sandra Roberts-Taylor, Member of the Board. Appointment term ended Feb. 2019**
Appointment Term: Feb. 2014 – Feb. 2019
- **José Aguayo, Member of the Board**
Appointment Term: Feb. 2015 – Feb. 2020
- **Frank Schultz, Member of the Board**
Appointment Term: Feb. 2018 – Feb. 2023
- **Nancy Burkhart, Alternate Member of the Board until Feb. 2019. Member of the Board beginning Feb. 2019**
Alternate Appointment Term: Jan. 2018 – Feb. 2023
Member of the Board Appointment Term: Feb. 2019 – Feb. 2024.
- **Charlie Young, Alternate Member of the Board**
Appointment Term: Jan. 2018 – Feb. 2023
- **LeAnn Anderson, Alternate Member of the Board**
Appointment Term: Mar. 2019 – Feb. 2024

2019 Staff

- **Austin Keithler, Technical Director BOA**
- **Phillip Williams, Senior Plans Review Tech/Deputy Director**
- **Justin Gumo, Administrative Support Assistant IV**

TYPES OF APPEALS BY CATEGORY

The appeals listed below represent the typical ones that come before the Board.

Variations are the most common form of relief requested and accounted for the majority of cases before the Board in 2019. As has been consistent for the past few years, the most common cases are Variance requests for additions to existing houses, such as **Bulk Plane, Setback, Lot Coverage**, or **Excess Height in the Front 65% or Rear 35%** of a zone lot; or for location related violations in **Fences, Sheds** or **Garages**. Variations can be granted for the expansion of a legally permitted compliant or nonconforming use, but cannot authorize a new use that is not permitted in a zone district.

Time to Comply can be offered as relief for existing structures or activities when a Variance is denied, or in cases where a Variance is unavailable.

Some common violations that do not qualify for a Variance include **Excess Units**, where there are more residential units on a zone lot than the district permits (for example, a duplex in a single unit district rather than a multiple-unit district) or **Unrelated Adults** living together that exceed the limit of unrelated people per dwelling unit in a zone district.

Certain violations are legally eligible for Variations, such as **Excess Vehicles, Recreational Vehicles**, or **Unsurfaced Parking** (for example, gravel used instead of the required concrete, asphalt or a similar material for parking areas at multiple unit dwellings). However, most Appellants with these violations find it difficult to meet the Variance standards: the usual hardship alleged is a financial one, which is not a legal hardship under the Zoning Code.

The Six-Month Delay is offered as an alternative to all appellants under an Order to Cease and Desist. A Five-Year Stay is offered only if the violation regards excess units. No time is offered to an appellant who is denied a permit, as it would have the effect of allowing the Board to initiate an illegal use in the district.

Appeal of an Administrative Decision normally has the lowest number of appeals of any form of relief. This type of appeal requires the Appellant to prove that the Zoning Administrator or City staff made an error in a decision regarding the Zoning Code. Because the standard of review set out in the Code is heavily weighted in favor of the City, these cases have a low success rate for the applicant. Only 5 Appeals of an Administrative Decision were filed in 2019, of which 2 were granted and 3 were dismissed.

Zoning Permits with Special Exception Review (ZPSE) are a category authorized under the Denver Zoning Code that allows the Board to grant a permit as the reviewing body, rather than hearing an appeal from a denial or an order. ZPSEs replaced the use Exceptions granted by the Board under former Zoning Code Chapter 59 for such things as eating places, outdoor patios, telecommunications towers, and businesses located in or adjacent to residential areas.

YEARLY CASE STATISTICS

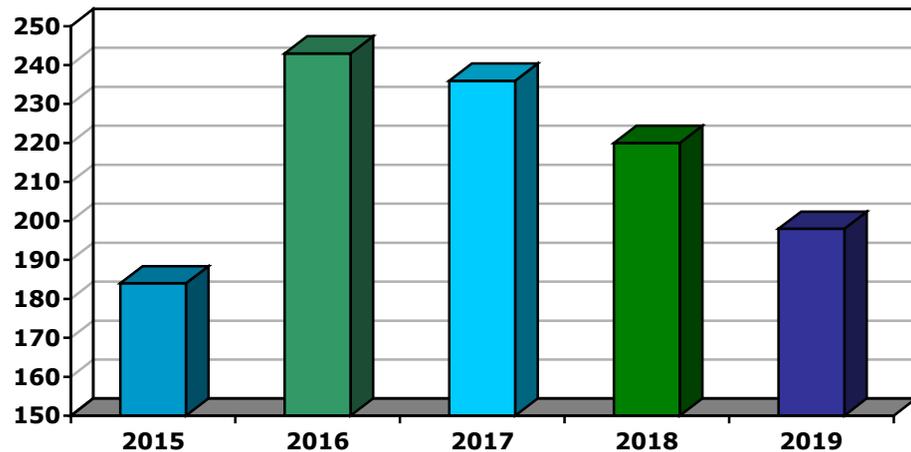
Hearing Statistics

In 2019, the Board had 45 hearing dates, with a total of 306 hearings (218 regular hearings and 88 supplemental hearings). There was an average of 5 regular hearings and 2 supplemental hearings per week. The total session time for the 306 hearings was 105 hours and 49 minutes, which averages 2 hours and 35 minutes per hearing docket, and 31 minutes per individual case. The average docket length was approximately the same as previous years, as was the length of the individual cases. Cases typically are scheduled for 30 minutes each, although hearings on more technical issues, or on cases with general public interest, may be scheduled at the end of the docket to allow for longer hearings.

New Case Statistics

In 2019 there were 198 new cases taken in, lower than the preceding three years. 2016 had the most cases filed in the past five-year period, with 243 cases filed. 2017 had a slightly lower case volume with 236 cases filed. 2018 showed a drop of approximately 10%, down to 220 cases filed. 2019 again showed a decline, with only 198 cases filed. The reasons for the reduction in case volume are unclear but may in part be attributed to a change in leadership in Neighborhood Inspection Services. The department head retired in the summer of 2019 and NIS has been working to fill the management role. In 2019 there were only 54 cases filed on Cease and Desist Orders from NIS, compared to 83 cases in 2018 and 93 cases in 2017. Cases filed on permit denials from Community Planning and Development have been consistent with 129 cases filed in 2019, on similar levels with the 122 cases in 2018, and 129 cases in 2017. It appears that the reduction in case volume is related to the NIS departmental change in leadership and we expect the lower case volume and lower number of Orders filed to rise to normal levels as the department hires new management.

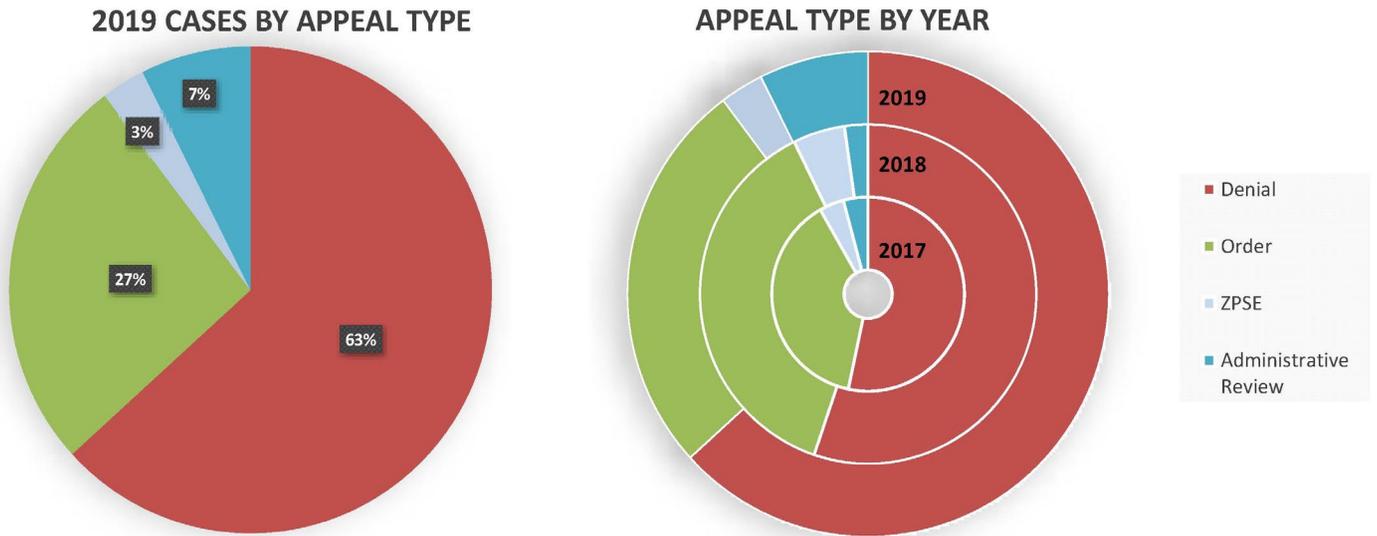
Figure 1:



Case Type Statistics

The most common type of appeal brought before the Board is an appeal of a Denied Permit, seeking a Variance. The next most common type of case is an appeal of an Order to Cease and Desist, seeking either a Delay of Enforcement or a Zoning Variance for an existing, noncompliant condition which has been established without permits. The two least common types of cases are Zoning Permit with Special Exception Review (ZPSEs) and appeals for review of an Administrative Determination. This was the case in 2019 and has been consistent over the past three years.

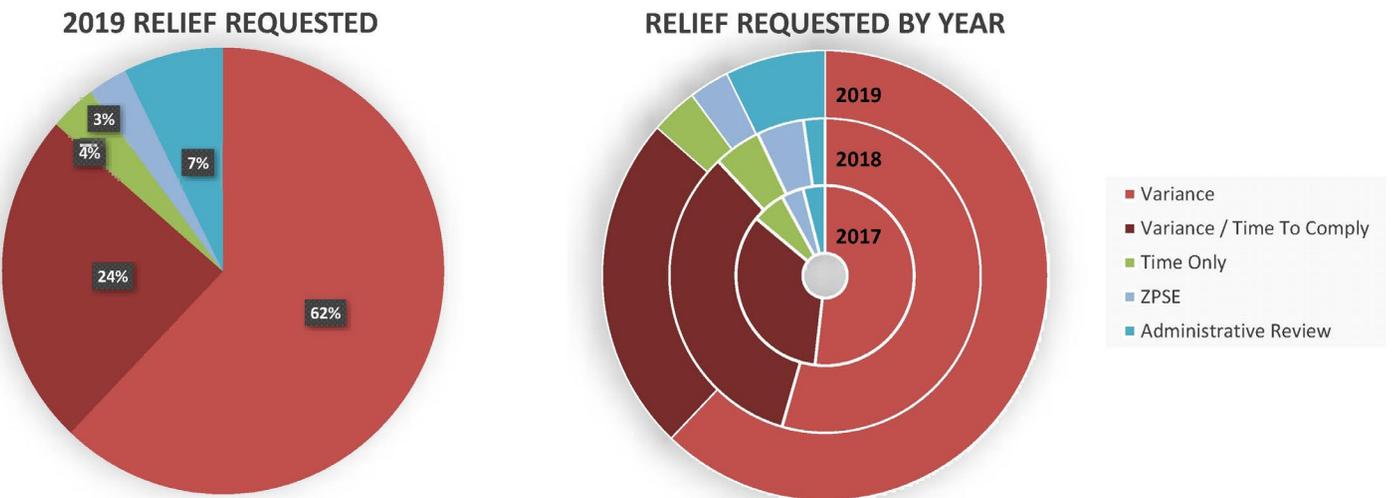
Figure 2:



Relief Requested

For cases filed as an appeal of a Denied Permit, the only available relief the Board can offer is a Variance. For cases filed as an appeal of an Order to Cease and Desist, the Board can offer a Variance or in the alternative a Delay of Enforcement under Section 12.2.6.8 of the Denver Zoning Code. With some Orders, the Board does not have the authority to grant a Variance and can only authorize additional time to bring a property into compliance with the Code. Zoning Permit with Special Exception Review (ZPSE) cases are for uses which are generally allowed in an area but have the potential for limited impacts to adjacent properties and are subject to a separate review process, as detailed in Section 12.4.9 of the Denver Zoning Code. Administrative Review appeals may be filed by any aggrieved party who believes the Zoning Administrator has erred in making a determination or action, as detailed in Section 12.4.8 of the Denver Zoning Code.

Figure 3:

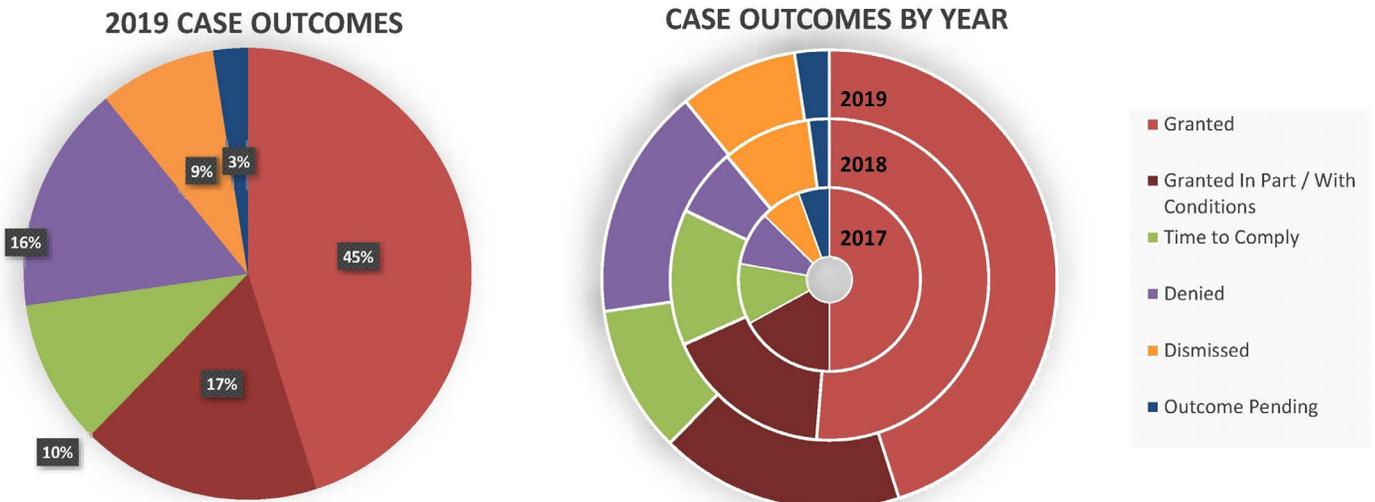


Relief Granted

In 2019, 45% of all cases were approved as requested. The code allows the Board to place conditions on Variances, or to approve a request in part but not in total. In 2019, 17% of the Board’s cases were approved either in part or with conditions. For existing conditions which do not meet zoning standards, the Board is authorized to allow additional time to come into compliance with the code requirements. In 2019, 10% of the Board’s cases approved additional time to comply. If the Board finds that no hardship has been demonstrated and no relief is appropriate, the Board will deny an appeal. In 2019, 16% of the Board’s cases were denied. If an Appellant decides not to pursue an appeal for a final decision from the Board or if the City determines that a project can be properly permitted within the allowances of the

code, a case may be dismissed without a final determination from the Board. In 2019, 9% of the Board’s cases were dismissed. As of this time, 3% of our cases filed in 2019 have not yet received final decisions from the Board. These levels appear to be fairly consistent over the past three years. Appeals granted as requested have ranged from a low of 45% in 2019 to a high of 51% in 2018. Appeals granted in part have remained at approximately 17% between 2017 and 2019. Time to Comply has ranged from a low of 10% in 2019 to a high of 14% in 2018. The largest fluctuation is seen with appeals being denied outright, with a low of 7% in 2018 up to a high of 16% in 2019. Dismissed cases have ranged from a low of 7% in 2017 up to 9% in both 2018 and 2019.

Figure 4:



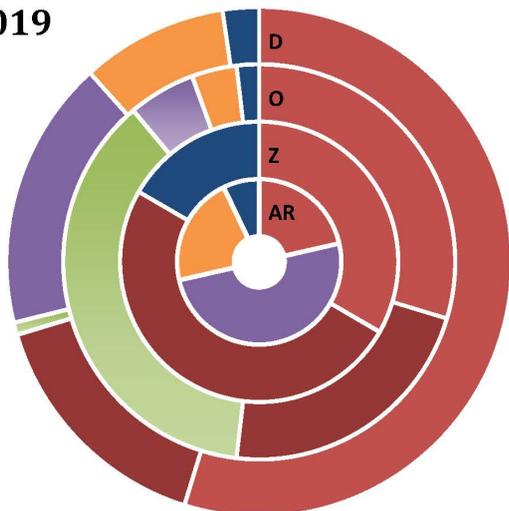
Case Outcome By Appeal Type

Year to year, the most consistency in case outcome is for Denials of Permits and Orders to Cease and Desist Cases. In 2019, cases filed as Denials of Zoning Permits have the highest rate of being granted as requested. This has been consistent for the past three years, with a low of 53.9% in 2019 and a high rate of 64.1% in 2017. Cases filed on Orders to Cease and Desist have a granted as requested rate of approximately 33%, with a low of 29.1% in 2019, and a high of 35.6% in 2017. Cases filed on Cease and Desist Orders tend to receive either full or partial permanent relief around half the time, with a low rate of 50.5% in 2018 and a high rate of 58.6% in 2017. Cases filed on Orders to Cease and Desist receive a Delay of Enforcement approximately 1/3 of the time, with a low rate of 26% in 2017, and a high rate of 36.3% in 2019. The greatest fluctuation in case outcome is seen in ZPSE and Administrative Review Cases. The main reason for this is the low number of each of these case types. With only 6 ZPSE cases filed in 2019, the outcome of a single case counts for approximately 16% of the ZPSE cases for the year. Compared to the outcome of a single case filed on a Denied Permit which counts for approximately 0.8% of Denial cases for the year, it’s easy to see why there is so much variation year to year. However, we can see though that ZPSE cases are more likely to be approved and Administrative Review cases are more likely to be denied as an underlying trend. ZPSE cases tend to have a high level of interaction between Appellants and City staff, and they are more likely to proceed with a favorable position from the City. Administrative Review cases on the other hand are more likely to be denied, as these cases are filed by aggrieved parties alleging that the City acted in error. By their nature, these cases are more adversarial, with the City nearly always opposed to the appeal.

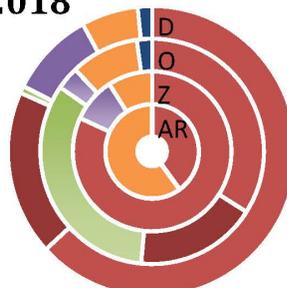
Figure 5:

CASE OUTCOME BY APPEAL TYPE

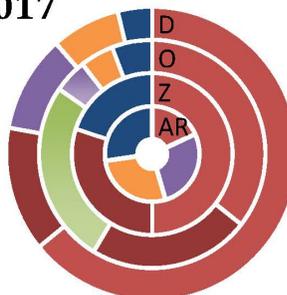
2019



2018



2017



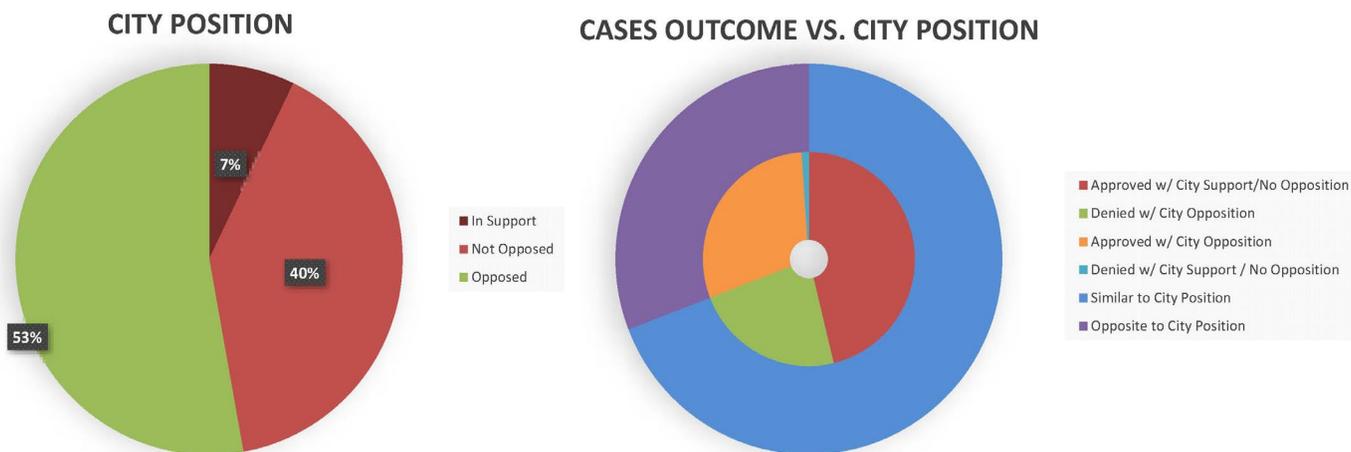
D - Denial
O - Order
Z - ZPSE
AR - Administrative Review

Granted
Granted in Part / With Conditions
Time to Comply
Denied
Dismissed
Outcome Pending

Case Outcome Compared to City Position

For every case that comes in front of the Board, the City will provide its position on the appropriateness of the relief requested. The City typically will provide one of three positions: In Support, Not Opposed, or Opposed. In Support of a request means the City has reviewed the criteria and found that a hardship has been met, or that a ZPSE is appropriate to approve. Not Opposed to a request typically means that the City does not take a strong stance on the appropriateness of a request and leaves it to the Board to determine whether or not a hardship has been demonstrated. Opposed to a request means that the City has considered the request and either feels that a hardship has not been demonstrated or that the request should not be approved. In 2019, the City has been In Support in 7% of cases, Not Opposed in 40% of cases, and Opposed in 53% of cases. The Board has issued final decisions aligned with the City position in roughly 2/3 of cases and contrary to the City position in roughly 1/3 of cases. This is divided into 45.8% where the Board approved requests in line with the City's position, 23.1% where the Board denied requests in line with the City's position, 30% where the Board approved requests over the City's position, and 1% where the Board denied requests over the City's position. (For the purpose of these statistics, In Support and Not Opposed are combined into a single, 'favorable' position.)

Figure 6:

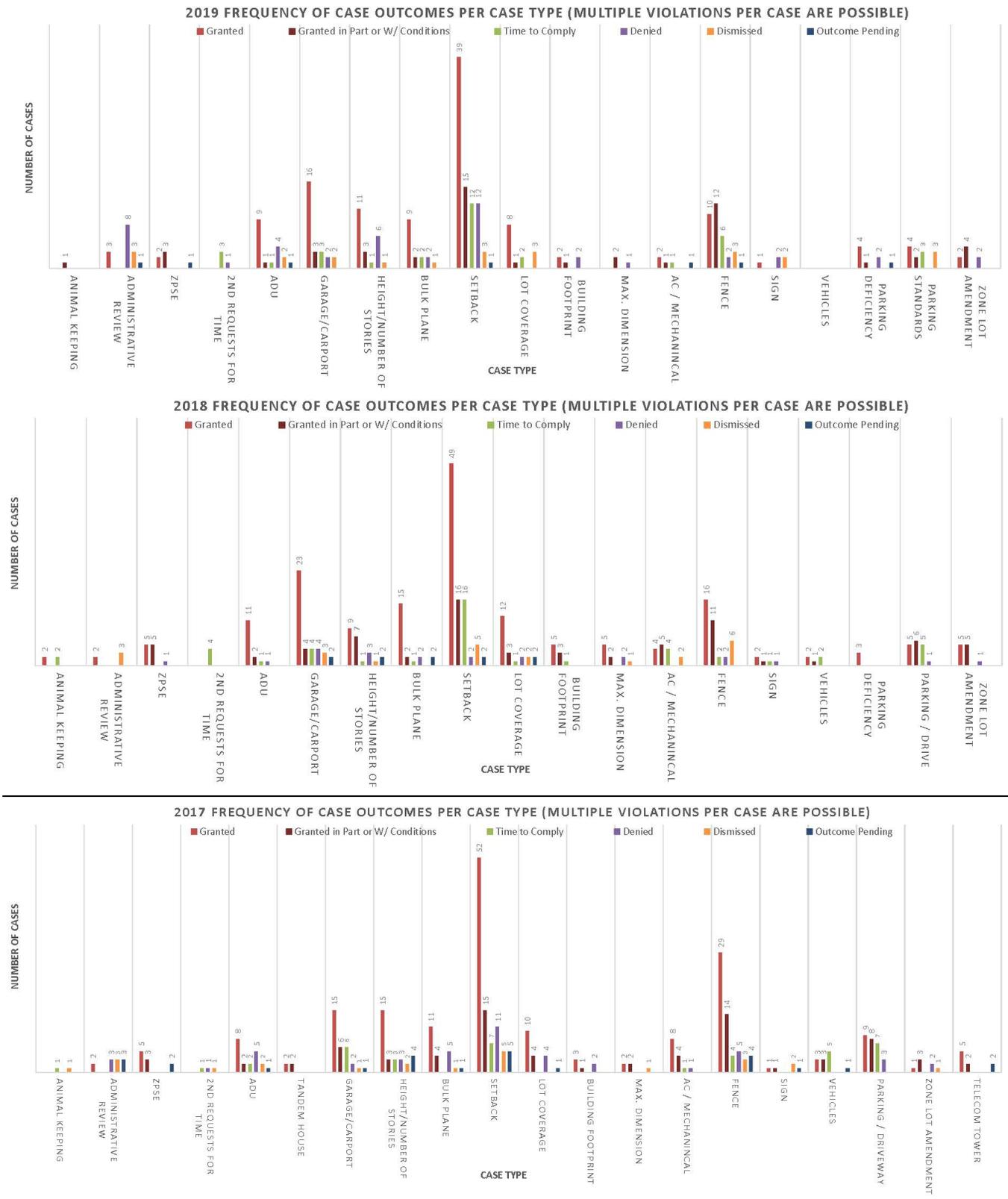


Case Outcome By Case Type

Looking at the final outcome separated into violation types, setback, garage/carports, and fence violations are the most commonly appealed to the Board, and also the most successful. Regardless of case type, there is a greater likelihood to

be approved than denied, with the exception of Administrative Review cases. The least common case types filed in 2019 and in 2018 were related to the keeping of animals, and second requests for delays of enforcement. As in previous years, the Board heard a small number of ZPSE cases, but the majority were either approved as requested or with conditions.

Figure 7:



2019 DISTRICT COURT APPEALS UNDER C.R.C.P. 106

Appellants who are dissatisfied with a decision of the Board have the option of appealing the decision to Denver District Court under Colorado Rule of Civil Procedure 106 (a)(4). The Appellants must demonstrate that the Board exceeded its

authority or acted in an arbitrary or capricious manner for the appeal to succeed. From the date of the decision, Appellants have 28 days under the state statute or 30 days under Section 3.2.9(O)(I) of the City charter to file their cases with District Court.

In 2019, the Board responded to one case filed under Rule 106.

Case Number 2019 CV 31776, Greenbox IV LLC, Board of Adjustment for Zoning Appeals was filed from the Board's action in Case No. 19-19. The Appellants challenged the Board's decision to uphold the Zoning Administrator's decision to apply Denver Zoning Code Provision Section 11.5.23.2 to the Appellants project in denying their final Site Development Plan application due to their proximity to a Denver Light Rail mass transit station. The case was dismissed through a Motion to Dismiss by the Appellants, following an agreement with the City that they had not exhausted their legal remedies for relief.

TRENDS NOTED IN 2019

Reduced Number of Cases: The Board's case filings for 2019 were lower than in previous years. This is likely due to the change in leadership in Neighborhood Inspection Services. It is noteworthy, but is anticipated to be an anomaly rather than a trend. 2020 will likely have an increase over 2019, with case numbers similar to 2017 and 2018.

Types of Cases Consistent with Previous Years, with Emerging Trends: Case types in 2019 have been consistent with previous years. The most common case types by far are for setback issues. While the Code has adopted standards to allow compliant structures which are legally established within a setback to expand without the need for a Variance, setback related issues are still the most common. Part of the reason for this is that there is some overlap in case categories, and setbacks are a common issue. A number of the cases shown in the 'ADU' or 'Garage/Carport' categories are also listed in the 'Setback' category. Additionally, fence and garage/carport cases have remained consistently high in 2019 and in the previous two years. Although 2017 had a large spike in Telecommunication Tower cases, there has not been an emerging trend of unusual or unique case types in 2019.

PREDICTIONS FOR 2020

Number of cases filed to rise to similar levels to 2018 and 2019: Community Planning and Development has remained busy over the past year and does not yet show any signs of slowing down. Likewise, the Board of Adjustment has remained steady over the past year. There has been a slight downtick in 2019 due to fewer Cease and Desist Orders being appealed, but we expect this to rise back to typical levels in 2020. In 2020 we expect to see case levels rise to somewhere between 2018 and 2019, somewhere around 200 – 220 cases filed.

Continuing Trends in Case Types: As in previous years, the Board expects to see the largest volume of cases related to Denied Permit appeals. This trend has been consistent for years and there is no reason to expect this to change. The most common subject matter will likely relate to setbacks, garages, and fences, which have been the most common case types for at least the past three years of more detailed data collected.

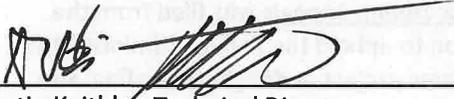
Decrease in Approved Cases: Over the past year, the City has taken a harder stance on their position for Variances. They have been more vocal in articulating what the Code requires in order to prove a hardship, and they have been more strongly opposed if they do not feel this criteria has been met. The Board has often used an informal metric, approving less impactful cases with a lower demonstration of hardship, and requiring a more significant demonstration of hardship for a more impactful case. Where the Board has allowed this 'reasonableness' standard to influence their consideration for relief, the more focused discussion of the strict criteria in the Code appears to be raising the standard for approval and reducing the number of Variances granted. We expect to see this trend continue, with less relief granted on a percentage basis than in prior years.

CONCLUSION

Since 1925, the Board has played an invaluable role in the orderly growth and development of the city. Today the Board of Adjustment and its staff continues this tradition, helping other City agencies to ensure that Denver and its residents prosper as much this century as they did in the last.



Penny Elder, 2019 Chair



Austin Keithler, Technical Director

CONCLUSION

Since 1992, the Board has played an essential role in the orderly growth and development of the City. Today, the Board of Adjustment and its staff continue the tradition, helping other City agencies to ensure the development of our community in a way that reflects the City's history and vision. The Board's role is to ensure that the City's growth is consistent with the City's long-term vision and that the City's resources are used in a way that is sustainable and equitable for all.

RECOMMENDATIONS

The Board recommends that the City continue to support the Board of Adjustment and its staff in their efforts to ensure the development of our community in a way that reflects the City's history and vision. The Board also recommends that the City continue to support the Board of Adjustment and its staff in their efforts to ensure the development of our community in a way that reflects the City's history and vision.

APPENDIX

The Board has reviewed the information provided and has concluded that the Board of Adjustment and its staff have performed their duties in a professional and efficient manner. The Board also recommends that the City continue to support the Board of Adjustment and its staff in their efforts to ensure the development of our community in a way that reflects the City's history and vision.