Board of Adjustment
City and County of Denver

2023 Year End Report

Austin Keithler, Technical Director

INTRODUCTION
This Annual Report presents a summary of the activities of the Board of Adjustment (BOA) from January 1, 2023, through December 31, 2023.

BACKGROUND

The Board of Adjustment exists to review provisions of the Denver Zoning Ordinance and to make exceptions to the terms 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 of Adjustment 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.

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

BOARD RESPONSIBILITIES AND COMPOSITION

The Board of Adjustment meets weekly on Tuesdays, typically between 9 a.m. and 12:00 p.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 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 required to hear a case. Four affirmative votes are required to reverse any order, decision, or determination of any administrative official authorized to act under the Code and three affirmative votes are required to decide in favor of the applicant on any other matter for which the Board is the reviewing authority under the Code.

Historically, the Mayor has appointed all Board members with the aid of the Office of Boards and Commissions. Beginning in 2022, the Board of Adjustment was re-established through CB22-0093. With this Bill, board members would be appointed by both the Mayor and by City Council, with 2 regular member appointments each, 1 alternate member appointment each, and with 1 regular member jointly appointed. Both the regular Board members and alternate Board members are appointed for three-year terms, as provided by the Zoning Code.

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

2023 Board

- **Ignacio Correa-Ortiz, Chair of the Board**. Feb. 2023 – Feb. 2024 (Vice Chair June 2022 – Feb. 2023)
  - Appointment Term: Reappointed July 10, 2023 – December 31, 2025
- **Jeremy Haywood, Vice Chair**. Feb. 2023 – Feb. 2024 (Member of the Board June 2022 – Feb. 2023)
  - Appointment Term: Reappointed July 10, 2023 – December 31, 2024
- **Tim Camarillo, Member of the Board**. Feb. 2023 – Feb. 2024 (Chair June 2022 – Feb. 2023)
  - Appointment Term: Reappointed July 27, 2023 – December 31, 2024
- **Adam Rice, Member of the Board**.
  - Appointment Term: Reappointed July 27, 2023 – June 30, 2024
- **Dee Dee DeVuyst, Member of the Board**.
  - Appointment Term: Reappointed July 27, 2023 – June 30, 2025
- **James Keavney, Alternate Member of the Board**
  - Appointment Term: Reappointed July 10, 2023 – December 31, 2024
- **Liia Koiv-Haus, Alternate Member of the Board**
2023 Staff

- Austin Keithler, Technical Director
- Phillip Williams, Senior Plans Review Tech/Deputy Director
- Stacy Lindsay-Esnault, Administrative Support Assistant IV

2023 ACCOMPLISHMENTS

Variance Modernization Project: Along with Community Planning and Development (CPD) staff, the Board of Adjustment was involved in the Variance Modernization Project which was approved by City Council in May of 2023. The intent of the project was to update and modernize the Variance criteria under the Denver Zoning Code. In addition to modernizing the Variance criteria, CPD expanded the scope of projects which could be approved through Administrative Adjustments (AAs) which are approved internally by CPD staff. The Variance criteria was revised from the ‘hardship’ standard to the ‘justifying circumstances’ standard. The project removed the prior criteria to approve a variance based on ‘Disability’ and ‘Designated Historic Property or District’ and relocated these criteria into the AA process instead. The criteria for ‘Unusual Conditions’, ‘Neighborhood Compatibility’, and ‘Nonconforming or Compliant Uses in Existing Structures’ remained as criteria for approving Variances. Additionally, the project added three new Variance criteria for ‘Affordable Housing’, ‘Permits Issued in Error’, and ‘Limited Tolerance for Construction Errors’. Along with the change to the Variance criteria, the threshold for approval was revised. Previously the Code required four affirmative votes to approve a Variance; under the new version of the Code only three affirmative votes are required to approve a Variance. Four votes are still required to overturn a decision of the Zoning Administrator under the Appeal of an Administrative Determination process.

CPD also revised the process for Applicants to be able to file for a variance with the Board of Adjustment. Previously, proposed conditions would come to the BOA through Permit Denials and existing noncompliant conditions would come to the BOA through Orders to Cease and Desist. Beginning June of 2023, both proposed and existing conditions would begin with an application for a permit submitted to CPD for review. CPD would review the permit application and determine if it could be approved through the AA process or if it would need to come to the Board for a Variance. CPD would meet with Applicants for a Pre-Application meeting to discuss the project with them. If a case needed to be referred to the BOA for a Variance, CPD would issue a Pre-Application Referral letter to allow an Applicant to initiate a case with the BOA.

Digitization and Records Management Project: The Board of Adjustment’s staff has continued to expand its collection of digital records. All current cases are saved in hard copy format as well as digital format, and the Board of Adjustment’s staff is working to create digital copies of older case files. Each year the BOA works to expand its collection of fully digitized case files. At this time, it has more than 20+ years of cases fully digitized and available, with older cases available upon request.

YEARLY CASE STATISTICS

Hearing Statistics

In 2023, the Board had 37 hearings dates, with a total of 134 hearings (114 regular hearings and 20 supplemental hearings). The past few years have seen a lower number of hearings compared to previous years, and 2023 remained at similar levels. 2020 saw a significant drop in volume compared to prior years, and 2023 remained at lower levels. In 2022, there were 36 hearings dates, with a total of 132 hearings (109 regular hearings and 23 supplemental hearings). In 2021, there were 33 hearing dates with a total of 166 hearings (131 regular hearings and 35 supplemental hearings). In 2020 there were 30 hearing dates, with 166 hearings (133 regular hearings and 33 supplemental hearings). In 2019 there were 45 hearing dates, with 306 hearings (218 regular hearings and 88 supplemental hearings). In 2018 there were 47 hearing dates, with 316 hearings (234 regular hearings and 82 supplemental hearings). In 2017 there were 47 hearing dates, with 325 hearings (233 regular hearings and 92 supplemental hearings).
The Board has typically scheduled cases at 30-minute intervals. Sometimes cases will resolve quickly if they are simple and straightforward, other times they will run long if they are more complicated. However, the average case duration in most years has remained around 30 minutes, with 28 minutes 59 seconds in 2017, 28 minutes 35 seconds in 2018, 30 minutes 45 seconds in 2020, 28 minutes 29 seconds in 2021, and 29 minutes 20 seconds in 2022. The current Board members were all appointed to the Board in June of 2022. After serving for a few months, they had found that 30 minutes did not provide enough time to take in testimony and for discussion among the Board members. In the last quarter of 2022, the Board decided to expand the length of each hearing from 30 minutes out to 45 minutes. With the expanded length of a scheduled hearing, the average length of an actual hearing has also expanded out to 44 minutes 47 seconds in 2023.

New Case Statistics

2023 saw a slight uptick in cases filed compared to the past couple of years. In 2023, the BOA had 110 cases filed. In 2022, the BOA had 96 cases filed, the fewest in the history of the agency. Previous years had 125 cases filed in 2021, 133 cases filed in 2020, 198 cases filed in 2019, 220 cases filed in 2018, 236 cases filed in 2017, 243 cases filed in 2016, and 184 cases filed in 2015.
There is no consistent trend on when cases are filed throughout the year. If there were an equal distribution of cases filed throughout each month, 8.33% of the years’ cases would be filed in any given month. Across the past 6 years, every month has some years which are above the 8.33% and others which are below. Most months have a case intake of somewhere between 5% through 13% of the yearly case load.

In 2023, CPD revised the process for cases to be referred to the BOA for Variance requests. This process change coincided with the updates to the Variance criteria which were adopted at the end of May. The BOA saw a considerable slowdown in new cases as CPD implemented their process changes, with 4.55% of the years’ cases filed in June, 2.73% filed in July, 2.73% filed in August, and 4.55% filed in September. Less than 15% of the years’ cases filed over the 4-month period after the process changes were made. After a few months of adjusting to the process changes, the case filings per month returned to more typical levels.

2023 experienced a transition in the process for Applicants to file with the Board of Adjustment. Up until June 1, 2023, there were four types of cases which could be filed with the Board of Adjustment: Denied Permits from CPD staff (Denials), Orders to Cease and Desist from Neighborhood Inspection Services (Orders), requests for Zoning Permit with Special Exception Review (ZPSE), and Appeals from Administrative Decisions (Appeals). The type of case is determined by the action which is appealed. Different appeals have different review criteria for the BOA to consider and have different remedies available for the BOA to grant.
Beginning June 1, 2023, CPD began their new processes associated with the Variance Modernization Project. The updated process was changed so that both proposed and existing noncompliant projects would be routed through permit review by CPD before coming to the Board of Adjustment. The changes to the process eliminated Denials and significantly reduced Orders, combining these two separate case types together. With the current process, Variance requests which used to come from Denials and Orders are now combined and come to the Board under Pre-Application Referral Letters (Referrals). While Denials have been entirely replaced with Referrals, Orders may still occasionally be appealed to the Board to ask for additional time to comply.

Denials have historically been the most common case type filed with the Board of Adjustment. Denials were for proposed projects which were under review with CPD. If there are zoning violations which cannot be overcome, CPD will deny a zoning permit for a project by issuing an Informal Denial. Property owners can appeal the Informal Denial to the Board of Adjustment to initiate a case. For Denials, the BOA may, if certain criteria are satisfied, approve a Variance from the Code to allow a property owner to complete their project. Denials were issued for the first half of 2023, but have since been entirely phased out.

Orders have historically been the next most common appeal type filed with the Board of Adjustment. Orders are for existing conditions which have been identified by CPD which have zoning violations. These could be for improvements which have been made without permits, construction errors for previously approved projects, or for other existing conditions which do not comply with the Code. The BOA could grant Variances for many conditions which come in under Orders. If the BOA does not determine that the Variance is appropriate to allow a nonconforming condition to remain in place, the BOA can approve a Delay of Enforcement of up to 6 Months to allow property owners to bring their property into compliance. The BOA also has the authority to approve a Delay of Enforcement for up to 5 years only for an Order related to the operation of dwelling units in excess of the number authorized by the Code. After June 1, 2023, Variance requests could no longer come to the BOA under an Order, they would instead be routed through Permit review. If CPD determined that a Variance would be necessary, they would then issue a Pre-Application Referral Letter to allow an Applicant to file with the BOA. Under the new process Orders can still be used to initiate a case with the BOA, but they can only be used to request additional time to comply, through a Delay of Enforcement under Sections 12.2.6.7 or 12.2.6.8 DZC.

Pre-Application Referral Letters (Referrals) are an updated case type which was created during 2023. Referrals are for Variance requests related to either proposed or existing noncompliant conditions. Referrals have largely combined Denials and Orders from the prior process, and will be the most common type of case moving forward.

Zoning Permit with Special Exception Review (ZPSE) are for uses which are generally allowed in an area but which have the potential to impact the surrounding area. ZPSE cases often are filed related to eating and drinking establishments within residential areas, restaurant patios adjacent to residential zone districts, telecommunications towers, or utility uses. These types of cases require an application to CPD, as well as a pre-application meeting with the Zoning Administrator. Once the application has been refined, the Zoning Administrator will issue a referral letter to allow a case to be filed with the BOA. The BOA reviews the request at a public hearing and may deny, approve, or place conditions and restrictions upon the approval of the ZPSE.

Appeals of an Administrative Decision (Appeal) are appeals of any determination or decision of the Zoning Administrator. If an aggrieved party believes that a decision was made in error regarding the zoning code, they can appeal that decision to the BOA for review. This is a technical review of the Code and CPD’s decision making process. The BOA must consider what the plain language of the Code says, how CPD interpreted and implemented the Code, and decide whether CPD has acted correctly or if they are in error. The standard in the Code is that CPD is presumed to be correct unless clear and convincing evidence is introduced to support a contrary determination or finding.

Case Types by Year

Historically, Denials and Orders have made up 90-95% of the Board of Adjustment’s cases in any given year, with ZPSEs and Appeals making up the remaining 5-10%. 2023 will be a transition year, with Referrals replacing Denials and Orders as the associated document to file with the BOA for a Variance request. CPD began using Pre-Application Referral Letters in June of 2023, but would still allow Applicants to file with already issued Denials throughout the summer.
Denials remained the most common case type in 2023, with Referrals close behind. In 2023, 54 Denial cases and 41 Referral cases were filed with the BOA. Denials have made up 129 cases in 2017, 122 cases in 2018, 129 cases in 2019, 112 cases in 2020, 88 cases in 2021, 75 cases in 2022, and 54 cases in 2023. While case intake has generally declined over the past few years, the sharpest drop has been with cases based on Orders. Before 2018, the BOA would commonly take in between 75 to 100 appeals of Orders in any given year. In 2019 this dropped down to 54 cases. Over the past three years, Orders have remained consistent but at a lower level. In 2020, 15 cases were filed on Orders. In 2021, 16 cases were filed on Orders. In 2022, 16 cases were filed on Orders. In 2023, 6 cases were filed on Orders. ZPSE and Appeal cases remain the lowest types of appeals overall. ZPSEs have accounted for 10 cases in 2017, 11 cases in 2018, 6 cases in 2019, 9 cases in 2020, 10 cases in 2021, 5 cases in 2022, and 8 cases in 2023. Appeals have accounted for 10 cases in 2017, 5 cases in 2018, 15 cases in 2019, 3 cases in 2020, 13 cases in 2021, 4 cases in 2022, and 4 cases in 2023.

**Relief Requested**

For cases filed based on Denials or Referrals, the only available relief are Variances. For cases filed based on Orders for the first half of 2023, the BOA could consider a Variance or a Delay of Enforcement under Section 12.2.6.8 of the Denver Zoning Code. Cases where the BOA could offer either a Variance or Time to comply were discontinued after the new process changes went into effect. For cases filed based on Orders for the second half of 2023, the BOA could only offer a Delay of Enforcement. 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. Appeals of Administrative Decisions 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. In 2023, 84% of cases were filed based on Denials or Referrals where a Variance was the only available relief.
Relief Granted

In 2023, the BOA approved 67 applications as requested. The Code allows the BOA to place conditions on Variances, or to approve a request in part but not in total. In 2023, the BOA approved 18 cases in part or with conditions. For existing conditions which do not meet zoning standards, the BOA is authorized to grant additional time to come into compliance with Code requirements. In 2023, the BOA did not grant additional time to comply in any cases. When the BOA does not find that an applicant has demonstrated a hardship for their request, the BOA will deny an appeal. In 2023, the BOA denied 17 requests. If an Appellant decides not to pursue an appeal for a final decision from the BOA 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 BOA. In 2023, 15 of the BOA’s cases were dismissed. As of this time, 3 cases filed in 2023 have not yet received final decisions from the BOA.

Figure 8: RELIEF GRANTED BY YEAR – TOTAL CASES

The prior chart shows an increase in cases approved as requested over the previous couple of years. A higher number of cases were filed in 2023 than in 2022, but 2023 otherwise had fewer cases filed than any other year on record. In 2023, the BOA approved 55.37% of cases as requested, the highest approval rating in the seven-year time period tracked. The prior high for requests granted as requested was 51.71% in 2018. Combining the granted as requested and granted in part or with conditions categories, we see that the Board approved 70.25% of requests in 2023. This approval rating is also slightly higher than any other year in the seven-year period, just above the 69.23% overall approval rate in 2018. The BOA did not grant any additional time to comply in 2023, as a result of the new policies with CPD and NIS. Moving forward, the BOA will likely receive fewer requests for time than in years’ past. Cases which were denied outright were at 14.05% in 2023, which is around the middle of the range for the time period. 2023 saw the highest percentage of cases dismissed in any year of the time period, with 12.4% of cases in 2023 being dismissed.

Figure 9: RELIEF GRANTED BY YEAR – PERCENTAGE
While it can be interesting to consider the full spectrum of cases filed with the Board of Adjustment in a given year, examining the different types of applications in isolation can provide better insight into common trends depending on the type of case filed. The different types of cases have different potential relief associated with them, and significantly different expectations on the outcome of the appeal.

Historically, Denials have been the most common type of case filed with the BOA. Beginning June of 2023 and moving forward, Referrals will be the most common case type. Denials and Orders have been phased out and replaced with Referrals instead. For the purposes of comparing historic trends to trends from the past year, Denials and Referral data will be combined. While the Referral data will include some cases which would have come to the BOA as orders, this is a small percentage which should be negligible across the full year of data.

**Denial / Referral**

Aside from ZPSE requests, the most consistency with case outcome year to year is with applications filed on Denials / Referrals. With the new Referral process, Applicants must meet with CPD staff for a Pre-Application meeting prior to applying to the BOA. CPD will explore options for compliant designs with Applicants, and will provide them with a preliminary position before allowing them to file with the BOA. The process is designed to encourage compliance with the Code rather than a Variance, to allow minor deviations from the Code to be resolved through Administrative Adjustments rather than Variances, and to dissuade Applicants with a low likelihood of success from filing for a Variance. For these reasons, Denial / Referral cases tend to have a high approval rate. 2018 had the highest number of cases approved either as requested or in part, with lower approval levels in subsequent years. In 2018, the Board approved 81.74% of cases either in whole or in part. This dropped to 71.32% in 2019, 67.26% in 2020, 66.3% in 2021, 68.08% in 2022, and 72.28% in 2023.
Order

Applications based on Orders have a much less consistent outcome compared to Denials, and a much lower rate of approval. Part of the reason for this is there is not the same type of self-regulation common to Denial cases. When people pursue Denial cases, they do so intentionally. When people pursue Order cases, they typically do so accidentally. Orders are issued when people have done work without permits or when there are construction errors resulting in code violations. Because there is not a purposeful consideration of Variance criteria ahead of time, Orders tend to be denied at a higher rate than permit Denials. In 2017, Order cases were approved either in whole or in part 59.62% of the time. This dropped to 51.61% in 2018, 52.73% in 2019, 41.18% in 2020, 42.11% in 2021, 55% in 2022, and 55.55% in 2023.

While Denials have been entirely replaced by Referrals with the 2023 process changes, applications based on Orders may still be filed with the Board. However, applications based on Orders will be solely for situations where Applicants are seeking additional time to comply. Existing non-compliant conditions will be identified and will be routed to the permitting and plans review process. For instances where a Variance will be necessary, an Applicant will file with the BOA based on a Referral rather than an Order. Applicants will only have to file with the BOA based on Orders if CPD is pursuing enforcement for non-compliance and Applicants need to seek additional time. With the process changes, this will likely be a rare occurrence moving forward with very few applications filed based on Orders.

Figure 11: ORDER OUTCOMES BY YEAR

ZPSE

Zoning Permit with Special Exception Reviews (ZPSEs) are the most consistently approved type of case brought before the BOA. They are among the lowest volume of case types brought before the BOA, but the most consistently approved. Part of the reason that ZPSEs are more consistently approved than other case types is that CPD staff work extensively with an Applicant before they file a case with BOA, and they generally have a favorable position on the request. Because Applicants must work with CPD so extensively. Also, while it is not unheard of for CPD to be opposed to a ZPSE request, it is much less common than with variance requests. ZPSEs have been approved either in whole or in part 90% of the time in 2017, 81.82% in 2018, 100% in 2019, 89.89% in 2020, 100% in 2021, 83.34% in 2022, and 87.5% in 2023. 2023 has one ZPSE request with an outcome pending at this time. The request has been approved but the final decision has
been withheld to allow the Applicants to work through various issues with ownership before the final decision can be released. When the final decision is released, 100% of the ZPSE requests filed in 2023 will have been approved.

Figure 12: ZPSE OUTCOMES BY YEAR

![ZPSE Outcomes by Year Graph]

**Appeals of Administrative Decisions**

Appeals of administrative decisions tend to be the least likely type of case to be granted. Appeals of administrative decisions can be filed on any decision of CPD regarding the zoning code, so they have a very broad range of specific case subjects. The one consistent element in these types of appeals is that CPD will almost always be opposed to the appeal being granted. These appeals call a decision of CPD into question, and CPD will always, with very limited exceptions, argue that they are correct. The Code defined standard of review also favors CPD, with the Appellant needing to provide a preponderance of evidence that CPD erred for the BOA to overturn their decision. Generally, these types of appeals have a low number of cases filed in any given year and have a low rate of approval. There were 10 appeals filed in 2017, 5 filed in 2018, 15 filed in 2019, 3 filed in 2020, 13 filed in 2021, 4 filed in 2022, and 4 filed in 2023. They have received approval 10% of the time in 2017, 40% of the time in 2018, 21.43% of the time in 2019, 0% of the time in 2020, 15.38% of the time in 2021, 0% of the time in 2022, 25% of the time in 2023. The appeal which was granted in 2023 was for an instance where CPD acknowledged that they had erred and therefore CPD agreed that the appeal should be granted.

Figure 13: APPEAL OF ADMINISTRATIVE DECISION OUTCOMES BY YEAR

![Appeal of Administrative Decision Outcomes by Year Graph]

**VARIANCE REQUEST BREAKDOWN**

Historically Variances have been granted based on ‘hardship’ as defined in the Denver Zoning Code (DZC) and the Former Chapter 59 zoning code (FC59). Under the FC59 zoning code, hardship was simply defined as extraordinary or exceptional circumstances where literal enforcement of the code would result in hardship. Beginning in June of 2023, the ‘hardship’ standard in the DZC was changed to the ‘justifying circumstances’ standard instead. Along with the change from ‘hardship’ to ‘justifying circumstances’, the categories to argue for a Variance have changed as well. The prior version of the DZC defined five categories of hardship which could be claimed to argue for a Variance: Disability, Unusual Conditions, Designated Historic Property or District, Compatibility with Existing Neighborhood, or
Nonconforming or Compliant Uses in Existing Structures. With the change to the justifying circumstances criteria, Disability and Designated Historic Property or District have been removed from the Variance criteria and relocated to the Administrative Adjustment criteria instead. There have been three new categories added, leaving a total of six justifying circumstances under the current version of the Code: Unusual Physical Conditions or Circumstances, Neighborhood Compatibility, Nonconforming or Compliant Uses in Existing Structure, Affordable Housing, Permits Issued in Error, and Limited Tolerance for Construction Errors.

**Hardship / Justifying Circumstances Claimed**

Both before and after the Variance modernization project, the most common Variance criteria argued in front of the Board is that of Unusual Conditions / Unusual Physical Conditions or Circumstances. Namely, there is some unusual physical condition or circumstance present on the property which makes compliance with the code difficult or impossible. In 2019, claims based on Unusual Conditions on the property accounted for 77.65% of Variance requests to the Board. Unusual Conditions accounted for 67.91% of cases in 2020, 67% of cases in 2021, 56.57% in 2022, and 58.16% in 2023. The next most common Variance criteria argued in front of the Board is Compatibility with the Existing Neighborhood / Neighborhood Compatibility. This hardship argues that while it may be possible to comply with the Code, a Variance would result in a design which is more consistently found in the established neighborhood pattern. Compatibility claims accounted for 16.47% of cases in 2019, 23.13% of cases in 2020, 23% of cases in 2021, 27.27% in 2022, and 25.51% in 2023. The remaining categories all account for very low percentages in any of the reference years. There were no arguments to the BOA based on Historic Property or District, Nonconforming or Compliant Uses in Existing Structures, or Affordable Housing in 2023. An argument based on Nonconforming or Compliant Uses in Existing Structures has not been presented to the Board in at any time between 2019 and 2023.

**Case Outcome by Hardship / Justifying Circumstances Criteria**

The sample size year to year on most of the hardship / justifying circumstances presented to the BOA is very small, making it difficult to extrapolate meaningful data. As an example, claims of hardship under the FC59 Code were approved 50% of the time and denied 50% of the time in 2021. However, since this examines a dataset of two instances, where one case was approved and another was denied, the results don’t yield any significant insight. Cases are reviewed individually, so a larger data set is necessary to look for any meaningful trends or patterns. For any hardship argument of less than 10 cases per year, the statistics can change drastically based on the outcome of any individual case. The sample sizes are simply too small to discern meaningful trends.
Arguments based on the Disability hardship were argued 4 times in 2019, 3 times in 2020, 1 time in 2021, 6 times in 2022, and 2 times in 2023. Arguments based on the Historic hardship were made 5 times in 2019, 4 times in 2020, 7 times in 2021, 6 times in 2022, and 0 times in 2023. Arguments based on the Nonconforming Use criteria were not made at all in 2019, 2020, 2021, 2022, or 2023. Arguments based on the FC59 hardship were made 1 time in 2019, 5 times in 2020, 2 times in 2021, 8 times in 2022, and 2 times in 2023. Affordable Housing, Permits Issued in Error, and Limited Tolerance for Construction Errors were added to the Code in June of 2023. There were no arguments based on the Affordable Housing criteria made in 2023. Permits Issued in Error were argued to the BOA 9 times in 2023. Limited Tolerance for Construction Errors were argued to the BOA 6 times in 2023. Although it has been included in the variance criteria for less than a year and there is a limited sample size for the data set, it appears that Permits Issued in Error may have a high rate of success. In 2023, Variances argued based on Permits Issued in Error had the highest overall approval rate with 89.89% of requests approved in whole or in part.

The two variance criteria most often claimed are for Unusual Conditions / Unusual Physical Conditions or Circumstances and for Compatibility with the Existing Neighborhood / Neighborhood Compatibility. The Unusual Physical Conditions or Circumstances criteria was claimed 91 times in 2020, 67 times in 2021, 62 times in 2022, and 57 times in 2023. The Neighborhood Compatibility criteria was claimed 31 times in 2020, 23 times in 2021, 30 times in 2022, and 25 times in 2023. Historically, claims of Unusual Conditions have the highest overall success rate with the BOA. The BOA has approved requests based on the Unusual Physical Conditions or Circumstances criteria either in whole or in part 68.09% of the time in 2020, 73.61% of the time in 2021, 64.52% of the time in 2022, and 78.46% of the time in 2023. Requests based on the Neighborhood Compatibility criteria have been largely consistent but had a drop in approval in 2021. The BOA has approved requests based on the Neighborhood Compatibility criteria either in whole or in part 54.54% of the time in 2020, 41.67% of the time in 2021, 60% of the time in 2022, and 75% of the time in 2023.
CASE LOCATIONS IN THE CITY

The City and County of Denver is divided up into 11 City Council districts, which have a roughly equal number of residents. When a case is filed with the Board of Adjustment, we will send notice to the City Councilor for the district to inform of the appeal and to give them an opportunity to weigh in on the case if they so choose.

Case Locations by City Council District

As has been the case for the past five years, District 1 has had highest percentage of cases filed in the city. The total number of cases has dropped overall, but District 1 remains the busiest district in the city for BOA cases. District 1 has had 21.98% of cases in 2019, 20.45% of cases in 2020, 22.31% of cases in 2021, 22.34% of cases in 2022, and 20.37% of cases in 2023. District 9 was the next busiest district, with 15.74%. Districts 5 and 6 followed after, with 12.96% and 12.04% respectively. As with prior years, Districts 2 and 11 have continued to have the fewest cases filed of any Council District.

Figure 18: CASES FILED BY CITY COUNCIL DISTRICT BY YEAR

Case Outcome by City Council District
Every Council district had at least one case filed and reviewed by the BOA in 2023. Every Council district had more requests approved in whole or in part than requests denied. District 1 and District 9 had the two highest levels of cases filed as well as the two highest levels of cases approved in whole or in part.

Figure 19: CASE OUTCOME BY CITY COUNCIL DISTRICT FOR 2023

![Figure 19](image)

Figure 20: MAP OF CASE OUTCOME BY CITY COUNCIL DISTRICT

![Figure 20](image)

COMMUNITY PLANNING AND DEVELOPMENT (CPD) AND THE BOARD OF ADJUSTMENT
Every case filed with the Board of Adjustment relates to a project or condition which has previously been reviewed by CPD. The BOA is an independent agency from CPD, but due to the nature of the agency, the BOA is very closely related to CPD. At public hearings with the BOA, three are three main parties to the cases. The Applicants, who have filed the case and are making their request, the staff of CPD, who provide CPD’s representation at the hearing, and the BOA, who will consider the request and decide the outcome.

**CPD’s Position**

For every case that comes in front of the BOA, CPD will provide its position on the relief requested. CPD typically will provide one of three positions: In Support, Not Opposed, or Opposed. In Support of a request means CPD has reviewed the criteria and found that a Hardship / Justifying Circumstances have been shown, or that a ZPSE is appropriate to approve. Not Opposed to a request typically means that CPD does not take a strong stance on the appropriateness of a request and leaves it to the BOA to determine whether or not the request should be approved. Opposed to a request means that CPD has considered the criteria and they do not believe that a Hardship / Justifying Circumstances have been demonstrated or that the request should not be approved.

For the purpose of this analysis, In Support and Not Opposed are considered as a single ‘favorable’ position, while Opposed is an ‘unfavorable’ position. In general, there is a fairly even split between favorable and unfavorable positions from CPD. In 2019, 2020, 2022, and 2023 there was an almost half and half division between CPD’s positions, with 2021 showing a higher rate of opposition than normal. While it has been common to have a roughly 50% favorable position in any given year, the majority of the favorable positions were from positions of Not Opposed rather than In Support. In 2022 and 2023, CPD has increasingly been In Support of requests rather than simply Not Opposed. In 2022, CPD was In Support of 17.64% of requests and in 2023 this rose to 33.64% of requests. In 2019 CPD was opposed to 52.5% of requests and either In Support or Not Opposed to 47.5% of requests. In 2020 CPD was opposed to 50.78% of requests and either In Support or Not Opposed to 49.22% of requests. In 2021, CPD was Opposed to 64.46% of requests and either In Support or Not Opposed to 35.54% of requests. In 2022, CPD was Opposed to 51.04% of requests and either In Support or Not Opposed to 48.96% of requests. In 2023, CPD was Opposed to 47.66% of requests and either In Support or Not Opposed to 52.33% of requests.

![Figure 21: CPD’s POSITION BY YEAR](image)

**Case Outcome Compared to CPD’s Position**

The BOA is not required to agree with CPD in their review of an application. If CPD is Opposed to a request but the BOA finds it appropriate, the BOA can approve the request over CPD’s Opposition. The BOA can approve a request either with the City’s Support or despite the City’s Opposition. The BOA can deny a request either in line with CPD’s Opposition or despite CPD’s Support. Most commonly, the BOA will approve a request where the CPD has a favorable position. The BOA approved requests with favorable positions in 46.28% of cases in 2019, 48.12% of cases in 2020, 36.15% of cases in 2021, 44.66% of cases in 2022, and 51.35% of cases in 2023. The least common outcome for a case is for the BOA to deny a request where CPD has a favorable position of either In Support or Not Opposed. This occurred in 1.06% of cases in 2019, 2.26% of cases in 2020, 0% of cases in 2021, 0.97% of cases in 2022, and 0% of cases in 2023.
Year to year, the BOA has been consistent with how often they agree with CPD, aligning with their position in approximately 2/3 of cases. In 2019, the BOA’s position aligned with the CPD’s position in 69% of cases. In 2020, the BOA’s position aligned with CPD’s position in 70% of cases. In 2021, the BOA’s position aligned with CPD’s position in 66% of cases. In 2022, the BOA’s position aligned with CPD’s position in 73.79% of cases. In 2023, the BOA’s position aligned with CPD’s position in 66.67% of cases.

Figure 22: CASE OUTCOMES COMPARED TO CPD POSITION BY YEAR

In Person versus Virtual Attendance

Before the pandemic, all hearings were held in person. During the pandemic, the BOA transitioned to holding semi-virtual hearings, with a quorum of the Board members attending hearings in person and remaining Board members attending virtually. Applicants and city staff had the option to either attend in person or virtually. As the pandemic stretched on, the BOA moved to holding fully virtual hearings with all Board members attending virtually. Applicants and city staff had the option to either attend in person or virtually, but with the Board members all attending virtually most Applicants chose to attend virtually as well. In March 2023, the BOA began maintaining a quorum of Board members in the hearing room again, with remaining Board members attending virtually. For 10 of 12 months of 2023, there has been a quorum of Board members attending the hearings in person each week.

The Board has seen a pretty even split of Applicants choosing to attend virtually versus in person. In 2023, 48.65% of Applicants attended in person, and 51.35% attended virtually. The type of attendance does not seem to impact the outcome of the hearing, with either type of attendance showing predominantly approved requests.

Figure 23: ATTENDANCE TYPE AND CASE OUTCOME

Case Outcome By Case Type

As with prior years, setback variances are the most common case subject for the Board to consider, and also the most commonly approved case type. Requests related to bulk plane and height / number of stories remain common variance requests as well.

Figure 24: CASE OUTCOMES BY SUBJECT, BY YEAR
Applicants who are dissatisfied with a decision of the BOA 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 to file their cases with District Court.

In 2023, no new appeals of BOA decisions were filed under Rule 106(a)(4), but one appeal filed in 2022 was resolved.
Case Number 2022 CV 272, Christopher Benson v. Board of Zoning Adjustment, was filed appealing the BOA’s action in Case No. 23-2022, on 20694 East 49th Avenue. The request was for a Variance to the height of a fence along a shared property line between the Appellants and Mr. Benson, their direct neighbor. The fence ranged in height between 6 and 7 feet, where only a 6-foot-high fence was permitted. The Plaintiff attended the hearing in opposition to the request, arguing that the fence should not be allowed as it was out of scale compared to other fences in the neighborhood. The BOA approved the Variance to allow the fence to remain as built, finding both that there were topographical differences along the two properties which made a standard 6-foot-high fence insufficient, and that the added fence height would helpful given the contentious relationship between the neighbors. The Plaintiff disagreed, arguing that the fence should be brought down to the compliant 6 feet in height. He believes the BOA’s decision was made in error and filed the appeal to District Court. The Court denied the appeal and upheld the BOA’s decision.

In 2021, the BOA also responded to a grievance filed under the Federal Fair Housing Act (FFHA), with the U.S. Department of Housing and Urban Development (HUD). HUD Case No.: 08-21-3770-8, Johnson and Johnson v. City and County of Denver, et al. is a Housing Compliant filed against the BOA’s decision in Case No. 119-20 on 2580 West 46th Avenue. Case No. 119-20 was filed to allow the construction of a new Accessory Dwelling Unit (ADU) for the Appellant’s disabled mother/mother-in-law to occupy. The case was initially continued to allow the Appellants to reduce the violations and/or to pursue a design which was closer to complying with the Code. The case was heard again, at which point it was denied. The BOA did not dispute that the Appellant’s mother/mother-in-law had a disability. However, the BOA did not find a correlation between the mother’s needs and the relief requested, and thus denied the request. The Appellants filed a complaint with HUD alleging discrimination on the basis of disability, sex, and race. At the time of this report, the appeal remains unresolved.

TRENDS NOTED IN 2023

Reduced Number of Cases: As with every year since the pandemic, the BOA has seen fewer cases filed than pre-pandemic. 2023 showed a slight uptick in cases filed, but cases are still filed at much lower levels than before the pandemic. Before the pandemic, most years had somewhere in the realm of 200 cases filed. 2020 had the lowest number of cases filed in any year with 133 cases. This dropped to 125 cases filed in 2021. 2022 didn’t even break a 100, with only 96 cases filed. 2023 had 110 cases filed, which is higher than 2022, but well below pre-pandemic levels.

Revised Case Tyles: Before the second half of 2023, Permit Denials were the most common type of case brought before the BOA, with Orders coming in second. With the Variance Modernization Project, Referrals will be the most common case type moving forward. Permit Denial cases have been discontinued beginning in the second half of 2023. While Order cases may still be filed, there will be a much lower rate of Order cases filed than in prior years.

More Definitive Positions from CPD: For the purposes of analysis, positions of ‘Not Opposed’ and ‘In Support’ are lumped together as favorable positions, while ‘Opposed’ is considered an unfavorable position. The BOA has seen fairly consistent levels of favorable and unfavorable positions over the years, with a roughly even split in any given year. While this remained true in 2023, with 52.53% favorable and 47.66% unfavorable, the positions that comprise ‘favorable’ positions have shifted. 2023 saw CPD submitting positions of ‘In Support’ much more commonly than ‘Not Opposed’. CPD has submitted positions of Not Opposed in 40% of cases in 2019, 39.84% of cases in 2020, 27.27% of cases in 2021, 30.39% of cases in 2022, and 18.69% of cases in 2023. CPD has submitted positions of In Support in 7.5% of cases in 2019, 9.38% of cases in 2020, 8.26% of cases in 2021, 17.64% of cases in 2022, and 33.64% of cases in 2023.

PREDICTIONS FOR 2024

Lower number of cases than pre-pandemic: Since the pandemic began in 2020, the BOA has seen a significant drop in overall cases filed. Initially this was attributed to a drop in the number of cases coming from Cease and Desist Orders. While that is still part of the explanation for lower case levels, there are new factors at play as well. In 2023, CPD completed their Variance Modernization Project, which updated the Variance criteria and expanded CPDs ability to approve certain requests administratively. The intent of the change is to allow CPD to review more requests at a staff level and to only send more complicated or higher degrees of violation to the BOA. While the lower number of cases was initially circumstantial, CPD is now intentionally pushing fewer cases toward the BOA. 2024 will likely see levels consistent to the past couple of years, with somewhere in the realm of 100 cases filed.
Referral Cases: Historically the BOA has seen four case types filed, with Denials, Orders, ZPSEs, and Appeals. Moving forward, Denials and Orders will be largely combined into the new Referral Case type. The BOA will likely see around 90% of all cases filed in 2024 come in as Referral Cases, and probably fewer than 5 cases filed based on Orders in any given year.

CONCLUSION
Since 1925, the Board of Adjustment has played an invaluable role in the orderly growth and development of the City. Today the Board 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.

Ignacio Correa-Ortiz
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Date: 2024.06.12 14:23:29 -06'00'

Ignacio Correa-Ortiz, 2023 Chair

Austin Keithler, Technical Director