

Appeals

by

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Submitted in partial fulfillment of the requirements for the degree

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Abstract

Appellate zoning boards provide aggrieved property owners the ability to appeal bulk zoning regulations which otherwise create an undue hardship on the property owner. However, this process when not monitored, can create the following three primary, twentieth-century criticisms: (1) a high number of cases paired with high rates of approval, (2) applicant properties which lack uniqueness, and (3) the ability to issue conditional use permits (Bryden, 1977; Leary, 1957). In order to test if the three criticisms are relevant in twenty-first-century practices, the research developed a record system for reviewing all state statutes; records and analyzes the actions of appellate zoning boards in ten Kansas municipal governments from 2014-2018, and focuses on the decision trends and themes of Manhattan, Kansas, an appellate zoning board currently subject to criticism. Document analysis, coding, and tracking are used to analyze 676 cases and reveal varying trends and themes among Kansas municipal governments. The most significant finding is that Manhattan's Board of Zoning Appeals out-paces peer municipal governments with a 17% higher rate of approval, 11% of approved cases fail to meet the uniqueness of property standard and a nearly 10% difference in the percentage of cases paired with conditional use permits. These findings support the validity of twentieth-century criticisms of appellate zoning boards and provide Manhattan, Kansas as a case of potential misuse of appellate zoning statutes.

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an investigation of Kansas appellate zoning boards

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Thank you to my family, friends, and peers who supported me during my pursuit of my master's degree. Especially to my mothers.

dedication

In memory of all loved ones who have passed on and sacrifices made during the pursuit of this degree, may it be dedicated to my father, grandfather, and grandmothers.

appeals

1

introduction

overview

Appellate zoning boards serve as a vital function to ensure property rights are not encroached upon. Due to potentially unique features of a parcel, appellate zoning boards are charged with the quasi-judicial authority to relieve undue hardship due to bulk zoning regulations. However, what occurs when the actions of a board created to review are not being reviewed itself?

dilemma

In 2018, the author was an intern with the City of Manhattan, Kansas, Community Development Department, when concerns were raised by elected officials, appointed officials, and members of the public regarding Board of Zoning Appeals decisions. The concerns surrounded the high number of cases, rate of approval for cases, and the similar themes of most cases. When confronted with these concerns, the City of Manhattan, Kansas had little to no recorded data outside of meeting minutes to respond to these concerns. Unbeknown to those who voiced concerns or city staff, the concerns raised were similar to mid-twentieth-century criticisms held by many scholar and practitioners regarding appellate zoning boards. These criticisms are the number of cases and rate of approval, application of uniqueness of property standards, and the ability to issue conditional use permits.

The appellate zoning board was fitting at the time of its conception because it served as a vital way for constituents to express their concern over new property regulations that were often perceived as restrictive. However, what function does the board of zoning appeals serve in modernity? If a zoning code is already present, why do

municipal governments grant exceptions to proposed projects instead of holding property owners accountable to the current regulations -- or amend the regulation to be the least restrictive and still fulfill the original spirit of the regulation?

The power of and potential misuse of appellate zoning statutes becomes obvious when considering the broader impact of board actions. I contend a taking happens when a property, which lacks uniqueness, is granted unique applications of regulations. This occurs when the owner appears before an appellate zoning board and is granted exceptions that are found to not violate the general spirit of the regulations and, following approval, planning staff do s not prompt the revision of zoning codes to provide all property owners of that district the same provisions.

Without record keeping, a municipal government is not prepared to respond to any of the above concerns. In an effort to demonstrate the power of record keeping, this report answers the following questions through document analysis, coding, and tracking:

research question

Are the twentieth-century criticisms of appellate zoning boards still relevant today? A case study, Manhattan, Kansas provides a means of answering this question, analyzing the themes and decision trends of the Board of Zoning Appeals cases in the City of Manhattan, Kansas in relation to other Kansas municipal governments revealed by methodical record keeping. In particular, the research addresses:

- (1) What are the primary trends?
- (2) What are the primary themes?
- (3) Is Manhattan comparable to other municipal governments?

2

background

overview

Created to relieve undue hardship to property owners from bulk zoning regulations, appellate zoning boards are enabled by federal regulation, created and regulated by state statute, and function at the municipal government scale. Bulk zoning regulations range from allowable lot dimensions and heights of structures to fence placement and design. Since the 1960s there has been little to no professional and academic scrutiny of the state of appellate zoning boards. However, during the 1960s multiple scholars criticized appellate zoning boards for their high number of cases and rates of approval, lack of uniqueness of the property, and ability to issue conditional use permits. The project creates and utilizes a record keeping system for appellate zoning boards to determine whether these criticisms are relevant today. Contemporary database methods facilitate this study. Many municipal governments already implement data-driven processes for budgeting and asset management, but these processes are not used to review zoning regulations. Critical evaluation of our planning systems is beneficial because it allows for zoning decisions which are responsive to constituent needs, the existing built environment, and the envisioned future environment.

history of establishing appellate zoning boards

In order to understand the value of criticisms appellate zoning boards face, one must first understand the original intent through the lens of zoning, takings, creation of appellate zoning boards and the forms of boards available.

zoning

Zoning is the practice of regulating land based on use and intensity (Herlocker, 1969). Bulk regulations began to provide spatial parameters to large areas of land. When Euclidean zoning was founded in the 1920s, this municipal power was upheld by the Supreme Court in the Village of Euclid v Ambler Realty when the legality of separating land by use was challenged as a taking (Anderson, 1961). Critiques of zoning and its power continued into the twentieth-century with most conflict existing in the up-zoning or down-zoning of land and how those actions impact property values (Leary, 1957). The most common zones are residential, commercial, and industrial. The zones are often subdivided into smaller segments, in order to respond to varying characteristics of dwellers. Bulk regulations govern each segment and include topics such as setbacks, structure heights, parking standards, design standards, lot dimensions, and accessory structures. Zoning is intended to assure character, common language, and function of individual lots, blocks, and neighborhoods.

takings

Even though the question of the legality of zoning was resolved in Euclid V Ambler, the case elevated the question of what defines a taking of personal property. As cities began to adopt codes of ordinances and zoning regulations which included more restrictions than simply land use, there was a burst of cases claiming that strict application of the zoning regulations classified a taking to unique properties (Leary, 1957). Due to the controversial nature of property rights, the courts and legislature were quick to enable the creation of appellate zoning boards where aggrieved parties would be able to appeal particular bulk regulations which inhibit the use of their unique property due to the strict and unreasonable application of the adopted zoning regulations (Dukemeier, 1962).

creation of appellate zoning boards

Creation of the board of zoning appeals was contentious as many thought the act of having to approve an appeal for a particular property was a failure of zoning regulations (Dukemeier, 1962). While appellate zoning boards were established to adjust bulk regulations to a reasonable standard, many feared boards would be utilized to vacate particular zoning regulations for a property entirely (Herlocker, 1969). Criticism was quick to follow the implementation of appellate zoning boards. In a 1950's article, a professional planner eloquently describes the functions and powers of an appellate zoning board, as well as depicting a convincing metaphor of its purpose.

"The Board of Zoning Appeals has four functions which it performs. They are:

- (1) The correction of errors in the administration of the zoning ordinance.
- (2) The modification of the regulations in cases of unique hardship so that substantial justice is done.
- (3) The efficient and realistic control over special or unusual uses of land.
- (4) The elimination of the need for legal action where relief is justified. This fourth function is attained by operation of one of the first three functions.

These functions are accomplished through the three powers which are normally given to Boards of Appeals. These powers are:

- (1) The interpretation of the ordinance in cases of ambiguity or disagreement by an applicant with a decision of the Zoning Administrator.
- (2) The granting of special exceptions for uses enumerated in the ordinance where the approval of the Board is necessary prior to the issuance of a permit for such uses.
- (3) The granting of a variance from the provisions of the ordinance where, because of unique conditions, strict compliance would cause unnecessary hardship.

...The Board has been termed a "safety valve" and while the term has been badly over-worked, it is still appropriate. A safety valve functions only when the pressure within the boiler reaches dangerous levels. It then opens only long enough to bleed off the excess pressure and then closes abruptly and as tightly as before. The marks of a good safety valve are its ability to open at the proper time, to close as soon as the pressure reaches a safe level, and to close tightly, so that there is no loss of pressure once it has closed. A safety valve which jams in an open position or which does not close completely, robs the boiler of its effectiveness and cuts down on its ability to perform its function. Many Boards of Appeals seem to resemble a very faulty safety valve rather than one which is operating as it was originally designed. Where a safety valve does not operate properly, repairs are necessary. The Spring controlling the opening and closing of the valve must be strengthened, and the valve and valve seat must be reground so that it will close tightly and quickly. An analogous course of action is called for where Boards of Appeals are not functioning as they were designed to function." (Leary, 1958)

forms of boards

There are three ways in which an appeal may be heard by an appellate zoning board: the planning commission doubles as an appellate zoning board, the appellate zoning board is a separate government function, or the municipal government may have a zoning hearing examiner and aggrieved persons would only appear before an appellate zoning board if they are appealing the decision of the zoning hearing examiner.

criticism

The criticisms which surround appellate zoning boards are products of zoning in and of itself, the desire to protect against takings, and the powers delegated to appellate zoning boards upon their creation. These criticisms focus on the number of cases and rate of approval, application of uniqueness of property standards, and the ability to issue conditional use permits.

number of cases and rate of approval

In the twentieth-century approval rates for the board of zoning appeals between 50 and 75% were considered "grounds for suspicion" and received much scholarly and judicial scrutiny (Bryden, 1977). However, in the twenty-first-century, the literature reveals little formal consideration regarding the rates of approval for these boards. Since the board was facing criticism for approval rates as low as 50%, it begs questions regarding the contributing factors for approval rates to increase to upwards of 90% in some municipalities (Herlocker, 1969).

uniqueness of property

In a one-year study of Kentucky appellate zoning boards, it was found that more than half of approved bulk variance appeals were granted without the applicant or

staff report establishing the uniqueness of the lot which would justify the variances (Dukemeier, 1962). Bulk variations are the focus of the research and there is a present concern that uniqueness is not evaluated. A thorough investigation of each case, preferably by video recording or in-person observation, would be needed to establish if the uniqueness of the property is relevant on a case-by-case basis. For the purpose of this study, the research only examines the minutes and decision presented in the staff report, therefore not verifying if the property is unique.

ability to issue conditional use permits

Many twentieth-century scholars and planning professionals believed appellate zoning boards should not have the authority to permit exceptions for land-use cases (Leary, 1957). This belief often stemmed from the fear of spot zoning and undue bias being administered. Land-use decisions are often confined to the planning board and governing body, so there was debate as to why a third entity should be able to grant conditional use permits when they are not involved in the greater zoning and land use decisions. State statutes vary on whether appellate zoning boards are permitted to grant conditional uses. For the purpose of this study, conditional uses will not be evaluated on a city-by-city basis, however, the ability for boards to grant them will be noted in the state statute evaluation.

manhattan, kansas

The City of Manhattan, Kansas Board of Zoning Appeals was selected as the subject for this study because the primary criticisms the board faced in 2018 were the same the primary criticisms presented by twentieth-century-scholars.

3

methodology

overview

The study utilizes three different scales of analysis in order to respond to the primary inquiry of: Are the twentieth century criticisms of appellate zoning boards still relevant today? The data collected provides a framework by scale which will be covered first in this chapter, followed by how the data collected directly responds to the criticisms of mid-twentieth-century scholars (Figure 3.1).

		scale		
		state statute	municipal government	manhattan
criticism	rate of approval and number of cases	<ul style="list-style-type: none"> form of review 	<ul style="list-style-type: none"> number of cases staff recommendation outcome of case number of conditions public comment applicant comment form of review 	<ul style="list-style-type: none"> number of cases staff recommendation outcome of case number of conditions public comment applicant comment form of review
	uniqueness of property	<ul style="list-style-type: none"> does state statute have this as a standard? 	<ul style="list-style-type: none"> does the municipal government record this statute being met? 	<ul style="list-style-type: none"> does manhattan record this statute being met?
	ability to issue conditional use permits	<ul style="list-style-type: none"> yes or no 	<ul style="list-style-type: none"> how many conditional use permits does the municipal government issue paired with an exception? 	<ul style="list-style-type: none"> how many conditional use permits does the manhattan issue paired with an exception?

Figure 3.1
Framework of study and data collection

research question

What are the themes and decision trends of the Board of Zoning Appeals cases in the City of Manhattan, KS in relation to other Kansas municipal governments revealed by methodical record keeping?

- (1) What are the primary trends?
- (2) What are the primary themes?
- (3) Is Manhattan comparable to other municipal governments?

methodology

Three scales of study were conducted: all states, municipalities in the State of Kansas, and a municipality, Manhattan, Kansas. A content analysis was first conducted on a state-by-state basis of state statutes dictating board creation, appointment, and procedures. The content analysis was used to compare and give context to the state statute of Kansas. On a smaller scale, content analysis of appellate zoning board minutes was then conducted on a city-to-city basis from ten of the largest municipal governments within the first class of Kansas cities. The content analysis of both state statutes and board minutes contain a qualitative analysis of various attributes. Quantitative descriptive analysis was then conducted to describe the context in which Kansas State statute exists and how appellate zoning boards are used by various municipal governments in regard to case themes and decision trends.

methods

The methods of data collection include document analysis, tracking, and coding. Document analysis was completed by the research of current state statutes regarding appellate zoning boards and open records requests from municipal governments to

access the archive of their appellate zoning boards minutes. Document analysis was initially conducted to determine the attributes mutually present in a sample of Kansas municipal governments appellate zoning board meeting minutes. From an extensive list of gathered factors, the top 15 most reoccurring factors in meeting minutes of the appellate zoning board were selected. The same technique was applied to establishing the attributes from state statute, however, 10 were selected to distinguish state statute attributes. During the document analysis process, the discrete variables were recorded and utilized to develop a Google form in which data from each state statute and case within meeting minutes could be coded and tracked.

process

Procedures were created by a sampling of state statutes and appellate zoning board minutes. After cataloging all of the possible factors of state statutes by reviewing all 50 state statutes, 15 of the most commonly occurring factors were selected to be recorded in the study. Similarly, case-by-case procedures selected the top 25 most commonly reoccurring factors.

procedures + data collection

Figures 3.2 and 3.3 represent the procedures and data collected during this study. Data was collected at two different scales, as previously discussed, at the state level and at the municipal government level.

Variables: State	Defintion/Question	Options
RAWP	Does the state board of zoning appeals statue include the word reverse, affirm, wholly or partly	yes or no
# of board members	Does the state board of zoning appeals statue require a number of board members?	yes or no
Board member residency	Does the state board of zoning appeals statue require board members to maintain residency in a specific place?	silent, in county, in jurisdiction, in city limits, in planning boundaries, combination
Separation from planning commission	Does the state board of zoning appeals statue require the board be separate from the planning board(yes), permits the combination (no), does not mention it(silent)?	silent, yes, no
Conditional land-use	Does the state board of zoning appeals statue permit the board to approve conditional land-use applications?	silent, permitted, not permitted
Fees	Does the state board of zoning appeals statue enable the city to collect fees?	silent, yes, no
Amount	If yes, what are the fees?	inifinite
Years of appointment	Does the state board of zoning appeals statue establish the years of appointment of the board?	1,2,3,4,5
Notices	Does the state board of zoning appeals statue establish days of notice?	silent, yes, no
Notice time	What is the established days?	infinite
Grandfather clause	Does the state board of zoning appeals statue grandfather in prior board of zoning appeals prior to the statute enactment?	silent, yes, no
Appeal to court	Does the state board of zoning appeals statue mention the board's decision can be appealed to a court?	silent, yes
Appeal to court time	If yes, what is the established timeframe?	infinite

Figure 3.2
State-by-state data collection

Variables: City	Defintion/Question	Options
Outcome	There final result of the exception application	Approve, deny, approve with conditions, table, approve with more conditions, approve with fewer conditions
Board members total	The number of appointed board members	3,5,7
Board members present	The number of board members who were present in the meeting and decision	0,1,2,3,4,5,6,7
Board members absent	The number of board members who were absent from the meeting and decision	0,1,2,3,4,5,6,7
Theme	What is the violation the applicant is trying to remedy?	front yard set back, side yard set back, back yard set back, lot coverage, parking
Infrastructure type	What is the violation the applicant is trying to remedy?	fence, roof overhang, deck, height, garage
Space Violation	The amount of space measured in the imperial system that the infrastructure type is violating	% of requirement
Applicant Comment	Is the applicant present at the meeting and spoke during the public hearing?	yes or no
Public Comment	Is there a public comment during the public hearing?	yes or no
Meets all standards	Does the application meet all Kansas and local statutes?	yes or no
1	will not be contrary to the public interest and where, due to special conditions, a literal enforcement of the provisions of the regulations, in an individual case, results in unnecessary hardship, and provided that the spirit of the regulations shall be observed, public safety and welfare secured, and substantial justice done.	yes or no
2	That the variance requested arises from such condition which is unique to the property in question and which is not ordinarily found in the same zone or district; and is not created by an action or actions of the property owner or the applicant;	yes or no
3	that the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents;	yes or no
4	(that the strict application of the provisions of the zoning regulations of which variance is requested will constitute unnecessary hardship upon the property owner represented in the application;	yes or no
5	that the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare; and	yes or no
6	that granting the variance desired will not be opposed to the general spirit and intent of the zoning regulations;	yes or no
Staff recommendation	What formal action does staff recommend to the board?	approve, deny, approve with conditions
Conditions	How many conditions of approval did staff recommend? If any?	0,1,2,3,4,5,6,7,8,9,10...
City population	What is the population of the city the board of zoning appeals is subject to hear?	infinite
City density	What is the square mile to population ratio?	infinite

Figure 3.3
Case-by-case data collection

4

findings

overview

The outcomes of this study are presented in the three categories of investigation: states, municipal governments, and Manhattan, Kansas. First, the data is presented in the categorical manner of which it was collected (Figure 4.1), then findings which directly relate to criticisms received by the board are addressed. In Chapter 5, the discussion and conclusions chapter, key findings which respond to criticisms by twentieth-century scholars will be discussed.



Figure 4.1
Outline of
findings

findings of context study states

Federal statute enables zoning and state statute enables municipal governments to have an appellate zoning board. There is a variety of differences in the guidelines provided by states to municipal governments which include topics such as board member compensation, ability to issue conditional use permits, and the residency of the board members. State data was categorized into three different areas: membership, procedures, and powers. The purpose of collecting state data is to understand the nuances of appellate zoning boards and how the Kansas state statute may impact the discrepancies found amongst municipal governments. Kansas statute position is delineated by the yellow bar on Figures 4.2 through 4.13.

membership

The majority of state statutes are silent on the issue of board number residency. Other state statutes are more stringent, including Kansas, identifying that board members must reside within either the planning jurisdiction or the city jurisdiction (Figure 4.2). Kansas state statute is also found to provide more guidance by prohibiting the compensation of board members (Figure 4.3). The majority of states, over 30 and including Kansas, regulate the number of board members possible. The majority of cities stipulate membership ranging from three to nine, with most requiring intensity from three members to seven (Figure 4.4). States also showed a favoring towards requiring odd numbers of board members rather than even numbers or providing an open range. As the board acts in a quasi-judicial capacity, an even number of members limits the possibility of tie votes. Years of appointment and limit terms are also options considered by state statute, with Kansas having no limit on the number of terms and requiring each term only last 3 years (Figure 4.5 and 4.6). With only three and six states opting to regulate the term limit and term duration, respectively, Kansas could be seen as one of the more stringent state statutes.

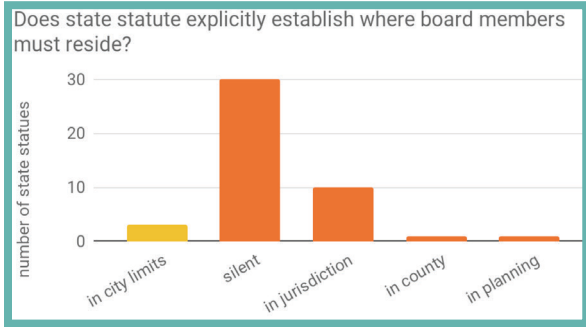


Figure 4.2
Board member residency

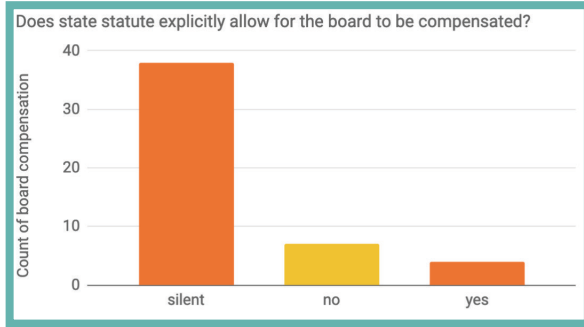


Figure 4.3
Board member compensation

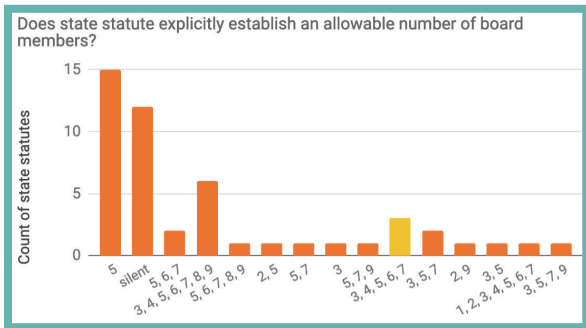


Figure 4.4
Number of board members

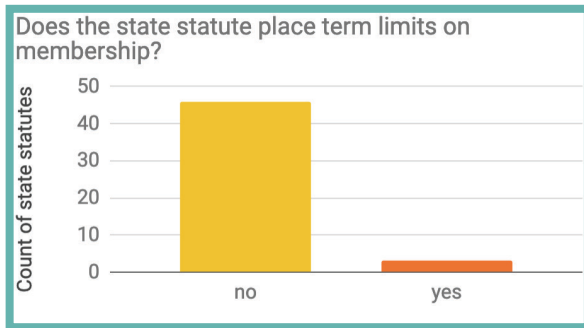


Figure 4.5
Board member term limits

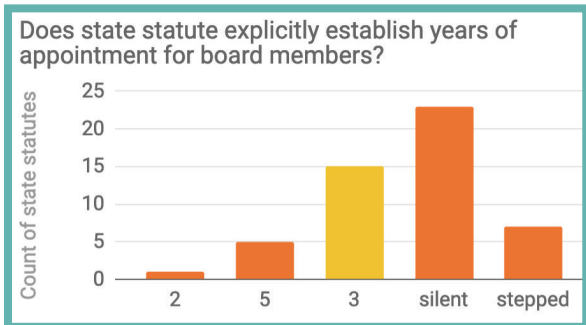


Figure 4.6
Board member years of appointment

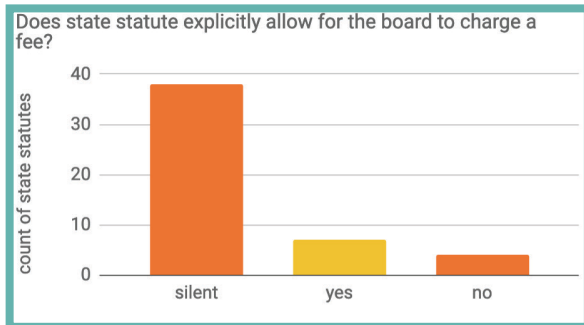


Figure 4.7
Ability to charge a fee

procedures

Procedures cover a large range of appellate zoning board responsibilities. Application and case fees vary greatly among state statutes, however Kansas is one of five states which indicates it is appropriate to strictly charge the expenses associated with the application. There are only two states, Illinois and Nebraska, which explicitly prohibit any fee structure (Figure 4.7). Carrying a similar share of statutes is the requirement of public notice and the setting of notice time (Figure 4.8 and 4.9). As covered in Chapter 2 of this report, there are three ways an appellate zoning case can be heard, reviewed, and had action taken upon it. Kansas is one of only three states that explicitly includes the options of a standalone appellate zoning board, a combination with the planning commission, or a hearing examiner (Figure 4.10). Out of the 21 state statutes which only list an appellate zoning board as the function for reviewing zoning cases, there are only ten of them which explicitly state they must be separate from the planning commission (Figure 4.11). Across the country, states and cities alike choose to use different language for appellate zoning boards. Instead of referring to the request as an 'appeal,' it is described as an 'adjustment.' A majority of states that do not allow for boards to issue conditional use permits refer to appellate zoning board as 'board of zoning adjustment.'

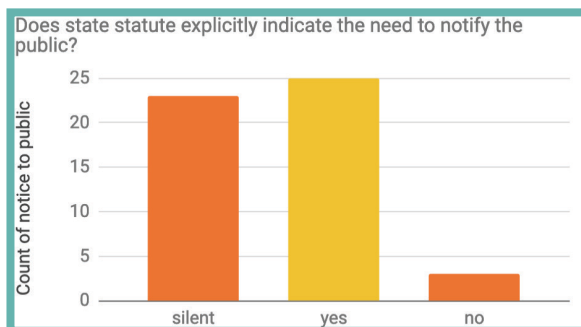


Figure 4.8
Notice to public

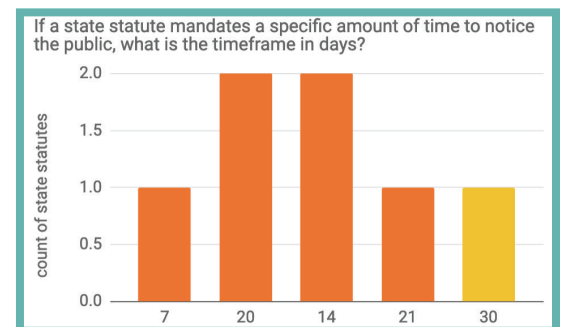


Figure 4.9
Timeframe of notice to public

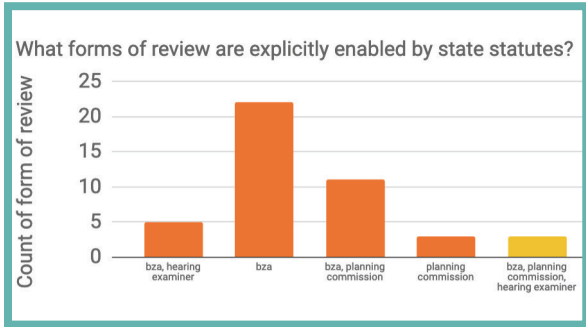


Figure 4.10
Form of review

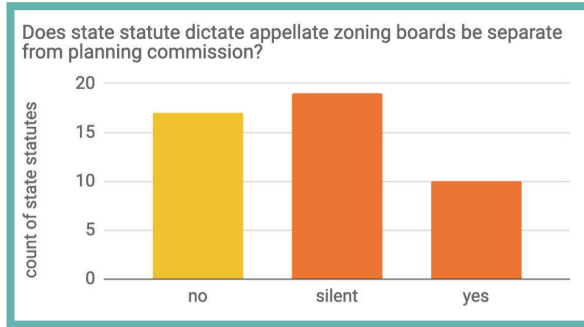


Figure 4.11
Separation from planning commission

powers

The powers of appellate zoning boards are the most contentious aspect of the boards due to their ability to issue conditional land-use permits and grandfather conditions existing prior to regulation. The ability for the appellate zoning board to be able to issue conditional use permits is controversial in nature as referenced in the background chapter with nearly one-fifth of states explicitly prohibiting conditional use permits being issued by appellate zoning boards (Figure 4.12). Following the mid-twentieth-century critiques of appellate zoning board powers, many primary cities within states that allow appellate zoning boards to review conditional use permits found their planning commissions or zoning administrators/examiners to be more appropriate administrators of these permits. Kansas is one of 17 state statutes which includes a grandfather clause enabling cities to allow for properties constructed prior to the adoption of the statute to exist without the variance or exception (Figure 4.13).

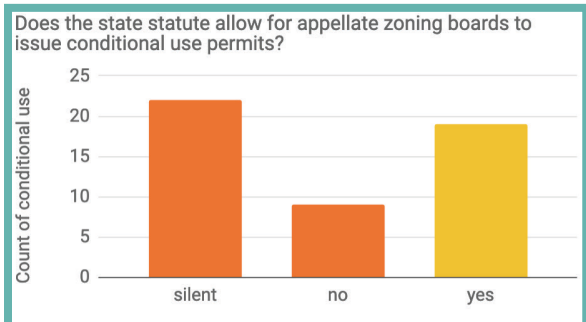


Figure 4.12
ability to issue conditional use permits

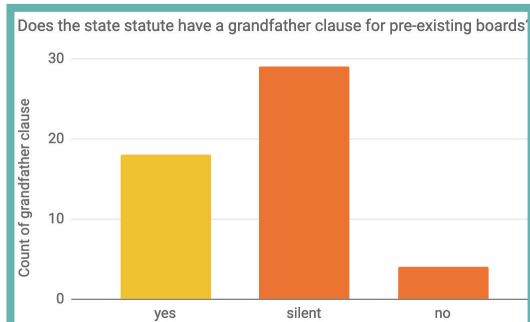


Figure 4.13
grandfather clause Figure 4.16

municipal governments

Ten first-class municipal governments in Kansas were studied to understand the nature of Manhattan's Board of Zoning Appeals and capture the similar and unique factors of their board actions (Figure 4.14). In all figures, the yellow hue references the category in which Manhattan is included. The data is presented in the categories of collection of membership, primary themes, and primary trends.

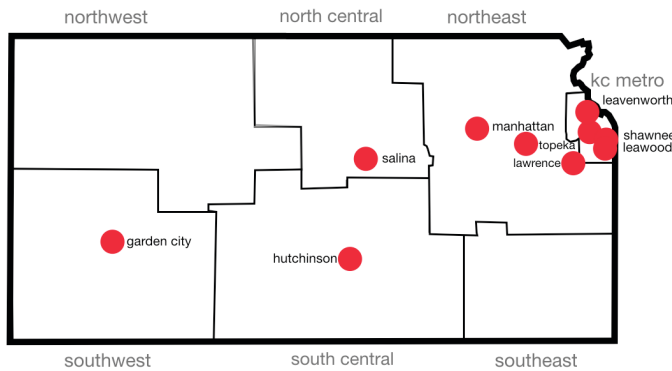


Figure 4.14
Municipal governments selected for the study

membership

Kansas state statute allows from three to seven board members on an appellate zoning board. Only two Kansas municipal governments exceed the number of allowed appellate zoning board members: Hutchinson, who reduced their number of board members in 2017, and Lenexa, with 9 members. Appellate boards in Kansas can be comprised of a standalone board, an extension of the planning commission, or as an appellate board to respond to a zoning hearing examiner (Figure 4.15). Standalone boards are the most popular amongst Kansas cities as eight of them utilize a

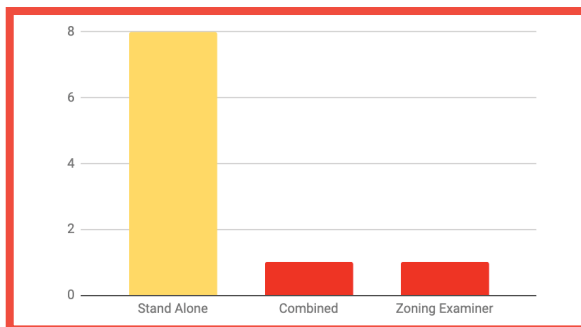


Figure 4.15
Types of boards in Kansas

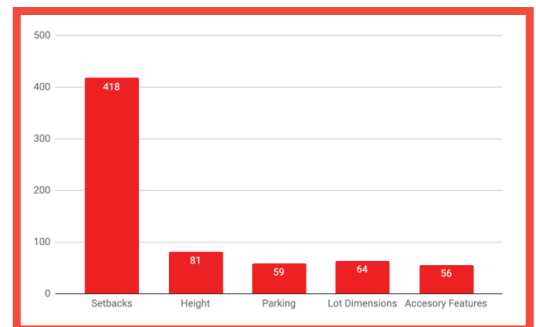


Figure 4.16
Number of cases by theme

standalone board, one is combined with the planning commission, and one serves as secondary to a zoning hearing examiner.

primary themes

The categorization of 45 unique themes found in appellate zoning board cases reveal the following five most prevalent themes: accessory features, parking, lot dimensions, height, and setbacks (Figure 4.16). A breakdown of the factors associated with each theme can be found in Figure 4.17. Accessory features comprise the smallest group of requests and typically involved items such as pools, telecommunication, and accessory dwelling units. Parking standard include cases of gravel lots, off-street parking requirements, and parking lot standards. Parking is the second most consistent item other than setbacks. Lot dimensions are another category which shows up consistently, yet still produced a relatively small number of cases. Lot widths and depths, maximum lot coverage, minimum lot area are items which are included in the lot dimensions. The second largest contributing category is the height of primary and accessory structures. Represented in over 60% of all appellate zoning cases is setbacks. Setbacks are consistently the highest number of cases in all municipal governments studied, however, they vary greatly in range and total contribution to appellate zoning board cases. Front yard setbacks are the most requested appeal, another contributing category is the height which is inclusive of primary and accessory structures.

Case Types consolidated into five Primary Themes				
Setbacks	Height	Parking	Lot Dimensions	Accessory Features
<ul style="list-style-type: none"> • front • rear • side 	<ul style="list-style-type: none"> • maximum height • minimum height 	<ul style="list-style-type: none"> • off street parking • parking lot design • gravel drive • parking placement • gravel lot • drive width 	<ul style="list-style-type: none"> • lot coverage • lot depth • maximum grade change • lot width • lot area • minimum lot size • landscaped open area 	<ul style="list-style-type: none"> • roof overhang • water infrastructure • accessory structure • sign • pool • illumination • building in floodway • solar array • remodel in floodway • fence design standards

Figure 4.17 Themes by factors

primary trends

Collected data shows a general decrease in the number of appellate zoning board cases, which could be attributed to the loss of cases which are concurrent with the updated zoning code. However, there is not a set of contributing factors which establish the totals for the past five years. The decrease, while alleviating some staff and board time, is not significant enough for conclusions to be drawn. There are general decreases in the five bulk themes, with an up-tick in lot dimension exception requests in the past four of the five years (Figure 4.18). Requests for accessory features saw a major decrease in 2018 down to three requests from the 18 requests for five years prior. Requests for setbacks remaining the most steady at an average rate of 22 setback cases per year in a municipal government. Although, the ability for an appellate zoning board to review conditional use permits is explicitly allowed in state statutes, the City of Manhattan's Board of Zoning Appeals appears to be the only board with high use of this function (Figure 4.19). Topeka, the only municipal government with a zoning hearing examiner, is also the only municipal government which has an approval record which is less than 50 percent. The remaining municipal governments have a an approval record above 50 percent, with the lowest rate of 59 percent, Garden City, and highest of 93 percent, Shawnee(Figure 4.20). The overall rate of approval is 74 percent and remains the same for cases in which the applicant is present (Figure 4.21). In contrast, cases where there is public comment rates of approval drop to 45 percent (Figure 4.22).

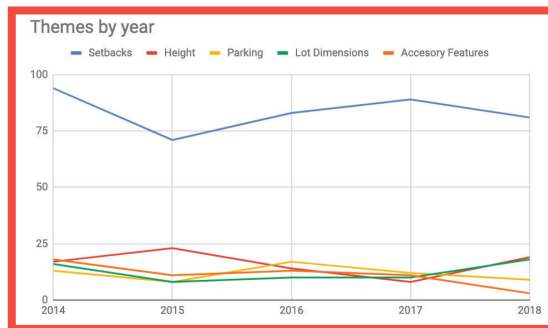


Figure 4.18
Themes by year

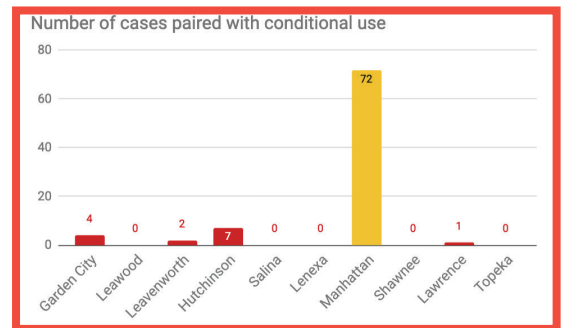


Figure 4.19
Number of cases paired with conditional use

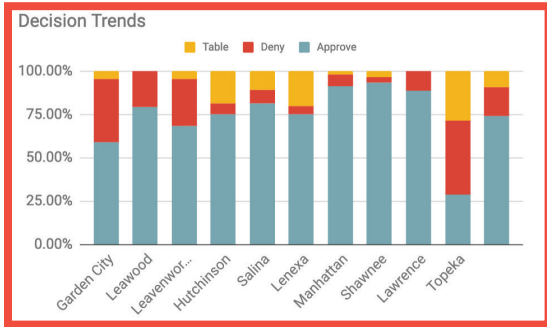


Figure 4.20
Decision trends

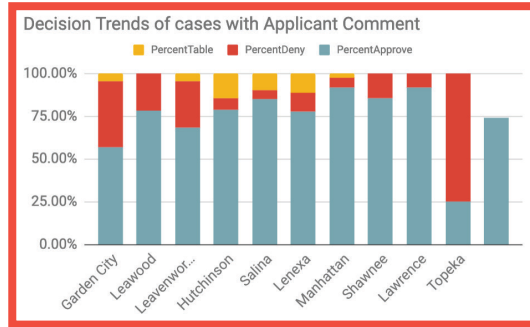


Figure 4.21
Decision trends with applicant comment

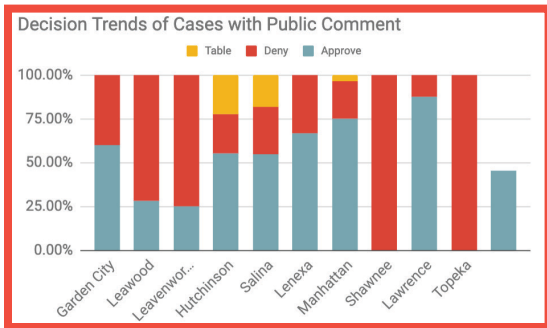


Figure 4.22
Decision trends with public comment

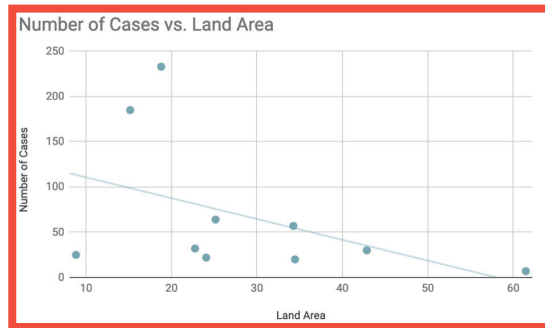


Figure 4.23
Number of cases vs. land area

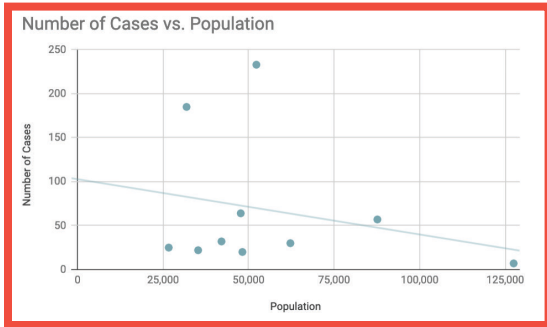


Figure 4.24
Number of case vs. population

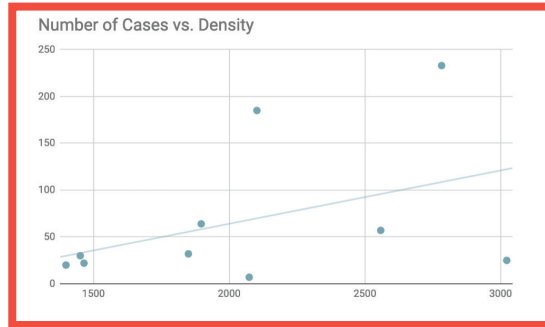


Figure 4.25
Number of case vs. density

geographic characteristics

There are fewer cases if the municipal government has a greater land area (Figure 4.23). Similarly, there are fewer cases if the population is greater (Figure 4.24). The relationship between density and number of cases are positive, indicating the more dense a city is the higher number of cases it may have (Figure 4.25). Density may be a contributing factor to the number of cases due to the decreased amount of space.

manhattan

Study of Manhattan, Kansas Board of Zoning Appeals utilized the same methods of collection for the other municipal governments. The primary categories of membership, primary trends, and primary themes remain the same. Therefore, only qualities which are specific to Manhattan will be discussed in the following section.

membership

The City of Manhattan's Board of Zoning Appeals is appointed by the City Commission, for a three-year term as dictated by state statute with the membership of five people. The board is stand-alone and has the power to issue conditional use permits.

primary trends

Manhattan possesses the highest number of cases within the five-year study period. Manhattan might be labeled an outlier. Leawood, Kansas also has a high number of cases with a zoning code which has not been updated since 2002. Manhattan has the second highest rate of approval at 91 percent over the five year study period. Manhattan maintains an approval rating at or above 85 percent on a yearly basis (Figure 4.26). Following the trend of all ten municipal governments, the rate of approval only slightly improves to 92 percent when there is applicant comment (Figure 4.27). The rate of approval for when public comment is present drops to 81 percent, a 10 percent differential from the average rate of approval.

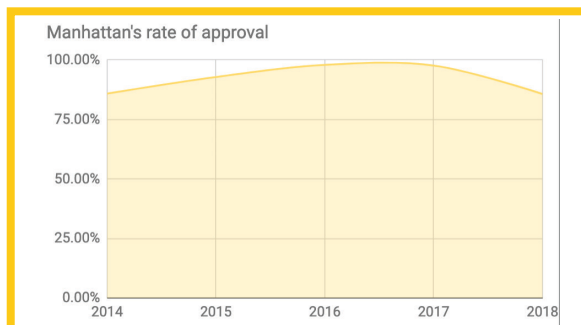


Figure 4.26
Manhattan's rate of approval

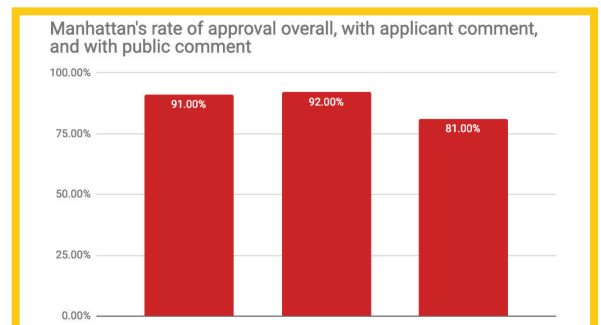


Figure 4.27
Manhattan's rate of approval with comment

primary themes

Falling in line with other Kansas municipal governments, the City of Manhattan's Board of Zoning Appeals also hears setback cases most frequently. The City of Manhattan's most frequent setback request is a front yard adjustment with an average difference of five feet within the original setback. Parking and lot dimensions are the second themes of which may be existing conditions or with concurrent plat request from the Planning Commission. Structure height and accessory features exceptions are the least recurring trend with most activity happening since 2014. Telecommunications cases comprise the majority of accessories structure appeals in Manhattan, Kansas. Throughout the five year period there has been a decrease in the number of cases. There appears to be no consistent patterns in the fluctuation of number of cases per theme in a given year, however there has been a decrease in setback cases since 2016 (Figure 4.28).

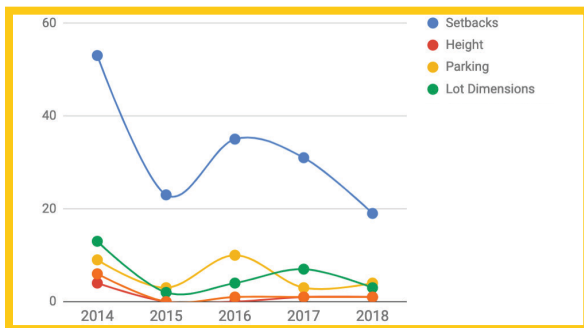


Figure 4.28
Themes by year

synthesis

While the membership of the City of Manhattan's Board of Zoning Appeals has a lower number of members than the average of Kansas municipal governments, their powers and standalone status are comparable to others. While Manhattan themes are consistent with the other Kansas municipal governments studied, setbacks make up a greater proportion of cases in Manhattan. Manhattan trends are inconsistent with the other municipal governments due to the high volume of cases and approval rating of cases.

findings for criticisms

number of cases and rate of approval

Manhattan exceeds all peer municipalities in their number of cases over the five year study period. Twentieth-century scholars found it appropriate for appellate zoning boards to convene twice a year (Bryden, 1977), although one can assume the intent was not for a board to hear 20 cases during a bi-annual meeting as would be the case for Manhattan if this theory were utilized. In regard to the rate of approval, all except one municipality is found to have a rate of approval greater than 50% with the average for the state of Kansas being 74 percent.

uniqueness of property

Out of 233 cases heard by the board, 213 were approved in some form. Of those 213, only 190 cases had all conditions of approval — the remaining were not found to meet uniqueness of property standard set forth by Kansas state statute. Almost 90% of approved cases meet all standards, while the remaining 11% of approved cases do not meet the uniqueness of property standard.

ability to issue conditional use permits

There is a difference in the manner of how municipal governments utilize conditional use permits, with three municipalities having a greater than 10% of all cases being paired with conditional use permits and five municipalities not seeing any pairings at all.

synthesis

All three twentieth-century criticisms are found in the findings of this research with Manhattan's Board of Zoning Appeals decisions representing these criticisms the most out of the three scales examined

5

discussion + conclusion

summary of findings

Appellate zoning boards were established to provide relief to unique properties from zoning regulations which suit the rest of the district but not the aggrieved property. Zoning regulations were created in order to establish neighborhood functions and forms. A great deal of scrutiny was directed at appellate zoning boards in the twentieth-century. The lack of recent scrutiny led to this study questioning whether the tenants of twentieth-century scholars and practitioners still exist in the twenty-first-century. The findings suggest that there are municipal governments who disproportionately issue conditional use permits, overlook the uniqueness of property standards when approving exceptions to bulk regulations, and have rates of approval greater than 75 percent. The following chapter will provide recommendations for the three study scales and discuss the current validity of the three twentieth-century criticisms.

recommendations for context study

state recommendations

The following recommendations are intended for state legislatures to consider in regard to their statutes for appellate zoning boards:

- (1) Forms of appellate zoning boards based upon city classification
- (2) Ability for appellate zoning boards to issue conditional use permits

forms of appellate zoning boards based upon city classification

Based upon the low number of cases in this study which make it to an appellate zoning board with zoning hearing examiners and the consistently high number of cases for standalone boards, it may be appropriate for the appellate zoning boards to be combined with planning commissions for second class cities. However there may exist a threshold for when a first class city may be better served by a zoning hearing examiner rather than a standalone appellate zoning board.

ability for appellate zoning boards to issue conditional use permits

Many states have removed the ability for appellate zoning boards to issue conditional use permits due to the high amount of scrutiny they received in the twentieth century. Dropping from 27 states that allowed appellate zoning boards to issue conditional use permits in 1961 to only 10 in 2018, there was an apparent shift in attitude about who should have the authority to issue conditional use permits. The arguments provided by authors Anderson and Leary(1961, 1959) prove, on a rational level, that the board that which creates the zoning code and enables opportunity for conditional uses should be the board to review such a request.

municipal government recommendations

The following recommendations are intended for municipal governments within Kansas, yet could be applied more broadly with consideration of unique state factors:

- (1) Number of cases
- (2) Rate of approval
- (3) Form of review and population size

number of cases

Municipal governments should consider applying strict scrutiny to the zoning code of municipal governments that demonstrate a significantly higher number of cases per year than the peer municipalities studied, such as Leawood and Manhattan. These inquiries must be unique to the municipal government with the objective of evaluating the validity of cases and aptitude of the zoning regulations.

rates of approval

If rates of approval of 50-75 percent approval were "grounds for suspicion" in the twentieth century as one author indicated (Leary, 1957), scrutiny should be applied to 10 of the municipal governments studied that average an approval rating of 74 percent. Seven of those municipal governments average over 75 percent approval ratings, Leawood (79%), Hutchinson (75%), Salina (81%), Lenexa (75%), Manhattan (91%), Shawnee (93%), and Lawrence (89%).

form of review to population size

Although no conclusion can be drawn from this study in regard to correlations between the form of review to population size, the study establishes a baseline for Kansas municipal governments. The base the study creates can assist municipal governments in determining the appropriate form of review based upon the number of

cases they find appropriate to send to the volunteer board rather than to hire a zoning hearing examiner.

manhattan recommendations

Due to Manhattan's moderate population yet high number of Board of Zoning Appeals cases it may be appropriate for Manhattan to review their regulations in regard to the following regulations:

- (1) Setbacks
- (2) Lot dimensions
- (3) Applying scrutiny to the uniqueness of property standard setbacks

setbacks

Since the majority of cases, 82%, heard by the City of Manhattan's Board of Zoning Appeals regard setbacks with the average space violations being within five feet, it is recommended they review setback regulations. Front yard setback regulations are the most prevalent, making up over 75 percent of all setback cases, or 98 of all 130 setback cases.

lot dimensions

Even though the number of lot dimension cases is low in comparison to the number of setback cases, they make up more than 10 percent of all cases before the board. The primary concern with lot dimension requests is that 82 percent of those requests are accompanied by an additional request, whether it be for an additional lot dimension adjustment or otherwise.

standards of approval

Manhattan has the second highest rate of approval of peer municipalities studied (92 percent), yet only 82 percent of Manhattan's approved cases were found to meet all of the standards set forth by state statute. Out of the 10 percent of cases that do not meet all of the standards, the most common lacking standard is establishment of undue hardship onto the property owner due to the uniqueness of a property. The City of Manhattan's Board of Zoning Appeals should apply strict scrutiny to this standards, as it is remarkable for 10 percent of all cases to not meet the standards required by state statute. A clerical staff member to be sure clarity of staff findings in the staff report may aid in improving the clarity for the Board to make their decision.

discussion of criticisms

Throughout the review of literature, previous case studies, and analysis of data, three primary criticisms surfaced: rate of approval and number of cases, application of the uniqueness of property standard, and the ability to issue conditional use permits. The following section is a discussion of how each of the studied scales impacts these critiques.

number of cases and rate of approval

A national recording of appellate zoning board cases may be more fitting to establish the current standard rate of approval and number of cases, however, statewide comparison of these factors suffices for internal review of a singular board. This study found that the subject municipality, Manhattan, Kansas, has an approval rate 17% higher than the total of other Kansas municipal governments and is a clear outlier in the sheer number of cases it hears. Municipalities would best serve themselves by recording this data and sharing it with other municipalities, however it is a comparison which could be guided at the state level and potentially by state statute.

State statute could indicate the most appropriate form of review, whether it be based upon population, number of cases, or another contributing factor. This could guide municipalities to choose the most appropriate form of review between a standalone board, combined planning commission, or a zoning hearing examiner.

uniqueness of property

Kansas belongs to a small sector of states who explicitly require appellate zoning board applications to meet a uniqueness of property standard, however it does not have a formal way of regulating the standard. This becomes problematic when a municipal government, such as Manhattan, Kansas which approves 11% of all cases without this standard being met, and does not keep and analyze records. While the responsibility should ultimately be on the staff liaison to make this finding clear to the board, and for the board to deliver a fair decision there is no regular review at the state level of the application of these standards. Absent regulatory review by the state, the only method in which a municipal government would have to defend its action is in a higher court. If an applicant was denied a request, and appealed to a higher court, and presented evidence the board had previously approved a reasonably similar case without the uniqueness of property standard being met, only then would a municipal government's previous actions come into question.

ability to issue conditional use permits

The ability to issue conditional use permits may always be a contentious debate; however, each scale of government should accept their responsibility and be actively aware of the nature of the topic. Kansas explicitly allows for appellate zoning boards to hear these cases, although Manhattan appears to be the only municipality with high board activity. This begs a couple of questions as to why there are such few cases that appear in front of other boards and/or why other municipalities delegate this task to another board. With ten states which explicitly prohibit the board of issuing permits, it

is also a state statute consideration which was also covered in the recommendations section , Pg. 44.

process of record keeping

By first compiling all of the unique factors and then selecting the most reoccurring from municipality to municipality, a regular record keeping process was established for this study. Individual municipal governments can implement a system of record keeping by first reviewing the data they already record via meeting minutes and evaluate if there is any additional data that would aid in identifying themes. Establishing the initial framework for the data and finding the most appropriate way to record the data for use later on consumes the most time, yet the data gathered can be rich and revealing.

limitations

The primary limitation to the research is the varying levels of detail that are encapsulated in meeting minutes. The data collected in this study was a result of compiling all potential factors and selecting the top 15 which were recorded among the 10 municipal governments. Since the research is bound to the quality of meeting minutes, it also does not account for cases that do not make it to the appellate zoning board due to input from the zoning administrator or otherwise retracted applications.

future research

While the purpose of this study was to demonstrate the recommendations possible with the current status of record keeping using meeting minutes, one would be able to further this research by establishing the factors a municipal government should record of cases that come before an appellate zoning board. Establishing those factors would enable the creation for a database framework which could then be distributed to municipal governments.

Items which were particularly lacking in this study were the consistent reporting on the address of the property and the accompanying zoning district and overlays at the time of application. Record of the address and zoning designation would expand the research into a geospatial study to determine if there are spatial patterns to decisions. This would allow municipal governments to focus their zoning code amendment efforts in specific areas of the city. Since Kansas statute sets forth standards in which all cases should be evaluated, one could either do a qualitative study of the rationale impacting each case or a quantitative study of how frequently all of these standards reported to be met.

On a smaller scale, and dependent upon the quality of meeting minutes, one could further study the content of the public hearing or the spatial value of negotiations. The content of the public hearing, negative or positive, could be recorded to further evaluate if there is a relationship between the number and position of public comment and the outcome of a case. One could also study the spatial difference between the initial request of the applicant and the value approved by the board to understand the negotiation which may be occurring to make a request meet the standards. Although not directly related to this study, one might study if there is a relationship between consecutive staff liaisons and the rates of approval. One might also consider studying the number of cases asking for relief for an existing condition or permission to create the condition.

synthesis

If a municipal government is tracking the decisions of their appellate zoning board and the themes of cases, then the municipal government is in a better position to justify their actions to a higher court, identify the uniqueness of lots and cases, and to review the adopted zoning code for items which could better reflect the built environment

or intent of future developments. In the case of Kansas municipal governments, the number of cases and high approval rating of those cases deserves further scrutiny on an individual municipal government scale. Municipal government should start with data they already record in meeting minutes and identify data gaps that, if recorded, would be able to inform amending the zoning code.

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