

# **Board of Adjustment for Zoning Appeals**

**CITY AND COUNTY OF DENVER**



## **2020 Year End Report**



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### **INTRODUCTION**

This Annual Report presents a summary of the activities of the Board of Adjustment for Zoning Appeals from January 1, 2020 through December 31, 2020.

## **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.

## **2020 ACCOMPLISHMENTS**

**Publicly Accessible Database Search Function:** The Board's staff continues to work to make our records more transparent and accessible to the general public. In March of 2020, the Board's staff finalized a public facing search function to the internal records database. The database contains information on BOA cases from 1998 through today, with new cases automatically updated. The search feature is available on the Board's website, and allows users to filter information by Address, Case Number, Subject, and Action of the Board language.

**Transition to Virtual Hearing Environment:** The Board's staff has worked in collaboration with a number of other City agencies to ensure continuity of operations throughout the Covid-19 pandemic. The pandemic significantly impacted every aspect of our lives for the majority of 2020, shutting down weekly public hearings entirely between March 10, 2020, and May 19, 2020. In collaboration with the City Attorney's Office and other Boards and Commissions, the Board of Adjustment resumed public hearings with limited in-person attendance, and options to participate virtually. The transition from fully in-person hearings to semi-virtual hearings required significant revisions to the Board staff's workflow. Previously, Appellants could submit information for the Boards consideration at the hearing itself. With the change to a virtual environment, all exhibits had to be submitted by 8 a.m. the day prior to the hearing. This allowed the Board staff to scan in all case files and distribute the digital exhibits to all Board members, City staff, and Appellants to have before the hearing. The Board has since transitioned to a fully virtual hearing environment, with all parties participating virtually. Individuals unable to participate online are able to come to the hearing room to deliver comments via computer in person.

**Public Notification Signage Update:** The City and County of Denver has gone through a city-wide rebranding project to provide consistency among the notification signage for different agencies. The Board of Adjustment's public notification signs have been included in this update. The previous big blue signs templates, with printer paper details have been replaced with a fully printed and laminated version of the notification sign which has been designed to be consistent with the signage for other agencies that conduct public hearings.

**2020 Revised Rules of Procedure:** The Board's Rules of Procedure were most recently updated in 2012 in order to conform with the updated 2010 Denver Zoning Code. In May of 2020, the Board adopted Emergency Rules which authorized virtual participation in public hearings for Board members, City staff, and members of the public, to allow public hearings to safely resume during the Covid-19 pandemic. Emergency Rules can only be in place for a six month time period and cannot be renewed. When it was clear that the allowance for virtual participation would still be needed after the November 2020 expiration of the Emergency Rules, the Board decided to revise their Rules of Procedure. The 2020 revisions authorize virtual participation for public hearings throughout a period of emergency as declared by the Mayor or other public health officials. In addition to this change, the Board addressed some minor policy and language changes.

## **BOARD RESPONSIBILITIES AND COMPOSITION**

The Board meets weekly on Tuesdays, typically starting at 9 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 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**

### **2020 Board**

- **Penny Elder, Chair of the Board. Feb. 2019 – Feb. 2020. Re-elected Feb. 2020 – Feb. 2021**  
Appointment Term: February 2016 – February 2021
- **Jim Keavney, Vice-Chair/Member of the Board. Feb. 2019 – Feb. 2020. Re-elected Feb. 2020 – Feb. 2021**  
Appointment Term: Aug. 2016 – Feb. 2022
- **José Aguayo, Member of the Board until Feb. 2020. Alternate Board Member beginning Feb. 2020.**  
Appointment Term: Feb. 2015 – Feb. 2020  
Alternate Appointment Term: Feb. 2020 – Feb. 2025
- **Frank Schultz, Member of the Board**  
Appointment Term: Feb. 2018 – Feb. 2023
- **Nancy Burkhardt, Member of the Board**  
Appointment Term: Feb. 2019 – Feb. 2024.
- **Charlie Young, Alternate Member of the Board until Feb. 2020. Member of the Board beginning Feb. 2020.**  
Alternate Appointment Term: Jan. 2018 – Feb. 2023  
Member of the Board Appointment Term Feb. 2020 – Feb. 2023.
- **LeAnn Anderson, Alternate Member of the Board**  
Appointment Term: Mar. 2019 – Feb. 2024

### **2020 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.

**Variances** are the most common form of relief requested and accounted for the majority of cases before the Board in 2020. 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**. Variances 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 Variances, 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 three Appeals of an Administrative Decision were filed in 2020, of which two were denied and one was dismissed.

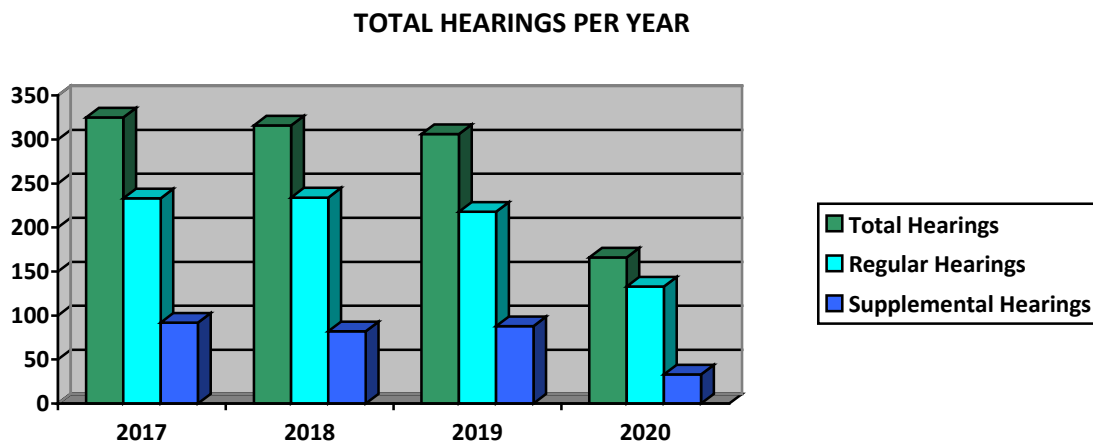
**Zoning Permits with Special Exception Review (ZPSE)** are a category authorized under the Denver Zoning Code that allows the Board to grant a permit as the reviewing body, rather than hearing an appeal from a denial or an order. ZPSEs replaced the use Exceptions granted by the Board under former Zoning 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

2020 was a unique year. The pandemic shut down public hearings entirely between March 10, 2020, and May 19, 2020. On May 12, 2020, the Board convened to adopt Emergency Rules authorizing virtual participation for Board members, City staff, and members of the public. There was no regular agenda scheduled for this date, only the adoption of the Emergency Rules. Excluding the May 12, 2020 meeting to adopt Emergency Rules, in 2020, the Board had only 30 hearing dates, with a total of 166 hearings (133 regular hearings and 33 supplemental hearings). This is the lowest number of hearing dates in recent memory. 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).

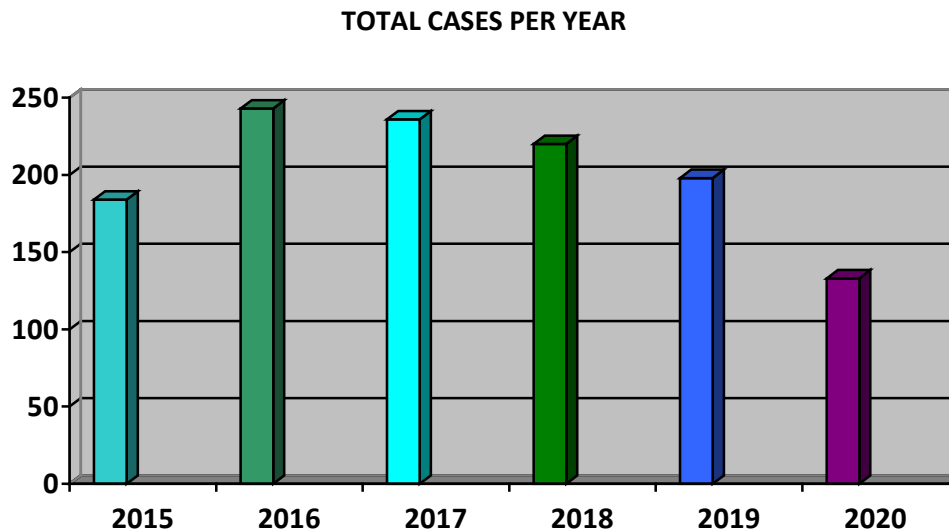
Figure 1:



### New Case Statistics

In 2020 there were 133 new cases taken in, the lowest yearly total for new cases in the Board of Adjustment's history. Previous years had 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. While the Covid-19 pandemic may have been responsible for a reduction in overall cases taken in, it does not seem to have been the largest contributing factor.

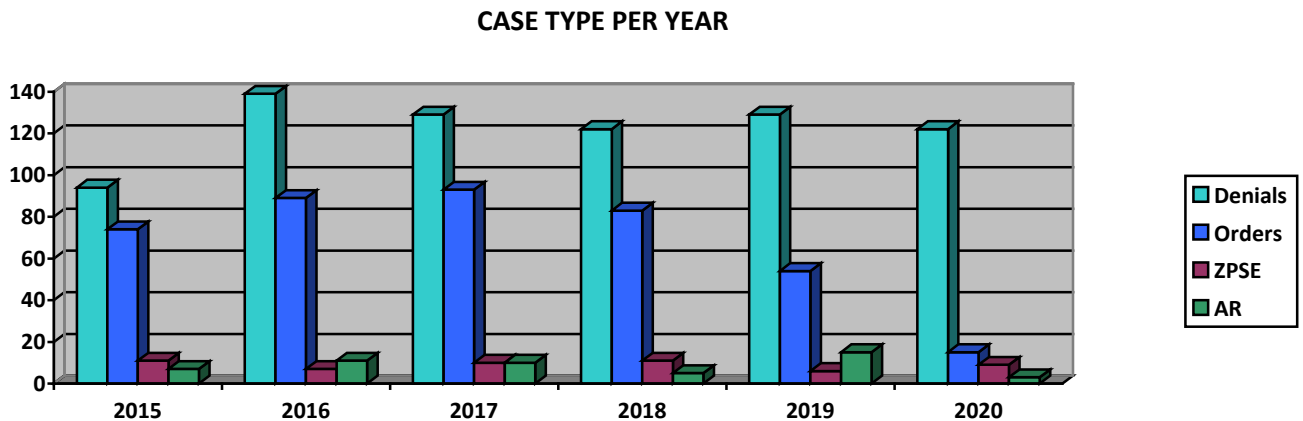
Figure 2:



The two main types of cases that the Board of Adjustment reviews are appeals of Cease and Desist Orders from Neighborhood Inspection Services (NIS) and Permit Denials from Community Planning and Development (CPD). These two case types make up around 90% of all appeals filed, with ZPSEs and Administrative Reviews making up the remainder. Permit Denials have stayed fairly consistent over the past few years, with 129 in 2017, 122 in 2018, 129 in 2019, and 112 in 2020. While 2020 had a lower number of Permit Denials appealed, it was not drastically lower. Cease and Desist Orders, on the other hand have drastically dropped over the past two years, with 93 in 2017, 83 in 2018, 54 in 2019, and 15 in 2020. In 2019, we noticed a downturn in the number of cases taken in, which we attributed to a change in leadership in NIS. This still seems to be the primary factor in the lower than average case load from 2020.

NIS has confirmed that inspectors are out in the field and writing orders, so it is unclear why fewer cases are being appealed to the BOA. Although the reasons are unclear, this appears to be the primary reason for the significant drop in cases.

Figure 3:



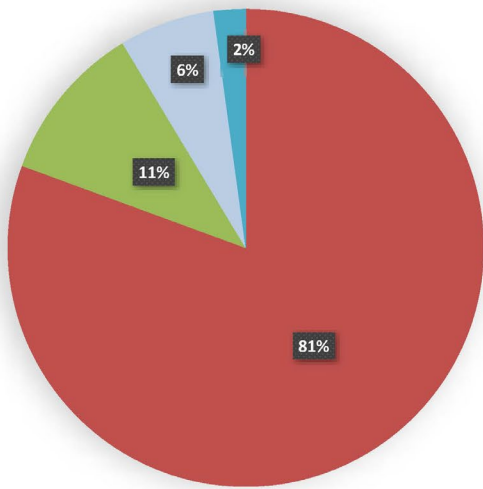
### Case Type Statistics

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. Despite the significant drop in Orders to Cease and Desist, this remains a consistent pattern in 2020.

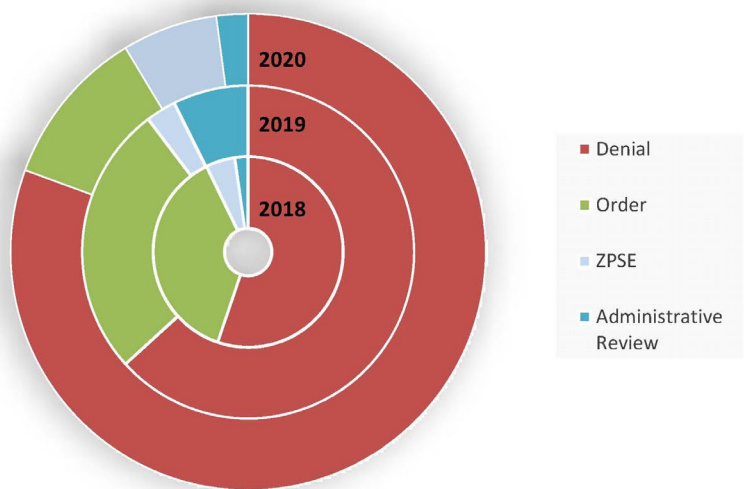
Figure 4:



**2020 CASES BY APPEAL TYPE**



**APPEAL TYPE BY YEAR**

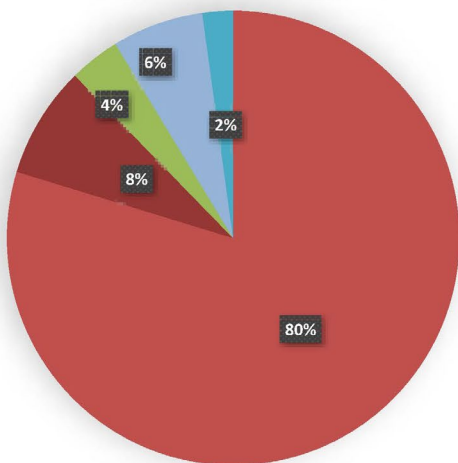


### Relief Requested

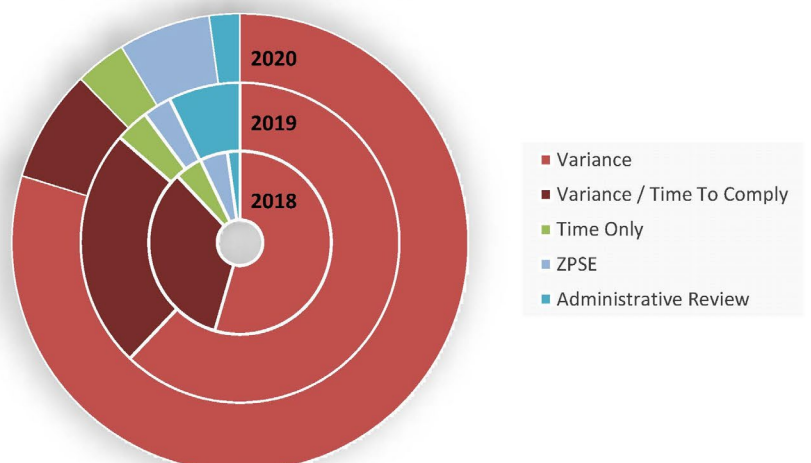
For cases filed as an appeal of a Denied Permit, the only available relief the Board can offer is a Variance. For cases filed as an appeal of an Order to Cease and Desist, the Board can offer a Variance or in the alternative a Delay of Enforcement under Section 12.2.6.8 of the Denver Zoning Code. With 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 5:**

**2020 RELIEF REQUESTED**



**RELIEF REQUESTED BY YEAR**

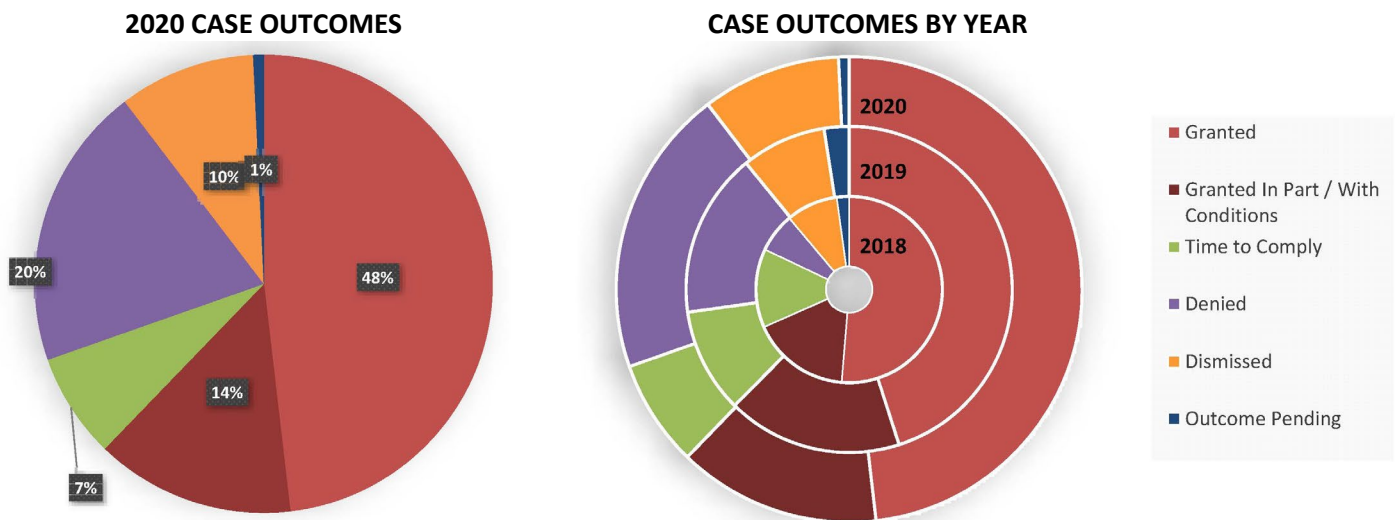


### Relief Granted

In 2020, 48.15% 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 2020, 14.07% 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 2020, 7.41% 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 2020, 20% 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 2020, 9.63% of the Board's cases were dismissed. As of this time, 0.74% of cases filed in 2020 have not yet received final decisions from the Board. These levels appear to be fairly consistent year to year. 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 ranged from a low of 14% in 2020 to a high of 17% in 2018 and 2019. Time to Comply has ranged from a low of 7% in 2020 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 20% in 2020. Dismissed cases have ranged from a low of 7% in 2017 up to 10% in 2020.

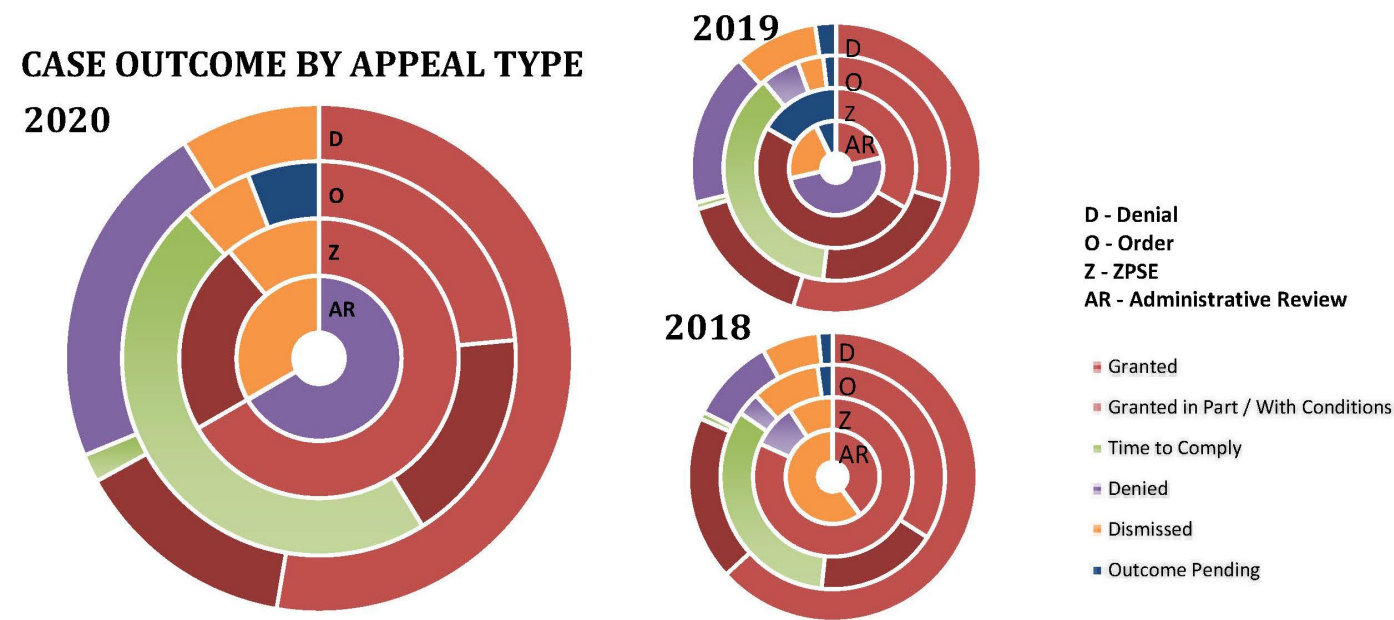
**Figure 6:**



### Case Outcome By Appeal Type

Year to year, the most consistency in case outcome is for Denials of Permits. In 2020, cases filed as Denials of Zoning Permits have the highest rate of being granted as requested, with 52.68%. This has been consistent for the past three years, with a low of 52.68% in 2020 and a high rate of 62.7% in 2018. Cases filed on Orders to Cease and Desist have been fairly consistent, although 2020 was a somewhat anomalous year. In 2020, Variances were granted for Cease and Desist Orders with a rate of 23.53%, which is noticeably lower than the 29.1% in 2019, 33.33% in 2018, or 35.6% in 2017. Part of the reason is the lower number of appeals filed on Orders to Cease and Desist, limiting the sample size. Additionally, in 2020, 1/3 of all cases for Cease and Desist Order appeals were ineligible for Variances. Cases filed on Cease and Desist Orders tend to receive either full or partial permanent relief around half the time, with rates of 50.91% in 2019, 50.5% in 2018, 58.6% in 2017, and another anomalously low percentage of 41.18% in 2020. Cases filed on Orders to Cease and Desist receive a Delay of Enforcement approximately 1/3 of the time, with rates of 36.3% in 2019, 32.26% in 2018, 26% in 2017, and an anomalously high rate of 47.06% in 2020. Year to year, 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. Only nine ZPSE cases and only three Administrative Review cases were filed in 2020, leaving the outcome of a single Administrative Review case to account for 33% of the year. Despite the potential for significant deviation year to year, 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 7:



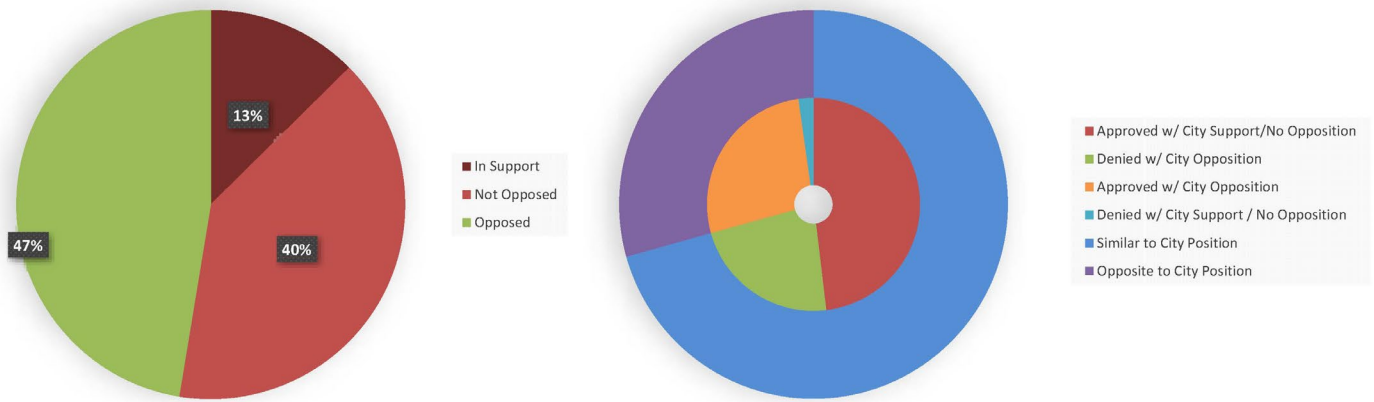
**Case Outcome Compared to City Position**

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 2020, the City has been In Support in 13% of cases, Not Opposed in 40% of cases, and Opposed in 47% of cases. The Board has issued final decisions aligned with the City position in roughly 70% of cases and contrary to the City position in roughly 30% of cases. This is divided into 48% where the Board approved requests in line with the City's position, 22.5% where the Board denied requests in line with the City's position, 27% where the Board approved requests over the City's position, and 2% 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 8:

**CITY POSITION** **CASE OUTCOME VS. CITY POSITION**

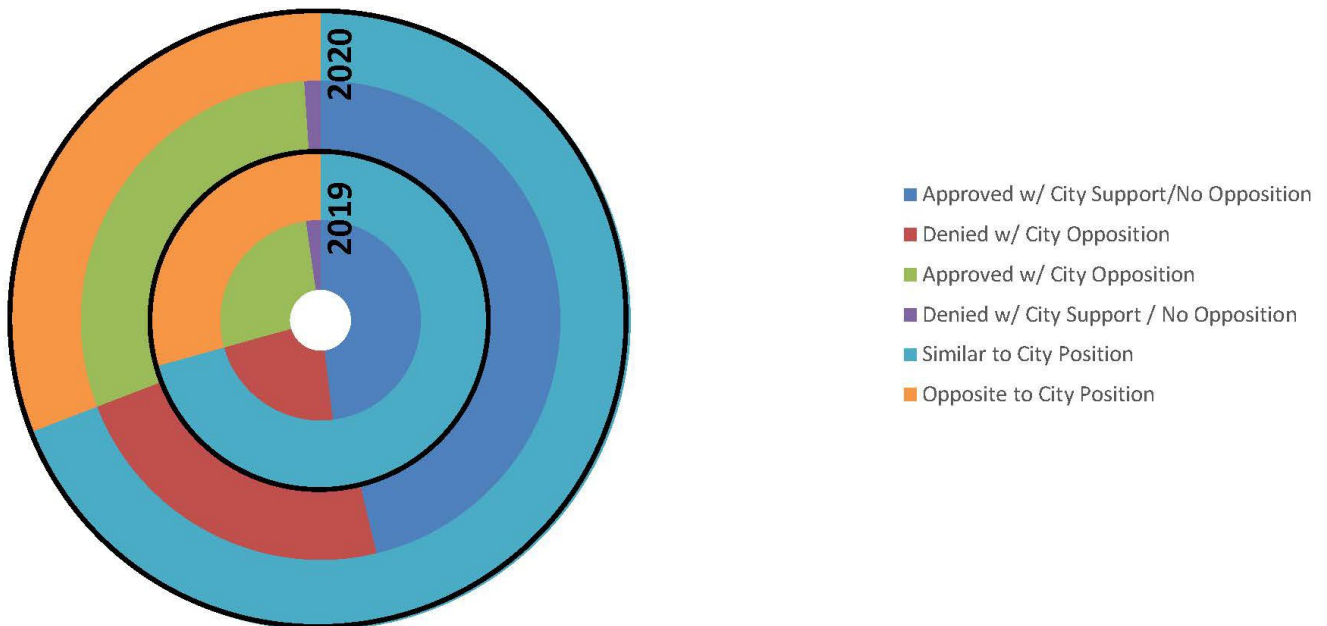




Case outcomes compared to the City's position in 2020 were very similar to levels in 2019. 2020 showed outcomes in line with the City position 70% of the time, compared to 69% of the time in 2019.

**Figure 9:**

### CASE OUTCOME VS. CITY POSITION

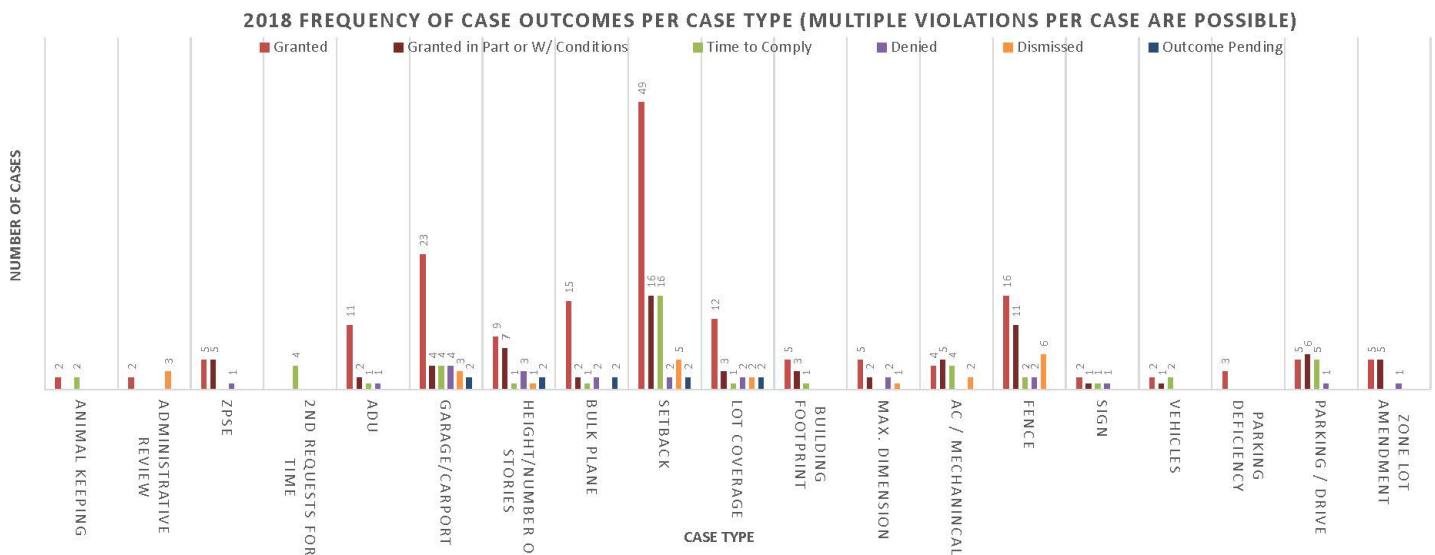
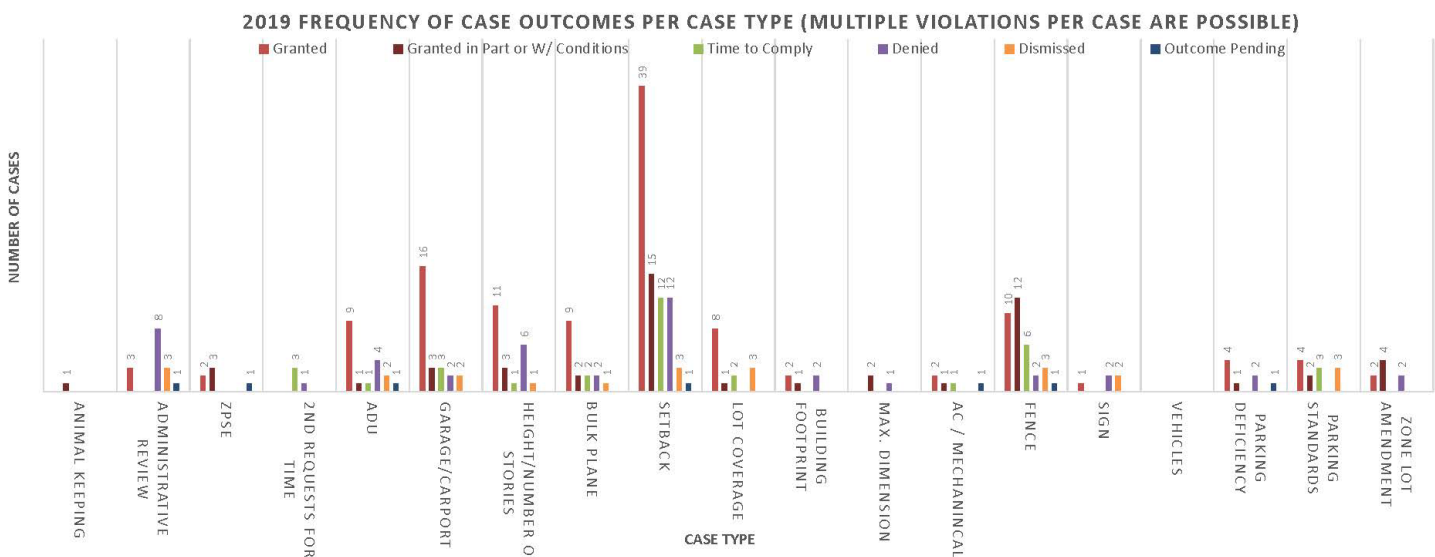
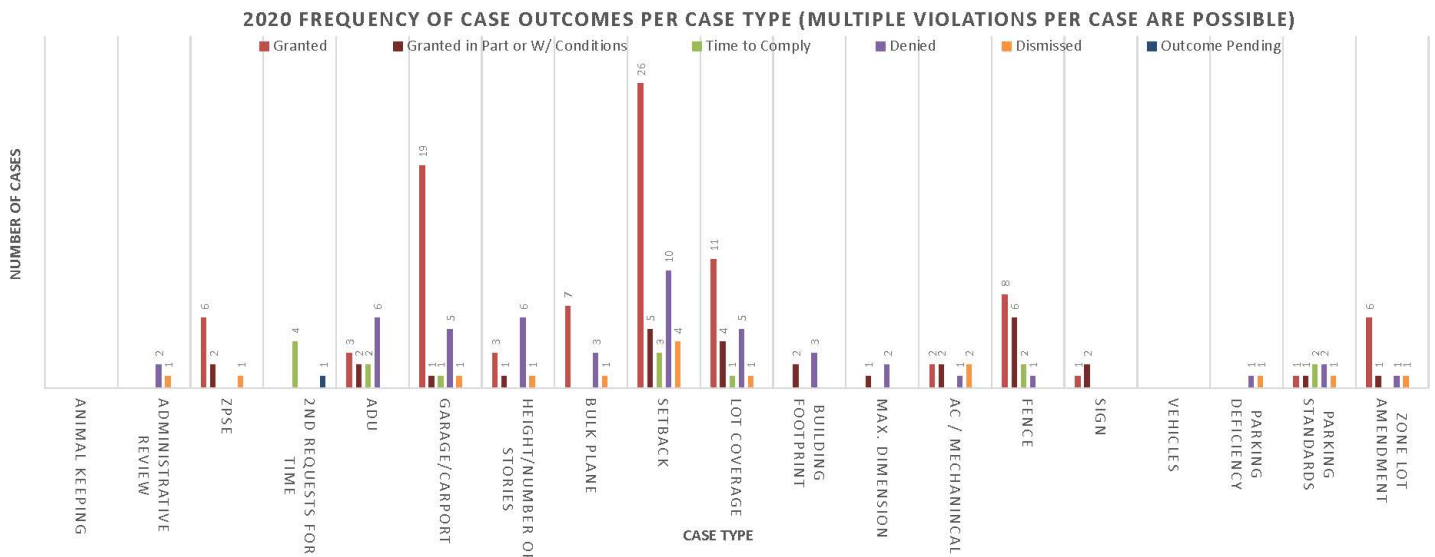


### Case Outcome By Case Type

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 2020 were related to the keeping of animals and oversized vehicles, with no cases filed in either category. Both of these appeals most commonly come from Orders to Cease and Desist, likely explaining the lack of cases in 2020. As in previous years, the Board heard a small number of ZPSE cases, which were largely approved or approved with conditions, and a small number of Administrative Review cases, which were largely denied.

**Figure 10:**

### CASE OUTCOMES PER CASE TYPE, BY YEAR



## **2020 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 to file their cases with District Court.

In 2020, the Board responded to one case filed under Rule 106.

**Case Number 2020 CV 246, Berkeley Regis Residents Action Coalition (BRRAC), Denver Board of Adjustments** Board's action in Case No. 193-19. In the case, the request to overturn the Zoning Administrator's decision on how the limitation in Section 11.4.2.1. DZC relates to overall building occupancy failed by operation of law, with three votes to overturn and two votes against. A request for reconsideration was then denied by operation of law at a later date, with three votes to approve the request and two votes against. The Defendant filed a Motion to Dismiss the appeal on the grounds that the Plaintiffs filed their claim pursuant to C.R.S. 24-2-106 instead of C.R.C.P. 106, and that the appeal was filed outside of the statutory deadlines. The court concurred and dismissed the appeal.

## **TRENDS NOTED IN 2020**

**Reduced Number of Cases:** The Board's case filings for 2020 were once again lower than in previous years. As noted above, this is likely in part due to complications arising from the Covid-19 pandemic, but seems to be more due to a reduced number of cases filed from Orders to Cease and Desist from NIS. 2020 saw only 15 cases filed on Orders to Cease and Desist, four of which were second requests for time from prior Board cases. 2019 already showed a notable drop in appeals of Orders to Cease and Desist, which was attributed to the change in leadership in NIS. Excluding 2019 as an anomaly, a typical year would normally have around 80-100 Orders. If 2020 saw a number of Orders appealed similar to a normal year, our case load would have been in line with a typical year.

**Types of Cases Consistent with Previous Years, with Emerging Trends:** In 2020, case types related to permit denials remained similar to prior years. Appeals for setback violations are by far the most common issues brought to the Board. Some case subjects primarily come in front of the Board from Orders to Cease and Desist, which were lower in 2020 than in average years. Issues like Animal Keeping violations or oversized or excess vehicles almost always come to the Board from Cease and Desist Order appeals. In 2020 the Board had no Animal Keeping or oversized vehicle cases filed. Cases like over height fences, air condition units, or noncompliant driveway expansions can come from either Denied Permits or Cease and Desist Orders, but tend to come from Cease and Desist Orders more often. While these case subjects were in front of the Board, they were less common in 2020 than in prior years.

## **PREDICTIONS FOR 2021**

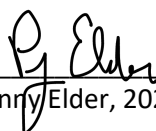
**Number of cases filed to remain lower than prior years:** While permit denial appeals remain at consistent levels, appeals related to Cease and Desist Orders have dropped considerably in 2019 and 2020. The reason for the drop is unclear, making it difficult to predict future levels. Assuming lower levels of appeals from Cease and Desist Orders, it's likely that 2021 will have a low overall case volume, ranging from 120 – 150 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. It's likely that 2021 will see lower numbers of appeals related to Cease and Desist Orders than a typical year, and will instead be similar to 2019 or 2020, ranging from 15 to 54 cases filed. Setback violations will likely remain the most common case subject.

**Continuing Trends in Case Outcomes:** In 2020, approved permanent relief (approved either in whole or in part) has been the outcome of approximately 62% of all cases. Denied permanent relief (either approving additional time to comply or outright denying appeals) was the outcome of approximately 27% of all cases in 2020. These levels have been fairly consistent in prior years, with 62% approved, 26% denied in 2019, 68% approved, 21% denied in 2018, and 67% approved, 20% denied in 2017. It's likely that 2021 will see similar levels, with roughly 2/3 of permanent relief approved, and the remaining 1/3 denied or dismissed.

## **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, 2020 Chair

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*Austin Keithler*  
Austin Keithler, Technical Director

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