AN EVALUATION OF PLANNING APPEAL SYSTEM OF SELECTED STATES IN MALAYSIA

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DEDICATION

Specially dedicated to my family:

*The late* Jamaludin Bin Ahmad
Azizah Binti Hashim
Muhammad Ikmal Bin Jamaludin
Siti Khalilah Binti Shahbudin
Nadiah Binti Jamaludin
Muhammad Mukhris Bin Jamaludin
Muhammad Lutfi Hadi Bin Jamaludin
Muhammad Darwish Akif Bin Jamaludin
Muhammad Iman Rayyan Bin Muhammad Ikmal

This is all for you.
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Planning appeal is recognised as a duel platform for aggrieved applicant against the local planning authority decision on planning application. However, to date, very little study has been done on the planning of the appeal system in Malaysia to determine the efficiency of the system. Thus, this research reviewed the planning appeal process and practices to determine suitable criteria for measuring the performance of an appeal delivery system in Malaysia. Review of literature indicated that six criteria can be employed to assess the efficiency of the Appeal Board mechanism, namely time taken for appeal process; expertise of the Appeal Board; manner of proceedings; access to justice; cost of justice; and evidence and procedure. Besides, the research identified the challenges and problems associated with the planning appeal practice. Finally, measures are recommended to improve the performance of the planning appeal delivery system. Using an exploratory research design, this research collected data from interviews and document analysis involving both qualitative and quantitative data. 588 cases were reviewed to determine time taken to resolve the cases and another 100 cases were studied for the decisions. The Penang, Perak, Johor and Selangor Appeal Boards were used as the case study. In-depth interviews containing 3 sections; perceptions on Appeal Board practices and process, criteria to measure efficiency of the Appeal Board and recommendations to improve efficiency were administered to 8 respondents comprising legal and urban planning practitioners. Meanwhile, analysis of the documents identified that 8 appeal decisions on the planning matters made were overridden that led to changes in the planning policy. The results suggested that the performance of the Appeal Board was less efficient in terms of time as most disputes took more than 6 months to be cleared. Furthermore, competencies of the chairman in decision-making were questionable due to decisions which override planning matters. Most of the respondents perceived that planning appeal is not widely known to the public. However, proceedings of the Appeal Board were commendable since most hearings were conducted in an informal manner. The appeal costs are generally affordable although the Penang Appeal Board has increased its fees for private developers. With regard to the challenges and problems in the planning appeal delivery, four major issues highlighted were non familiarity with legal practice and process; formal conduct of hearings; insufficient number of staffs in the Appeal Board, and lengthy process of the Appeal Board members’ appointment. Recommendations based on the study are appoint a competent and knowledgeable chairman; establish informal hearings; provide affordable administrative cost and legal aid; introduce amendments to the Act on waiting planning application decision of more than 1 year; allow third party appeal other than adjoining land owner; and provide further formal training for planning officers on planning appeal process to increase the efficiency of the Appeal Board.
ABSTRAK

Rayuan perancangan telah diiktiraf sebagai satu platform bagi pemohon yang terkilian untuk mencabar keputusan pihak berkuasa perancang tempatan mengenai keputusan permohonan perancangan. Namun begitu, sehingga kini, hanya terdapat sejumlah kecil kajian yang telah dijalankan di Malaysia untuk mengenalpasti tahap keberkesanan sistem rayuan perancangan. Oleh itu, kajian ini melihat kepada proses rayuan perancangan dan aplikasi untuk mengenalpasti kriteria yang sesuai untuk mengukur tahap keberkesanan pelaksanaan sistem tersebut di Malaysia. Kajian literature telah mengenalpasti enam kriteria yang boleh digunakan untuk menilai tahap kecekapan mekanisme Lembaga Rayuan iaitu; masa yang diambil untuk proses rayuan; keputusan Lembaga Rayuan; cara prosiding; akses kepada keadilan; kos keadilan; serta bukti dan prosedur. Selain itu, kajian ini juga telah mengenalpasti masalah dan cabaran yang berkaitan dengan pelaksanaan rayuan perancangan. Akhir sekali, terdapat kauk ukur yang telah dicadangkan untuk meningkatkan tahap pelaksanaan sistem rayuan perancangan. Menerusi reka bentuk penyelidikan penerokaan, kajian ini telah mengumpul data daripada temu bual dan analisis dokumen yang merangkumi data kualitatif dan kuantitatif. 588 kes telah dipilih untuk mengenalpasti masa yang diambil untuk menyelesaikan kes rayuan and 100 kes telah dikaji untuk meneliti keputusan rayuan yang dibuat. Lembaga Rayuan Pulau Pinang, Perak, Johor dan Selangor telah digunakan sebagai rujukan kes. Temu bual mendalam mengandungi 3 bahagian; persepsi mengenai pelaksanaan dan proses Lembaga Rayuan; kriteria untuk mengukur tahap keberkesanan Lembaga Rayuan dan cadangan untuk meningkatkan kecekapan telah diajukan kepada 8 responden yang merupakan pelaksana undang-undang dan perancangan. Manakala, analisis dokumen telah mengenalpasti 8 keputusan rayuan telah mengendalikan aspek perancangan yang menyebabkan perubahan kepada polisi perancangan. Hasil kajian mendapati tahap pelaksanaan Lembaga Rayuan adalah kurang cekap kerana mengambil masa lebih daripada enam bulan untuk diselesaikan. Tambahan pula, kewibawaan Pengerusi dalam membuat keputusan juga dipersoalkan kerana mengabaikan aspek perancangan. Kebanyakan responden menyatakan bahawa rayuan perancangan masih belum mendapat liputan yang meluas daripada orang awam. Namun begitu, prosiding Lembaga Rayuan dipuji kerana dijalankan dalam bentuk informal. Kos rayuan juga dilihat mampu milik walaupun Lembaga Rayuan Pulau Pinang telah meningkatkan fi untuk syarikat pemaju. Merujuk kepada masalah dan cabaran yang dihadapi dalam pelaksanaan rayuan perancangan, terdapat empat isu utama yang telah dikenalpasti iaitu ketidakbiasaan dengan pelaksanaan dan proses undang-undang; prosiding pendengaran yang formal; ketidakcukupan staf dalam Lembaga Rayuan dan proses pelantikan ahli Lembaga Rayuan yang mengambil masa yang lama. Kajian ini telah mencadangkan bahawa pelantikan Pengerusi yang berwibawa dan berpengalaman disambut dengan baik; melaksanakan proses pendengaran yang tidak formal; menyediakan kos pendirian dan bantuan undang-undang; memperkenalkan perubahan kepada Akta berkenaan keputusan permohonan perancangan yang mengambil masa lebih daripada 1 tahun; membenarkan permohonan rayuan pihak ketiga selain daripada pihak tanah berjiran; dan menyediakan latihan formal untuk pegawai perancang tentang proses rayuan perancangan untuk meningkatkan tahap keberkesanan Lembaga Rayuan.
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1 LNS 46  District Council of Central Province Wellesley v. Yegappan (1966)
3 MLJ 640  Lee Freddie & Ors v Majlis Perbandaran Petaling Jaya & Anor [1994]
3 MLJ 51  [1999]
7 CLJ 473  Ah San v. Majlis Bandaraya Ipoh (2005)
6 CLJ 805  Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur [2008]
3 CLJ 962  Awang Ismail & Ors v. Kerajaan Negeri Kedah & Ors (2010)
MLJU 885  Khaw Lay Eong v. Majlis Perbandaran Pulau Pinang [2013]
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1 KB 223  Associated Provincial Picture Houses Limited v. Wednesbury Corp 1949
AC 40  Ridge v Baldwin [1964]
JPL 634; 2 PLR 70  Electricity Supply Nominees Ltd v Secretary of State and Northavon District Council and Kingswood Borough Council [1992]
# LIST OF ABBREVIATIONS

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<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>JPBD</td>
<td>Jabatan Perancangan Bandar dan Desa</td>
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<tr>
<td>MBJB</td>
<td>Majlis Bandaraya Johor Bahru</td>
</tr>
<tr>
<td>MPJBT</td>
<td>Majlis Perbandaran Johor Bahru Tengah</td>
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<td>MPPP</td>
<td>Majlis Perbandaran Pulau Pinang</td>
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<tr>
<td>MBPP</td>
<td>Majlis Bandaraya Pulau Pinang</td>
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<td>MPSP</td>
<td>Majlis Perbandaran Seberang Perai</td>
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<td>MBI</td>
<td>Majlis Bandaraya Ipoh</td>
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<td>MBSA</td>
<td>Majlis Bandaraya Shah Alam</td>
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CHAPTER 1

INTRODUCTION

1.0 Introduction

Rapid urban population growth leads to an increasing number of physical developments around the world. Thus, urban planning needs to mobilize the existing resources in an optimum manner. In recent years, the role of physical planning has become more complex as it has involved the delicate balancing of urban development while delivering amenities to enhance the quality of life of the people, at the same time preserving the environmental quality (Marzukhi et.al., 2012). Accordingly, there is the need for laws and regulations to guide individuals or organizations. Thus, almost all countries promulgate laws related to land use and development. For a town planner, laws influence what form of physical changes can actually be realised and to an extent the socio-economic dimensions that should accompanied those changes. The laws set the parameters to the degree to which the authorities can influence other parties’ properties and provide the necessary policy instruments with which to intervene in order to achieve the desired goals (Beunen & Dijk, 2009). Planning law is essentially statutory as many other law subjects, such as contract and tort. This is explained by the introduction of a comprehensive system of planning and development control with far-reaching implications in the use and enjoyment of land (Khublall & Yuen, 1991). Planning law generally does not accommodate detailed ramifications relating to the exercise of administrative discretion in decision-making.
Disputes over land development are ubiquitous due to various complications that arose. Apart from the differential impacts of development as some individuals may benefit from development while others are deprived, a more persistent conflict in planning occurs on day to day basis involving development applications and the presence of ‘not in my back yard’ (NIMBY) attitudes which raised objections by property owners to what is being proposed. Planning theory has brought forth several methods to counter conflicts pertaining to land use. In the sixties, the conflict between protection of public interest and private interest has advanced the need for public participation (Arnstein, 1969) and advocacy planning (Davidoff, 1965). This led to assisted negotiations (Forester, 1989) and a more democratic focus of consensus building (Innes, 1996). Later the notion of ‘ideal speech situation’ (Habermas, 1981) was added to communicative methods (Healey, 1997, 2006). Such techniques are often successful at the development plan-making stage as it generally involves the whole community. While development plans set out the land use policy, development control is concerned with the implementation of the policy and it is at this stage that individual interests are affected.

Since land use planning represents an intervention by the government of traditional property rights, it is therefore justified that a review mechanism be established to ensure that such powers are appropriately used. Thus, when an applicant for planning approval received an adverse decision from the planning authority i.e. a refusal or planning conditions not in his/her favour, the conflicting parties may choose to appeal to some ‘higher’ decision-making authority. Countries like Australia and England provide for a right to appeal by establishing a tribunal to hear the appeals. Pursuant to s36 (1) Town and Country Planning Act 1976 (hereinafter, the Act) an Appeal Board is established for every state in Peninsular Malaysia. This research therefore attempts to contribute to further understanding of the planning Appeal Board by examining the performance of selected Boards in Peninsular Malaysia.
1.1 Problem statement

The establishment of appeal bodies in the field of planning is essentially attributed by the need to ensure efficient administration of disputes by a planning authority outside the judicial system. Planning decisions are legal decisions and it is bound under the general court system, even though Appeal Board is administered by state authority. The bodies that decide appeals and the decisions themselves are pertinent to urban planning. Indeed, the appeal procedures are considered to be the cornerstone of the planning system because it is where the system and its policies are challenged and often the premise where the debatable and complex issues are addressed (Cullingworth et al., 2015). Planning conflicts are first heard by the appeal tribunals as first instance independent appellate bodies, however the final say for the planning appeal decision holds by the legal Chairman appointed. Appeal tribunals serve as a meeting point of law and planning often to deliberate about rights and resources. It is also a place for the inevitable contestation between public authorities, developers, and the public. It therefore becomes an invaluable source for learning about planning works and to an extent the practical implications of policies that are being challenged (Punter & Bell, 2000).

Appeal tribunals may take various forms. For example, the English appeal system is made up of the Planning Inspectorates acting for the Secretary of State for the Environment, who sits alone in deciding appeals. The states in Australia have various forms of appeal bodies. The New South Wales established the Land and Environment Court aimed to provide a flexible procedural framework to resolve conflicts. In New Zealand, the Environmental Court was set up to conduct ‘people-friendly’ system of appeals. A right of appeal also varies in term of its scope. Some tribunals review the merits of a planning appeal e.g., England and Australia while others like the Oregon’s Land Use Board of Appeals are confined to review the questions of law. Whatever the form and scope are, the primary purpose establishing bodies to determine planning appeal is to provide a venue for conflict resolution, to prevent unfair decisions, and to protect aggrieved individuals against the unsatisfactory decisions of lower-tier planning agencies (N. Mualam, 2014).
Questions however are raised as how well the planning appeal systems performed. Compared to other aspects of planning, not many studies are done on aspects of planning appeals including appeal processes, form and composition of appeal bodies as well as appeal decisions. The studies carried so far however have raised a number of shortcomings of planning appeals. A study by (N. Mualam, 2014) suggested that there are planning tribunals established in democratic countries purportedly operate under transparent, equitable and fair guidelines are found to be lacking transparency and costly participation (A. A. Moore, 2013) or limited right of appeal (Ellis, 2006). The operation of an appeal body itself has also been disputed as it may undermine democracy due to decisions being made by the body itself instead of the local politicians (Chipman, 2002).

The methods of dealing with planning disputes have also been criticised (Barker & Couper, 1984; Pearce & Bingham, 1997; Purdue, 1991); also (Bacow & Wheeler, 1984; Dukes, 1996) they are found to be too formal thus users feel intimidated. Hearings or local inquiries which employed adversarial style often intensifies rather than alleviates conflict between the parties. In the British System, depending on the method or procedure used, appeal decisions are alleged to be partial towards the interests of central government; decisions are considered as inefficient as they come as win/lose outcomes and limited public involvement (Pearce, 1999).

Although the Malaysian planning law is closely modelled after the Town and Country Planning 1968 for England and Wales, the evolution of the laws in each country thus far, has occurred in quite different manner from each other. In the context of planning appeal, similarities may only be found in term of scope of appeals and the nature of review which is merit based. In Peninsular Malaysia, planning appeals are heard and decided by the planning Appeal Board set up for each state unlike the English Inspectorate system to be further discussed in Chapter 2. The Appeal Board is constituted as quasi-judicial body provided with wide power to review appeal cases “de novo” which raises the question as to the extent of the authority of the Board. Although instances where the Appeal Board overturned the
decisions of the local planning authority are relatively few, it would seem that some decisions are considered to be an interference of the planning system. It therefore raises concern as to whether the Appeal Board may have been given too much power as to be the ultimate authority in the final determination of planning policies (Lee, 2002b). The formulation of planning policy involves both consultative and participative process implying that the tribunal alone may not be adequate to ensure that public interest is protected.

Several cases that have been decided by the Appeal Board demonstrated that both issues of law and policy were addressed by the Board which goes against the notion that review of planning cases should be confined only to planning merits. These questions lead to the composition of the Appeal Board. As required by the Act, both Chairman and Deputy Chairman should have judicial qualification and experience to be appointed, however there is a concern that they may not be able to address the right planning issues in the appeal. Similar concerns are also raised in other planning tribunals, for example in New South Wales, Australia which consequently established the Land and Environmental Court to address the issues of expertise (Willey, 2007b). The Malaysian practice of appointing both the Chairman and Deputy Chairman from legal community also means that the appeal procedures are more inclined to be formal and on court basis. This has been contradicting to the practice of tribunal whereas it should be conducted in round table discussion and friendly to public.

Although the planning statute for Peninsular Malaysia was introduced in 1976, it is only in early 2000 that all states accepted the complete provisions of the law. By 1990, Penang was the only state that applied all parts of the Act and established the first Planning Appeal Board. Planning appeals started to be lodged in then and the number grew overtime. Of late the number of planning appeals in states other than Penang, namely Perak, Selangor and Johor have steadily increased. This implies an increasing awareness among the public that has underlies and echoes the importance of urban planning and the related rules of law. The issues raised above need to be further examined.
Theoretical knowledge on planning appeals are however underdeveloped. Compared to other aspects of planning, planning appeals do not attract as many studies. Studies on planning appeals have included Brotherton, (1993); Buitelaar, Galle, & Salet, 2013; Green Balance, Solicitors, Popham, & Purdue, 2002; Nir Mualam, 2014; Punter & Bell, 2007; Willey, 2001, 2005, 2006, 2007a, 2007b). Since planning discipline is closely tied to the governmental system as well as socio-cultural nature of the country, the findings of these researches may not be wholly applicable. Another study has been added up. To date, there have been only five studies on Malaysian planning appeals i.e. (Johar, 1989) who evaluated the Malaysian planning legislation; (Lim, 1994) who review the function of Appeal Board and how the decision affected the town planning; (Lee, 2002b) who reviewed the power of the Appeal Board; (Azlan & Ahmad Sarkawi, 2011) who examined the appeal cases of the Penang Appeal Board and (Maidin, 2012) who examined the Malaysian town and country planning law and procedure.

1.2 Research Questions

The study seeks to answer the following research questions:

i. Do the selected criteria for measuring the performance of Planning Appeal Boards is applicable in general?

ii. What are the problems and challenges within the administrative process of Planning Appeal Board in Malaysia?

iii. How can the delivery of Planning appeal system are improved for effective dispute resolution in Malaysia.
1.3 Aim and Objectives of the Study

The aim of this study is to assess the Planning Appeal system in Malaysia with a view to making recommendations for improving planning appeal practice. To achieve its aim, this study outlines the following objectives:

i. To review Planning Appeal processes and practices so as to determine the suitable criteria for measuring the performance of Appeal delivery system in Malaysia.

ii. To identify the challenges and problems associated with Planning Appeal practice in Malaysia.

iii. To recommend measures for improving the performance of Planning Appeal delivery system in Malaysia.

1.4 Significance of Study

The primary goal of the research is to improve the delivery system of planning appeal. An evaluation of the efficiency of the Planning Appeal Boards is fundamental for improving planning delivery system in Malaysia. This is because the planning appeal system is important in guiding and managing physical and land use planning and development for both current and future needs of the society. This is because, planning appeals has to take competing interests of different parties and public interest into consideration in every decision made. Apart from that, planning appeals also ensure that the equality of treatment for all parties is delivered, especially for aggrieved planning applicants. In addition, planning appeal acts as a platform to rectify any decision made by local planning authorities such as irrationality, impropriety, unreasonableness or disproportionality. Thus, better quality of life for both urban and rural can be promoted.
This significance of this study is to highlight the importance of Appeal Board as a safeguard mechanism against the wide discretionary power of local authority and the results of this study will be useful to improve the performance of Appeal Board process and practice. For example, this study has listed criteria to evaluate the performance of Appeal Board such as time taken for planning appeal process, the expertise of Appeal Board, conduct of hearing, evidence and procedure, access to justice and cost of justice. From the evaluation criteria, this study helps the policy makers and the agencies to speed up the administrative process for an appeal registered while delivering just and fair decision to the both aggrieved applicants and respondents. It also helps to point out the strength of weaknesses of current delivery performance of Appeal Board in the selected states.

1.5 Scope of the study

This study explores the current trends of planning appeal in Peninsular Malaysia to identify the strength and weakness of the current planning appeal system. Accordingly, the study undertook an extensive review of the literature to identify the most suitable criteria for evaluating the efficiency of the Planning Appeal system with particular reference to Appeal Boards in Malaysia. Similarly, the study also examined the problems and challenges associated with Appeal Board delivery system through process and practice. The study is, however, concerned with rejected planning permission and imposed conditions that come with planning approval.

Research with regards to Appeal Board delivery system is considerably difficult because it only a small fraction of the society is involved in Planning Appeal. As matter of fact, the Appeal Board establishment and its practices are only well-known by the persons who are directly involved in it. In addition, only two
planning consultants were established to specifically consult on planning appeal in Malaysia which are KWA Planners Sdn. Bhd. And PAG Consult Sdn. Bhd. In fact, some of respondents refused to participate because of their tight schedule. Therefore, it is difficult to use probability sampling technique to randomly select respondents as those involved in the Appeal Board’s system Board members are small in number. In practice, only 1 legal advisor manages appeal cases, whilst an urban planning officer serves as a registrar. This small number of respondents limited the study to the use of purposive sampling for data collection.

Other limitations of the study include unavailability of data for assessing grounds of decision for appeal cases. Besides, there was poor system of storing data especially for the first set of appeal cases that the Boards handled. Most of the appeal cases in the immediately after the Appeal Board were established were not stored in digital form. It was only available in hard copy that was not easily accessible by the public.
1.6 Research framework

This study encompasses five main stages (Fig 1.1), namely preliminary study, literature review, data collection, data analysis and synthesis, and research findings.

Stage 1
Understanding on the theory of planning law, planning appeal
- Identify issues and problems
- Formulation of objectives and purpose of the study
- Setting up scope of study

Stage 2
Primary data
In-depth interview with registrars, planning officers, planning consultants, legal advisor, Appeal Board members
- Data collection
- Research design and database development

Stage 3
Cross tabulation for time taken of planning appeal process, decision, fees, procedure
- Data analysis
  - Content analysis
  - Legal document analysis
- Data synthesis

Stage 4
Formulation of study findings and conclusion
- Identify criteria to measure the Appeal Board system’s efficiency
- Identify the problems and issues lie within the administrative practice and process in Appeal Board system

Figure 1.1: Research Framework
i. Preliminary Study

In preliminary stage, the study identified issues and background problems relevant to the subject of investigation. This stage involves the understanding of the research field with regards to Appeal Board’s system, processes, practices, and the most suitable criteria for evaluating the efficiency of the Appeal Board. This stage outlined the aim, objectives, and scope of study.

ii. Literature Review

Under this stage, the study explores the theoretical background of urban planning and law. The review examined the background of urban planning system and its roles in the planning appeal process in general. Subsequently, the literature review examined urban planning system in Malaysia and its planning appeal system with particular reference to the roles of planners (as a decision-maker), expert witness and advocates.

iii. Data Collection

This stage focused on gathering both primary and secondary data for the study involving several data collection techniques such as document analysis, in-depth interview with respondents and observation during Appeal Board’s proceeding. As for primary data, data is collected through in-depth interviews with 8 respondents which consist of Appeal Board’s registrars, legal advisors in local planning authority, registered town planners and members of Appeal Boards. For secondary data, the study collected statistical figures such as the number of cases registered, date of appeal registered and appeal’s decision is involved as shown the below table.

Table 1.1: Number of cases registered, date of appeal registered and appeal’s decision

<table>
<thead>
<tr>
<th>No.</th>
<th>Respondents</th>
<th>Date of appeal registered</th>
<th>Date of appeal’s decision</th>
<th>Appeal’s decision</th>
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iv. Data analysis and data synthesis

This chapter analysed the data in stage 3 and synthesizes the major findings with regards to the current trends in Appeal Board performances and Appeal Board decisions based on content analysis of legal documents and literature reviews. The analysis and synthesis are organised into 2 parts: perceptual responses and issues in Appeal Board process and practice, while the second part includes synthesis of the most suitable criteria to measure the efficiency of delivery system in Appeal Board system. Cross tabulation has been done for time taken of planning appeal process has been divided into 3 categories; less than 6 months, 6 to 12 months and more than 12 months. For the expertise of Appeal Board members, the decision made that has been approved and opposed to the urban planning framework has been taken into consideration. For conduct of hearing, process of the appeal such as the conduct of hearing and the process of evidence is assembled. Meanwhile, for access of justice and cost of justice, both access to Appeal Board and administrative costs are examined.

v. Conclusion and recommendations

The last stage focused on reporting the findings of the study and offering recommendations to improve the practice and process in the delivery system of Appeal Board based on findings of the study. The conclusion, limitation of study and areas for future studies are highlighted in this stage.
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