

# CITY AND COUNTY OF SAN FRANCISCO BOARD OF APPEALS



# ANNUAL REPORT

July 1, 2012 – June 30, 2013

# HIGHLIGHTS

## CASES HEARD

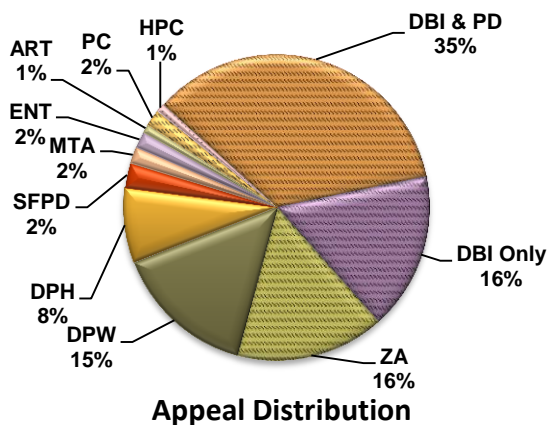
The Board held 27 regular meetings at which 147 matters were heard:

- 114 Appeals
- 14 Jurisdiction Requests
- 19 Rehearing Requests

## CASE ORIGINATION

Over two-thirds (70%) of the appeals heard by the Board were land use related, stemming from determinations made by the Department of Building Inspection (DBI), Planning Department (PD), Zoning Administrator (ZA), Planning Commission (PC) and Historic Preservation Commission (HPC). The Board also heard appeals of decisions made by the Department of Public Works (DPW), Department of Public Health (DPH), Police Department (SFPD), Taxi Division of the Municipal Transportation Agency (MTA), Entertainment Commission (ENT) and Arts Commission (ART).

The follow chart shows the percentage breakdown by the entity issuing the underlying determination being appealed. The land use portion is shaded.

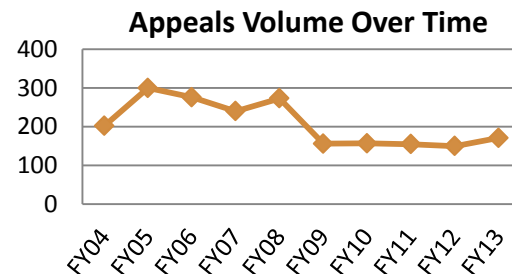


## BOARD ACTION

The Board upheld 55% of the departmental determinations it heard on appeal and overturned or modified 37%. Seven percent (7%) of the remaining appeals were pending at the close of the year and one percent (1%) was withdrawn.

## APPEAL VOLUME

The Board experienced the first increase in appeal volume since the economic decline began in 2008, ending the year 14% higher than the prior four years but still 18% lower than the ten year norm.



## APPEAL TRENDS

The number of Mobile Food Facility (food truck) appeals reduced by half over the prior year, but still comprised the largest number of appeals filed outside of the land use area. Restaurant and property owners located near proposed truck stops continued to raise concerns about the impact these trucks have on 'brick and mortar' establishments.

## BUDGET

The Board closed the year with a surplus in both of its revenue streams for the first time since the economic downturn began in 2008. Total revenue came in 11 percent over projections, even though no increases were made to the surcharge rates or filing fees, a clear indicator of the City's strengthening economy. Combined with reductions in expenditures, the Board ended the year with a surplus of \$188,428.

## ELECTION OF OFFICERS

During the first half of the fiscal year, Commissioner Chris Hwang served as President and Commissioner Frank Fung as Vice President. At the annual election of officers in January 2013, Commissioner Hwang was reelected President and Commissioner Ann Lazarus was elected as Vice President.

## MISSION

The Board of Appeals is a quasi-judicial body that was first created by the San Francisco Charter of 1932. It provides the public with a final administrative review process for a wide range of City determinations, including the granting, denial, suspension, revocation or modification of permits, licenses, and other use entitlements by various departments and other entities of the City & County of San Francisco.

As it hears and decides cases, the Board of Appeals strives to provide an efficient, fair and expeditious public hearing and decision-making process before an impartial panel as the last step in the City's review process.

## JURISDICTION

The Board's jurisdiction is derived from San Francisco Charter Section 4.106, portions of the San Francisco Business and Tax Regulations Code<sup>1</sup> and other City ordinances. The Charter authorizes the Board to "hear and determine appeals with respect to any person who has been denied a permit or license, or whose permit or license has been suspended, revoked or withdrawn, or who believes that his or her interest or the public interest will be adversely affected by the grant, denial, suspension or revocation of a license or permit...."<sup>2</sup>

Determinations made by the Recreation and Park Commission or Department or by the Port Commission are specifically exempted,<sup>3</sup> as are appeals of building and demolition permits for projects that have been granted a conditional use authorization by the Planning Commission.<sup>4</sup>

The Board's jurisdiction to hear and decide appeals of certain other types of determinations is set forth in specific City Code provisions. For example, appeals of Planning Commission determinations dealing with the allocation of downtown office space may be heard by the Board, as can Certificates of Appropriateness issued by the Historic Preservation Commission. In addition, there are various Code provisions that establish how certain types of appeals should be handled by the Board and what review criteria must be applied. For instance, provisions of the Police Code set out the criteria to be applied to an appeal of a Place of Entertainment Permit and provisions of the Public Works Code discuss appeals of Mobile Food Facility permits.

The most common types of appeals heard by the Board involve:

- Building permits issued or denied by the Department of Building Inspection (DBI), including many that are subject to Planning Department review or result from discretionary review decisions of the Planning Commission
- Actions by the Zoning Administrator, including variance decisions, Letters of Determination, Stop Work Order Requests and Notices of Violation and Penalty
- Mobile food facility permits, wireless site permits and tree planting and removal permits issued by the Department of Public Works (DPW)
- Suspensions of Tobacco sales permits issued by the Department of Public Health (DPH)

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<sup>1</sup> See Article 1, Section 8, *et seq.*

<sup>2</sup> See San Francisco Charter Section 4.106(b).

<sup>3</sup> *Ibid.*

<sup>4</sup> Appeals of the underlying Conditional Use Authorization may be made to the Board of Supervisors.

Less common but routinely heard by the Board are appeals related to:

- DPH-issued permits for restaurants and massage establishments
- Taxi driving and medallion permits issued by the Municipal Transportation Agency
- DPW-issued permits for minor sidewalk encroachments and street space occupancy
- DBI-issued electrical and plumbing permits
- Planning Commission determinations issued under Planning Code Sections 309, 320 and 325 dealing with large downtown developments

## **BOARD MEMBERSHIP**

The Board of Appeals is comprised of five members appointed to staggered four-year terms. Three members are appointed by the Mayor and two by the President of the Board of Supervisors. All appointments are subject to the approval (by majority vote) of the full Board of Supervisors. Officers are elected for one-year terms at the first regular meeting held after January 15 each year.<sup>5</sup> At the start of the fiscal year, the Mayor appointed former Port Commissioner Ann Lazarus to the Board. The Mayor also appointed San Francisco realtor Darryl Honda in December. At the Board's annual elections, President Hwang was reelected to another term and Commissioner Lazarus was elevated to the office of Vice President.

Current Board membership is as follows:

<b>Commissioner</b>	<b>Appointing Authority</b>	<b>Dates of Service</b>
<b>Chris Hwang</b> President, May 2012 – Present Vice President, January 2012 – May 2012	Board of Supervisors	May 12, 2010 to July 1, 2014
<b>Ann Lazarus</b> Vice President, January 2013 - Present	Mayor	July 25, 2012 to July 1, 2014
<b>Frank Fung</b> President, January 2009 – January 2010 Vice President, March 2008 – January 2009 May 2012 – January 2013	Mayor	October 19, 2004 to July 1, 2016 January 30, 1986 to June 8, 1988
<b>Darryl Honda</b>	Mayor	December 4, 2012 To July 1, 2016
<b>Arcelia Hurtado</b>	Board of Supervisors	September 11, 2012 to July 1, 2016 February 23, 2012 to July 1, 2012

<sup>5</sup> Rules of the Board of Appeals, Article I, Section 1.



## MEETINGS OF THE BOARD

During the fiscal year, the Board met twenty-seven times, totaling over 102 meeting hours. There were twelve meetings at which one member was absent, giving the Board a 90.5% attendance record. In addition, there were nine meetings during the first half of the year when a seat on the Board was vacant.

In addition to the appeals heard at each meeting, the Board also:

- Elected officers (January 16, 2013)
- Adopted the Board's two-year budget covering fiscal years 2013-14 and 2014-15 (February 13, 2013)
- Heard a presentation by the Department of Public Health Tobacco Free Project on the City's efforts to curb the sale of tobacco to minors (March 20, 2013)
- Heard a presentation by the General Services Agency's Director of Earthquake Safety regarding new legislation requiring retrofitting of multi-unit soft story buildings

Unless otherwise specially noticed, Board meetings are held on Wednesdays starting at 5:00 p.m. in City Hall.<sup>6</sup> They are conducted in accordance with the Rules of the Board of Appeals. In most cases, the appellant will address the Board first, then the determination holder, the respondent department(s) and members of the public. An opportunity for rebuttal is given to the parties. Board meetings are open to the public and are broadcast live on San Francisco's government television station (SFGovTV) cable television channels 26 and 78. Meetings may be viewed by computer, both live and on-demand.<sup>7</sup> Closed captioning is provided for these broadcasts and on the in-room monitor during Board meetings in City Hall. Meeting agenda and approved minutes are posted on the Board's website.<sup>8</sup>

## APPEAL PROCESS

Appeals must be filed within the legally prescribed appeal period, which varies depending upon the underlying determination being appealed. For most matters, the appeal period is fifteen days from the date the determination is issued, but other appeal periods may apply (for example, variance decisions issued by the Zoning Administrator must be appealed within ten days, and appeals of Certificates of Appropriateness issued by the Historic Preservation Commission must be filed within thirty days). In limited situations, the Board may allow an appeal to be filed late. Pursuant to the Board's Rules, late appeals are allowed when a City error has caused a would-be appellant to miss the appeal period.<sup>9</sup>

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<sup>6</sup> An annual meeting schedule is developed prior to the start of each calendar year and is available at the Board office and on the web at: <http://www.sfgov3.org/index.aspx?page=775>.

<sup>7</sup> Internet access is found at: [http://sanfrancisco.granicus.com/ViewPublisher.php?view\\_id=6](http://sanfrancisco.granicus.com/ViewPublisher.php?view_id=6).

<sup>8</sup> The Board of Appeals website is found at: [www.sfgov.org/boa](http://www.sfgov.org/boa).

<sup>9</sup> Rules of the Board of Appeals, Article V, Section 10.

The parties to each appeal, including the City department that issued the determination being appealed, are encouraged to submit written arguments and other evidence for the Board's consideration. When an appeal is filed, the parties are given a schedule establishing deadlines for these submittals and are advised of the Board's requirements on length and formatting.<sup>10</sup> Members of the public also may submit briefs, letters and other evidence in support of their position on an appeal. As a way of notifying the public about pending appeals, the Board mails out postcards to all property owners and occupants within a 150 foot radius of any property that is the subject of an appeal.<sup>11</sup>

After reviewing the written file, Board members conduct a public hearing on the appeal at which they consider the testimony of the parties and comments from interested neighbors and other members of the public. After deliberation, the Board may vote to uphold or overrule the underlying departmental determination, or may impose conditions on the determination.<sup>12</sup>

Conditions imposed by the Board are wide-ranging, and most typically include:

- Modifications to building plans, for example:
  - Adding a privacy screen such as lattice to a new deck to limit sightlines into neighboring windows
  - Setting back a portion of an addition or other structure so it is further from a protesting neighbor's property line
  - Obscuring glass in neighbor-facing windows
  - Establishing 'good neighbor' policies such as limiting when construction may take place and how construction-related complaints will be handled
- Qualifications made to Zoning Administrator determinations, for example:
  - Requiring the filing of a Notice of Special Restrictions in order to specify a limit on the number of dwelling units at a property
  - Limiting the type, location or hours of operation of a commercial use
- Changing the length of a suspension imposed on taxi driving or tobacco sales permits, or imposing a suspension instead of permit revocation
- Limiting the items that may be sold by a food truck, or modifying the hours of operation, to avoid competition to neighboring restaurants
- Reducing the financial penalties imposed for construction work performed without a permit
- Specifying the number or size of replacement trees when allowing trees to be removed

The Charter<sup>13</sup> requires that a supermajority of Board members must agree in order to overturn or place conditions on a department's decision. When fully seated, this means four out of five votes are needed. If there is a vacancy on the Board, three votes are needed. A supermajority also is needed to grant a rehearing request or a request to file a late appeal.

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<sup>10</sup> Rules of the Board of Appeals, Article V, Section 4.

<sup>11</sup> See San Francisco Business and Tax Regulations Code Article 1, Section 12.

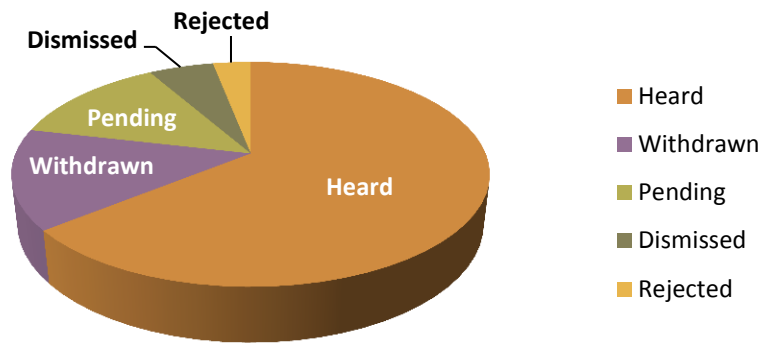
<sup>12</sup> On occasion, the Board will decide to continue a matter, typically to allow additional information to be prepared and submitted to the Board, or to give the parties time to negotiate a resolution. In rare instances a matter may be continued indefinitely (to the Board's "Call of the Chair" calendar) because an unknown amount of time is needed before the Board may move forward with a determination.

<sup>13</sup> See San Francisco Charter Section 4.106(d).

## APPEAL EXPERIENCE

During the year, 229 cases were on the Board's docket. Of these, 209 were new matters filed with the Board this year, consisting of 171 appeals, 16 requests for late jurisdiction and 22 rehearing requests.<sup>14</sup> The Board heard 147 matters: 114 appeals, 14 requests for late jurisdiction and 19 rehearing requests. The 82 matters that the Board did not hear were either withdrawn by the appellant (33), dismissed by the Board when the underlying permit was canceled by the permit holder (12), rejected by the Board<sup>15</sup> (7) or were filed late enough in the year that they will be heard in the subsequent year (30).

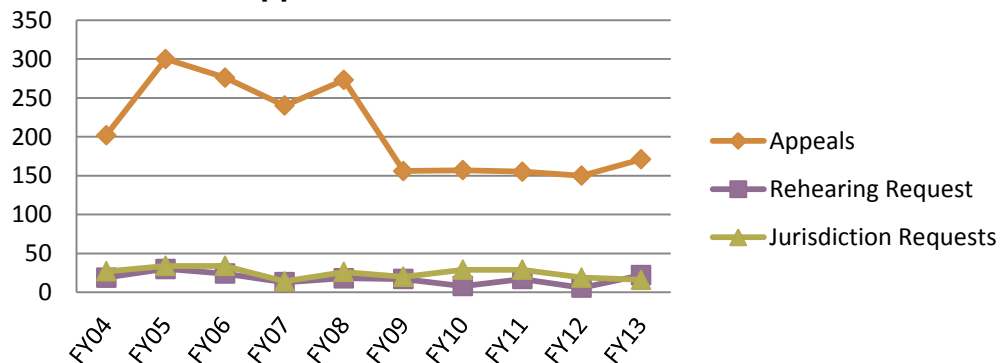
**Matters by status (n=229)**



## Volume

This year, the Board experienced its first significant increase in appeal volume since the nation's economic decline began in 2008. Over the past ten years, the Board has seen an average of 208 new appeals filed annually. However, since appeal volume tends to fluctuate with the health of the economy, during the previous four years the Board saw an average of only 150 new appeals, representing a 28% decline from the norm. The 171 new appeals filed this year reflect a 14% increase over the experience of the past four years, and places appeal volume at 18% under the ten year norm. The number of rehearing requests and jurisdiction requests has remained relatively constant over time.

**Appeal Volume - Ten Year View**



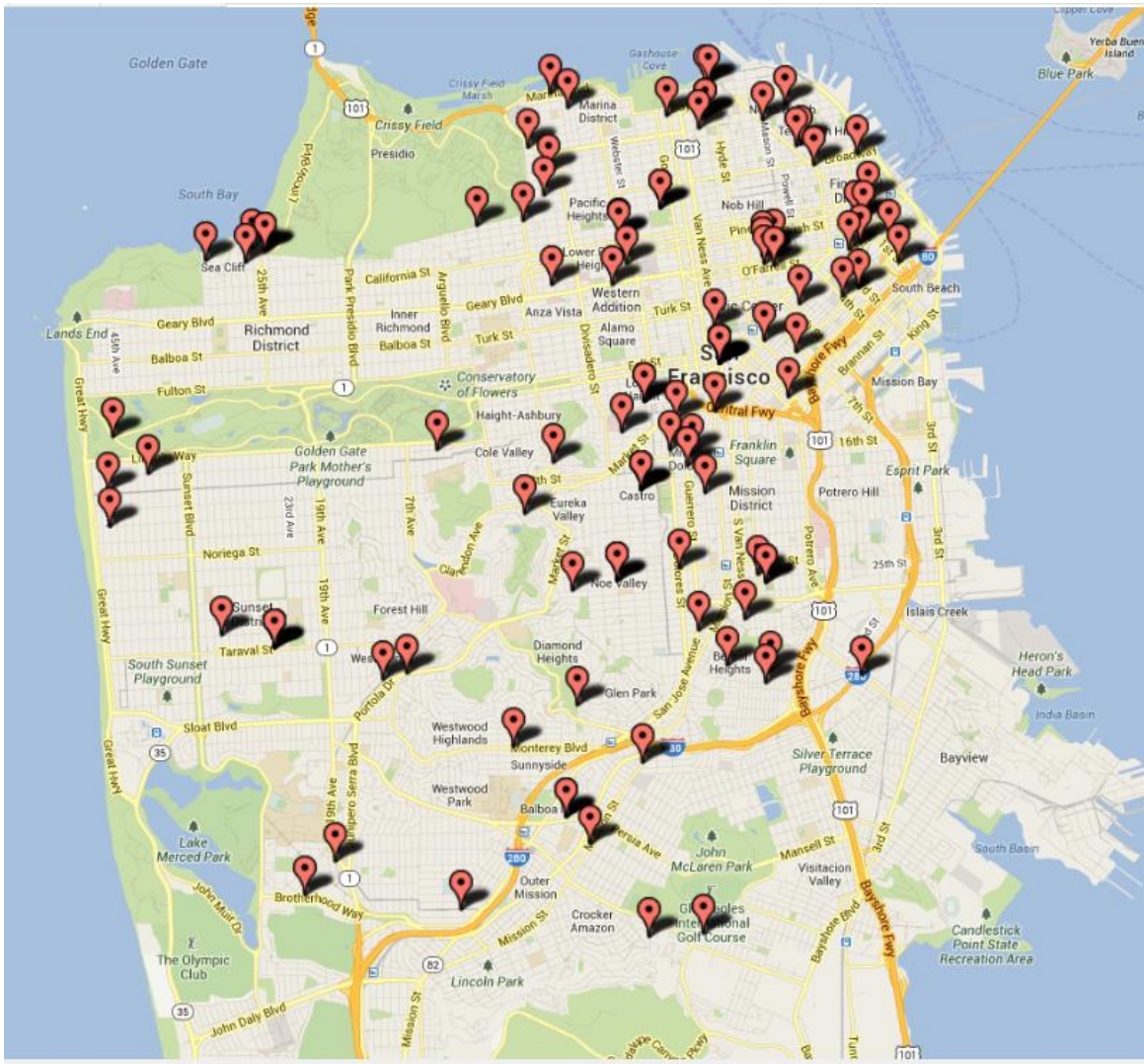
<sup>14</sup> The 20 additional matters were carried over from the prior year.

<sup>15</sup> Cases may be rejected after filing when further research determines that the Board lacks jurisdiction over the subject matter being appealed, for instance, where a Conditional Use Authorization was issued for a project related to a building permit.

## Geographic Distribution

The appeals heard by the Board during the year were associated with properties from a wide range of San Francisco neighborhoods. As depicted on the map below, the highest concentration of cases is seen in the Northeastern sector of the City, which is typical for the Board. Also typical, lower appeal volume is seen in the Western part of the City, as well as in the Northwest sector.

### Geographic Distribution of Appeals Heard



## Subject Matter

As in the past, the majority of appeals heard during the year were of land-use related determinations, with eighty land-use cases representing 70% of the appeals heard. As illustrated in the chart below,<sup>16</sup> these appeals were of determinations made by the

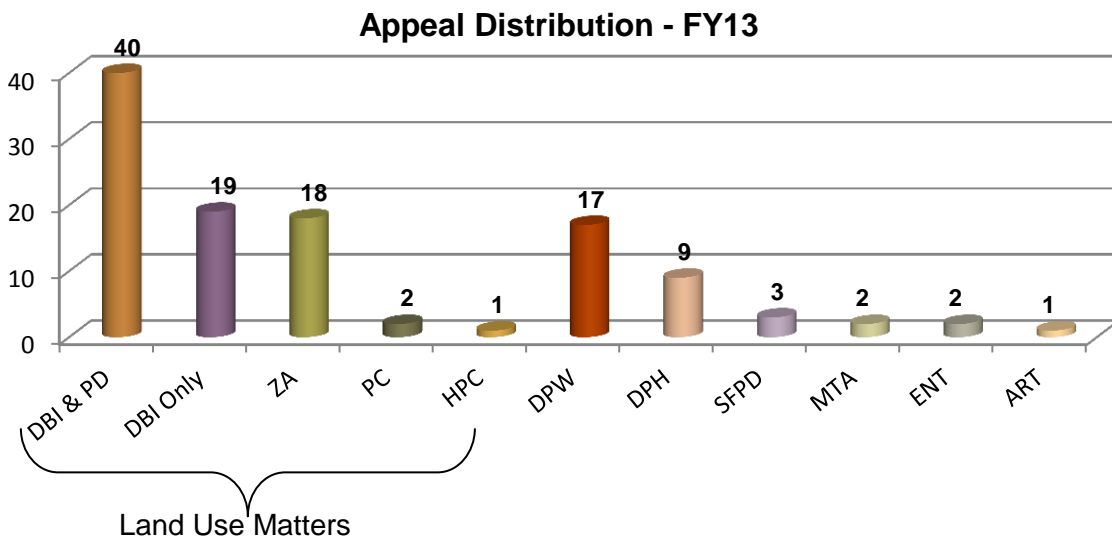
<sup>16</sup> DBI = Department of Building Inspection; PD = Planning Department; ZA = Zoning Administrator; PC = Planning Commission; HPC = Historic Preservation Commission; DPW = Department of Public Works; DPH = Department of Public Health; SFPD = Police Department; MTA = Municipal Transportation Agency; ENT = Entertainment Commission; ART = Arts Commission.



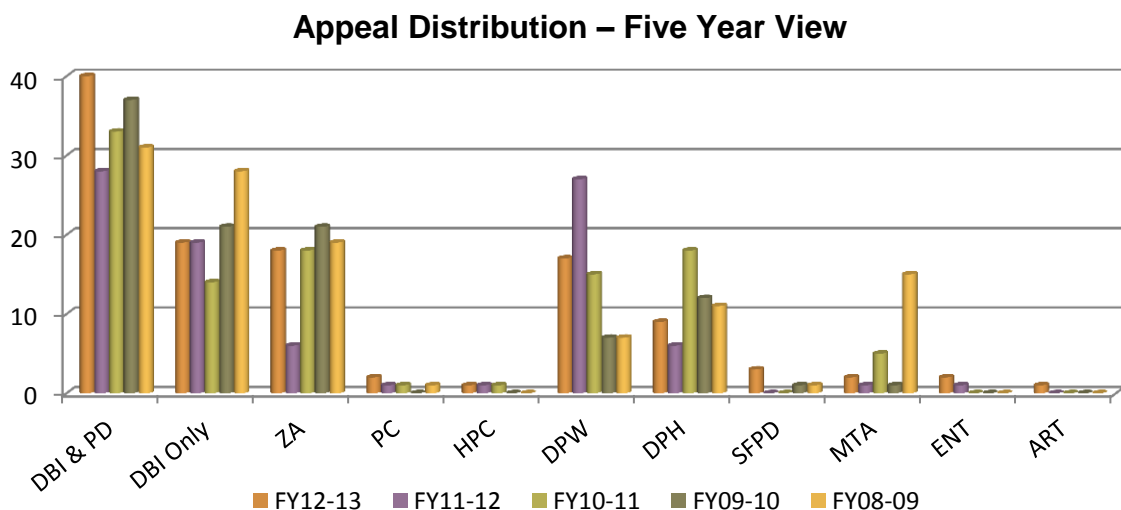
Planning Department, Department of Building Inspection, Zoning Administrator, Planning Commission and Historic Preservation Commission.

The next largest group of appeals was comprised of determinations made by the Department of Public Works (15%), primarily relating to Mobile Food Facility (food truck) and tree removal permits. Appeals of determinations made by the Department of Public Health represent eight percent of the matters heard, largely stemming from the suspension of tobacco sales permits resulting from the sale of tobacco to minors. The remaining seven percent was comprised of a few appeals each of determinations made by the Police Department, Municipal Transportation Agency, Entertainment Commission and Arts Commission.

A detailed description of the appeals heard can be found in Appendix A.



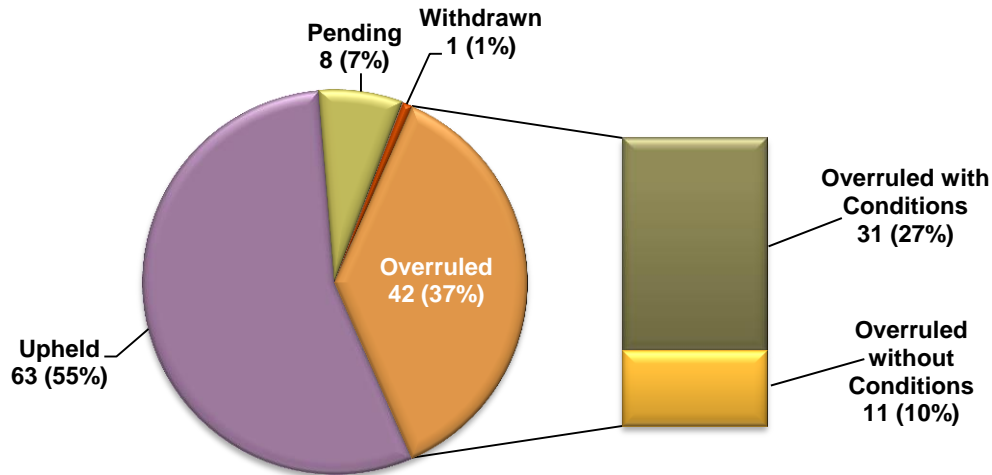
A review of appeal history over the past five years demonstrates both how appeal volume stemming from each source varies from year-to-year and also how land-use related matters consistently dominate the Board's calendar. As laws change and various business or development activities ebb and flow, appeal volume from a given source will fluctuate. For example, the chart below depicts a spike in appeals of DPW decisions issued last fiscal year, resulting from the enactment of the City's new food truck laws.



## Summary of Action Taken

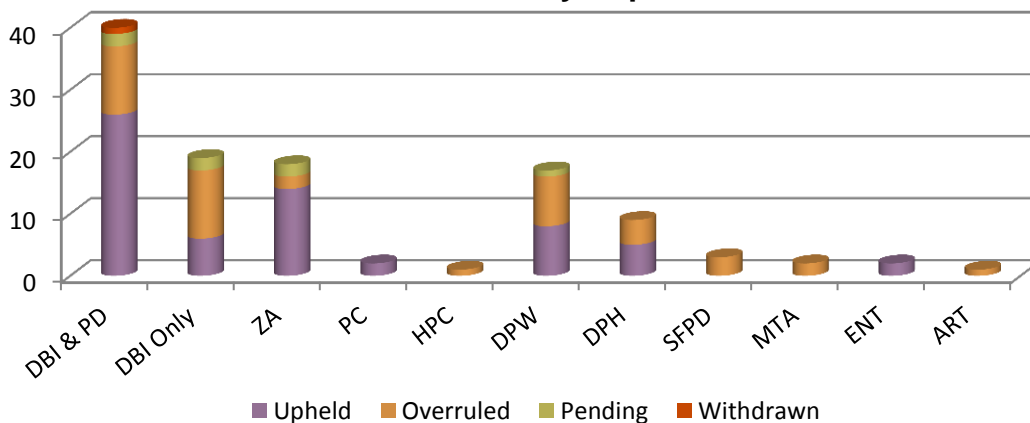
Of the 114 appeals heard during the year, the underlying departmental decision was upheld by the Board in 63 cases<sup>17</sup> and the department was overruled in 42 cases. Conditions were imposed by the Board in 31 of the departmental determinations it overruled. Eight cases were pending<sup>18</sup> and one was withdrawn at the close of the fiscal year.

### Outcome of Appeals Heard



The chart below depicts how appeals were decided by the Board relative to each department from which determinations originated.

### Outcome - by Department



<sup>17</sup> In eight of these cases, the matter was upheld by default. This occurs when there are fewer than four Board members who wish to overrule a departmental determination and fewer than three Board members who wish to uphold it. With four votes needed to pass a motion to overrule the department and three votes needed to pass a motion to uphold, no motion can pass. In such circumstances, by law, the underlying determination is upheld.

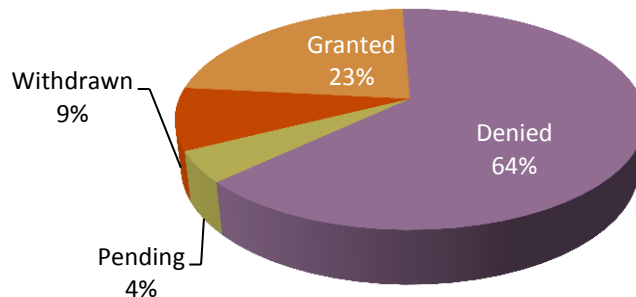
<sup>18</sup> Three of the pending cases were sent to the Board's Call of the Chair calendar. This calendar houses cases that the Board places on hold because some factor suggests that the matter is best decided at a later, unknown time. Typical reasons include allowing related litigation to resolve, providing time for the parties to seek necessary approvals or review from other City departments, and when the parties ask for an extended stay of the proceedings in order to attempt a negotiated resolution of the underlying dispute.

## Other Matters Heard

In addition to appeals, the Board routinely considers rehearing requests and jurisdiction requests.

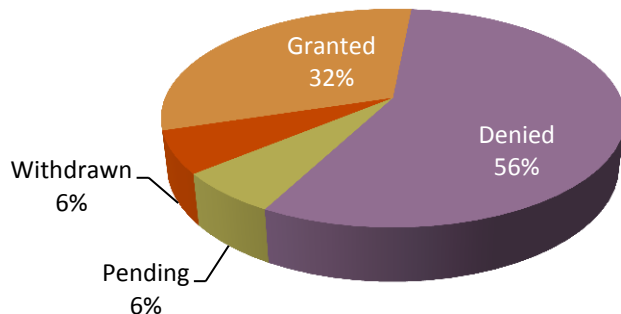
### Rehearing Requests

Once an appeal is heard and decided by the Board, the parties associated with the case have ten days within which they may request that the Board reconsider its decision.<sup>19</sup> Pursuant to the Board's Rules, upon the vote of a supermajority of Board members, to prevent manifest injustice, a motion for rehearing may be granted based on a showing that "new or different material facts or circumstances have arisen" since the Board's consideration of the matter that, if known at the time, "could have affected the outcome of the original hearing."<sup>20</sup> The Board received 22 rehearing requests during the year; five (23%) were granted, fourteen (64%) were denied. Of the remaining three, one (4%) was pending at the close of the year and two (9%) were withdrawn.



### Jurisdiction Requests

The Board may allow an appeal to be filed after the relevant appeal period has expired where some error on the part of the City caused the failure to file on time.<sup>21</sup> For example, a late appeal might be allowed where the Planning Code-required neighborhood notification about a project failed to properly describe the scope of work, or where such notice wasn't sent to all the required addresses. When a jurisdiction request is granted, a new five-day appeal period is created within which the requestor (and only the requestor) may file an appeal. Again, a supermajority of votes is needed for such a request to be granted. Sixteen jurisdiction requests were filed with the Board during the year. Five requests (31%) were granted and nine (57%) were denied. One request (6%) was pending at the close of the year and the one (6%) was withdrawn.



<sup>19</sup> See San Francisco Business and Tax Regulations Code, Article 1, Section 16; and Rules of the Board of Appeals, Article V, Section 9.

<sup>20</sup> Rules of the Board of Appeals, Article V, Section 9(b).

<sup>21</sup> See *Franklin v. Steele*, 131 Cal. App. 3d 558 (1982); Rules of the Board of Appeals, Article V, Section 10.

## LITIGATION

Parties dissatisfied with a Board determination may seek further review and relief in Superior Court. During the year, six new lawsuits were filed in which the Board of Appeals was named as a party. During this time, two lawsuits were resolved – with no liability to the City – and eight of the previously filed matters remain pending.

A description of each case and its status is provided in Appendix B.

## BUDGET

The Board's budget experience in Fiscal Year 2012-13 clearly evidenced the City's economic improvement. For the first time since the economic decline began in 2008, the Board ended the year with revenue that exceeded projections. The Board was able to close the year with a surplus of \$188,428; this was comprised of \$103,547 in surplus revenue and \$84,881 in reduced expenditures, as described below.

### Revenue

The Board's revenue budget is derived from two sources. The majority (95%) comes from surcharges placed on permit applications for those types of permits that have a recent history of being appealed to the Board.<sup>22</sup> The remainder (5%) comes from fees paid by individuals, community groups and businesses at the time a new appeal is filed. Each year, in preparing the coming year's budget, the Board and Controller's Office work together to determine whether any adjustments to the surcharge rates are needed in order to provide sufficient income to cover the Board's actual operating expenses. Any adjustment beyond inflation requires legislative action,<sup>23</sup> as does any change to filing fees.<sup>24</sup>

Going into Fiscal Year 2012-13, no adjustments were made to surcharge rates or filing fees based on the assumption that the City's continuing economic recovery would increase permit volume and correspondingly generate sufficient revenue for the Board. This assumption proved correct; the Board ended the year with a surplus in both funding sources, as shown in the table below.

**Projected v. Actual Revenue – FY12-13**

	Projected	Actual	Surplus (\$)	Surplus (%)
<b>Surcharge Revenue</b>	\$886,406	\$986,174	\$99,768	11.3%
<b>Filing Fee Revenue</b>	\$46,037	\$49,816	\$3,779	8.2%
<b>Total Revenue</b>	\$932,443	\$1,035,990	\$103,547	11.1%

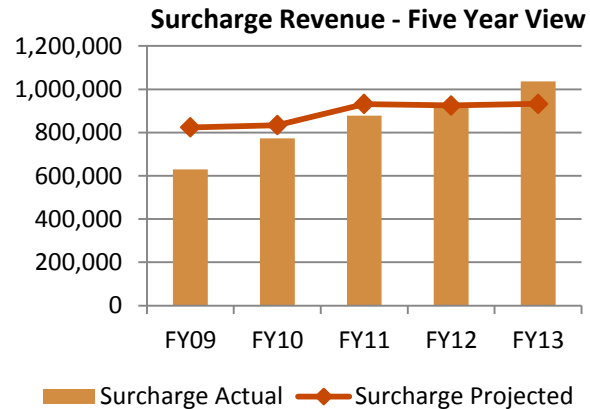
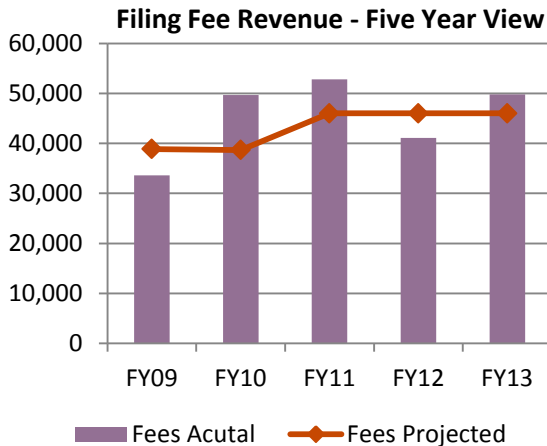
<sup>22</sup> Surcharges are calculated by (1) determining the number of appeals filed in the prior fiscal year that originated with actions taken by each funding department, (2) applying the percentage of appeals for each department to the Board's expenditure budget to determine the dollar amount each funding department should contribute, and (3) dividing this dollar amount by the anticipated number of appealable permits issued by each funding department.

<sup>23</sup> San Francisco Administrative Code Chapter 10G.

<sup>24</sup> Board fees are found in San Francisco Business and Tax Regulations Code Article 1, Section 8.

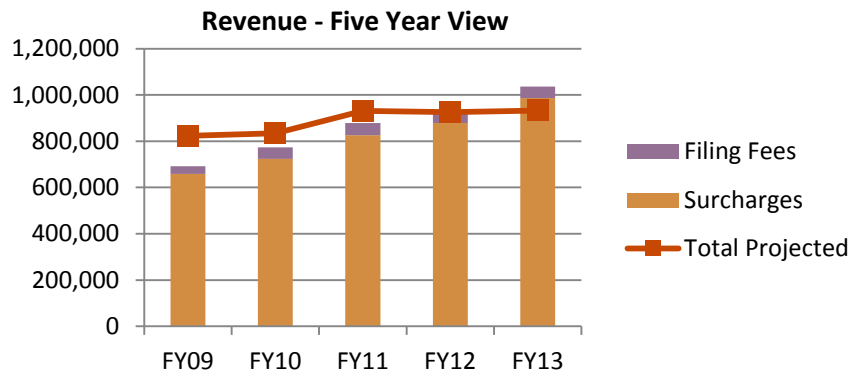


As depicted below, the Board's actual surcharge revenue – as compared to projected – has gradually improved since 2008 when the economic decline first caused this revenue streams to drop. In comparison, the Board's ability to capture filing fee revenue has fluctuated from year to year. Since appeal volume remained relatively constant, this fluctuation stems from variations in the types of appeals filed



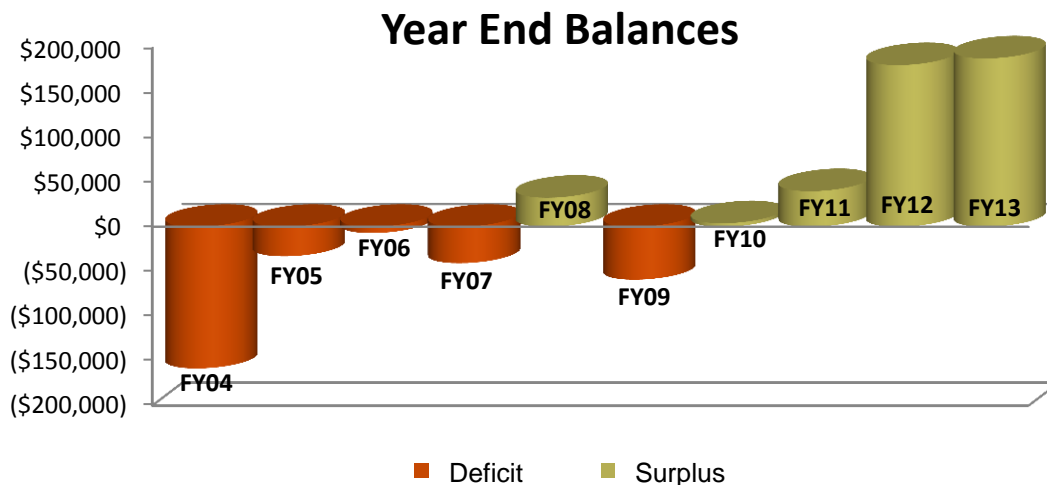
each year and the corresponding variation in filing fees. Given the small percentage of the budget comprised by fees, however, this fluctuation hasn't had a significant impact on the Board's total revenue budget.

As the Board's ability to generate surcharge revenue strengthened, the annual total revenue budget deficit continued to shrink. Fiscal Year 2008-09 saw the largest deficit of sixteen percent, down to seven percent in 2009-10, six percent in 2010-11 and just under one percent (.6%) last fiscal year. The chart below shows the Board's projected revenue budgets for the past five years, against actual revenue for those years from the two funding sources.



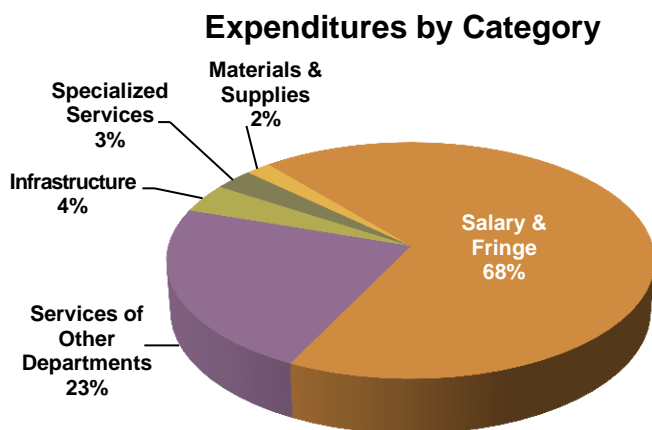
Despite sound projections and mindful spending, changing economic and other factors cause the Board's budget to fluctuate from year to year, in some years leaving the Board with a deficit and in others with a surplus (see chart below). To accommodate this variability, Board staff worked this year with the Controller and the Mayor's Office to establish a 'rainy day' fund. This fund captures any dollars remaining at the close of each year and allows the Board to apply those dollars in future years where the cost of service exceeds revenue. Previously, any surplus would be deposited into the General Fund as a form of reimbursement for those years in which a General Fund allocation

was needed to supplement a revenue deficit. With this fund, it is hoped that the Board will be self-sufficient and will no longer need to rely on General Fund dollars for additional support in the event lean revenue years return.



## Expenditures

With the economy still in flux, and in light of the revenue shortfalls experienced in recent years, the Board continued to limit its expenditures whenever possible in order to hedge against a possible deficit. Since appeal volume, though on the rise, was still lower than average, the Board was able to reduce spending on non-personnel expenses associated with the processing and hearing of appeals. This included lower costs to provide



neighborhood notification of appeals as well as the cost of televising Board meetings. In addition, a staff position was left vacant for part of the year. Overall, expenses were reduced by 9% (\$84,881) from the projected expenditure budget of \$945,403.<sup>25</sup> Combined with the revenue surplus described above, these savings allowed the Board to end the year with a total surplus of \$188,428.

As the chart (above) reflects, just over three-quarters (68% or \$588,555) of the Board's actual expenditures (\$860,522) paid for the salaries and fringe benefit expenses of Board employees. Twenty-three percent (\$196,732) paid for services provided by other

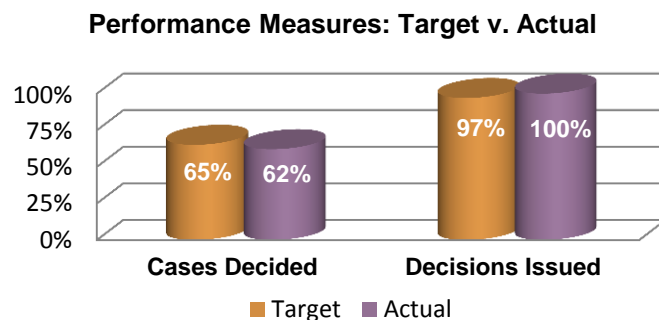
<sup>25</sup> The Board's projected revenue and projected expenditure budgets are not always balanced, and weren't going into this fiscal year. Due to an array of factors (e.g., modifications to labor agreements, insurance rate negotiations, etc.) changes are sometimes made to expense line items close to the end of the budget process, after the surcharge rates and revenue budget have been set. The Controller's Office assumes that any increase in expenses not covered by actual revenue will be paid for by a General Fund allocation, or going forward, by an allocation from the Board's 'rainy day' fund. Fortunately, such an allocation has not been necessary in recent years.

City departments, including advice and assistance provided by the City Attorney, the broadcasting and closed captioning of Board meetings by the Department of Technology's SFGovTV services, and support provided by the Department of Technology for the Board's computer systems and website. Infrastructure costs such as rent, phones and the rental of a photocopier, represented 4% (\$34,152) of the Board's expenses for the year. Three percent (\$24,801) paid for specialized services such as those of a contractor who researches and prepares the neighborhood notification address labels and maps, and interpreters who attend Board meetings to assist limited-English speaking individuals. Materials and supplies represented 2% (\$16,282) of the Board's expenditures, paying for commodities such as postage, paper and other office supplies.

## PERFORMANCE MEASURES

All City departments are required to report on specific statistical measures as a way of assessing and documenting performance. The two measures unique to the work of the Board of Appeals look at how long it takes the Board to decide cases and how quickly written decisions are released.

The speed at which the Board decides cases is measured by looking at how often cases are decided within 75 days of filing. Before the start of the year, a sixty-five percent target was set for this measure. In fact, the Board decided 62% of its caseload within the stated timeframe. In most instances, when cases are decided beyond the 75 day window, the delay is a result of continuances requested by the parties to allow time for settlement negotiations or further case preparation. In some cases, Board decisions are delayed when additional evidence is needed in order for the Board to make a fully informed decision, for example, when a permit holder fails to provide architectural plans and the Board cannot accurately assess the impact of a project without them.



The Board's second performance measure looks at how often written decisions are released within 15 days of final Board action. A 97% target was set for this measure, which the Board exceeded, releasing all written decisions within the 15 day timeframe.<sup>26</sup>

## BOARD STAFF

The work of the Board is supported by an Executive Director, Legal Assistant, two Legal Process Clerks and a Senior Clerk Typist. Staff is responsible for managing many facets of the appeal process, including the intake of new appeals, providing staff support at Board meetings,

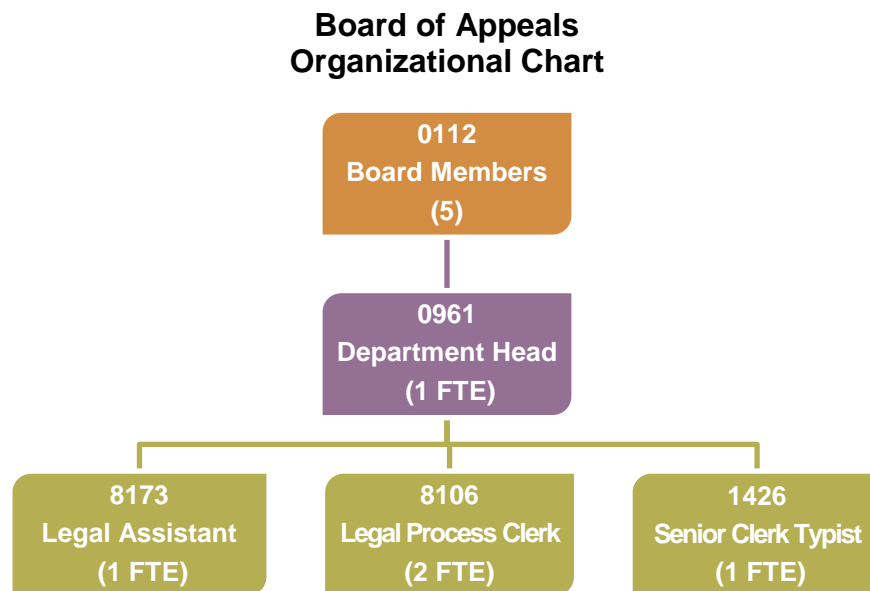
<sup>26</sup> In those rare instances when decisions aren't released promptly, the delay typically is caused when multiple appeals are filed on one action and not all of the related cases move through the process simultaneously (e.g., when one party requests a rehearing but others do not).

and preparing the Board's Notices of Decision which articulate the final determination made by the Board members at hearing.

Given the complexity of many of the appeals heard by the Board, it is common for voluminous filings to be submitted by the parties, including written argument, architectural plans, statements and studies prepared by experts and comments from members of the public. Staff tracks these documents as they move through the appeal process, ensuring that each Board member is given the materials needed to decide the matters presented at each meeting.

In addition to their usual responsibilities, the clerks at the Board continue to work on a long-term scanning project to capture Board decisions in an electronic format. Working backward from the present to the Board's inception in 1932, Board decisions are being scanned and shared with the Planning Department for inclusion in the City's on-line Property Information Map.<sup>27</sup>

During this year, one vacant Clerk Typist position was converted into a Legal Process Clerk position and filled mid-year. The Board is now fully staffed. Depicted below is the Board's current organization structure.



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<sup>27</sup> This online database may be found on the internet at: <http://ec2-50-17-237-182.compute-1.amazonaws.com/PIM/?address=&x=57&y=17>.



## **APPENDIX A – APPEAL DETAIL**

A description of the cases heard by the Board during the year is set out below.

### **Department of Building Inspection and Planning Department**

Just over one-third (35%) of the 114 appeals heard during the year stemmed from determinations made by the Department of Building Inspection (DBI) that also involved Planning Department review. These 40 appeals focused on both Planning Code and Building Code issues, and include:

- 36 appeals protesting the issuance of a building permit
  - Protest appeals are typically filed by neighbors concerned that proposed construction will negatively impact their property, such as when a new deck may create sightlines into a neighbor's windows, or when building expansion would limit access to light and air or obstruct the mid-block open space.
- 4 appeals of denied building permits
  - Appeals of permit denials are filed by property owners seeking permission to move ahead with a project that has been disapproved by DBI and/or Planning. These disapprovals are often made by DBI at the request of the Planning Department, based on a determination that the proposed project is inconsistent with provisions of the Planning Code or Residential Design Standards.<sup>28</sup>

The Board upheld 65% (26) of these determinations and overruled 28% (11), placing conditions on the underlying permits in eight of the overruled matters. Of the remaining 7% (three cases) two appeals were pending at the close of the year, and one was withdrawn.

### **Department of Building Inspection Only**

Nineteen appeals were heard of determinations made solely by the Department of Building Inspection:

- 12 appeals protesting the issuance of a building (7), plumbing (3) or electrical (2) permit
- 7 appeals protesting the imposition of penalties
  - Penalty appeals are filed by property owners who have been assessed fines for performing work without a permit or for exceeding the scope of a permit. In some cases, the Board will reduce a penalty where it finds that the property was purchased after the unpermitted work was performed or based on other extenuating circumstances.

The Board upheld 32% (6) of the DBI determinations and overruled 58% (11), imposing conditions on ten of the overruled matters, including all of the penalty-related matters. The two remaining cases (10%) were pending at the close of the year.

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<sup>28</sup> The Residential Design Standards promote residential building design that protects neighborhood character, preserves historic resources and promotes the goal of environmental sustainability.

### **Zoning Administrator**

The Board heard 18 appeals of Zoning Administrator (ZA) determinations:

- 9 appeals protesting the issuance of Letters of Determination (LOD)
  - LODs are written interpretations of how certain sections of the Planning Code should be applied to specific factual situations at a specific property. For example, an LOD may address whether a cannabis dispensary may operate at a particular address, whether a previously granted entitlement has expired, or what the legal dwelling unit count is for a particular parcel.
- 5 appeals of variance decisions: two protesting the granting of a variance; two appealing the denial of a variance; and one appealing conditions placed on a variance.
- 3 appeals protesting the issuance of Notices of Violation and Penalties, all protesting the Zoning Administrator's assessment that inappropriate business uses were taking place at the subject properties.
- 1 appeal of a Request for Release of Suspension, protesting the lifting of a suspension placed on a building permit where the Zoning Administrator determined the reasons for suspension had been satisfied.

The Board upheld the determination of the Zoning Administrator in 14 cases (78%), and overruled the ZA twice (11%) (imposing conditions in one case). The remaining two cases (11%) were pending at the close of the year.

### **Department of Public Works**

Seventeen appeals were heard relating to determinations made by the Department of Public Works (DPW):

- 8 were of mobile food facility permits, five of which protested the issuance of such permits, two appealed permit denials and one appealed permit revocation.
- 5 were of tree removal permits.
- 1 was of a wireless site permit.
- 1 was of a utility excavation permit.
- 1 was of a minor sidewalk encroachment permit.

The Board upheld eight and overruled eight DPW determinations, or 47% each. Conditions were imposed in all but one of the overruled cases. The one remaining case was pending at the close of the fiscal year.

### **Department of Public Health**

Nine appeals were filed on determinations made by the Department of Public Health (DPH):

- 6 appeals were related to penalties imposed on tobacco retailers
  - 4 of these were appealing a permit suspension resulting from the sale of tobacco to a minor that occurred as part of a joint DPH and San Francisco Police Department operation that uses underage decoys attempting to buy cigarettes. The Board upheld the suspensions in these cases.

- 2 related to business owners who allowed smoking in an enclosed area. The Board upheld the suspension in one appeal and the permit holder withdrew its appeal of a revocation in the other.
- 1 appealed the suspension of a massage establishment permit.
- 1 appealed the denial of a noise limit variance.
- 1 appealed the revocation of a permit to operate a restaurant.

The Board upheld the DPH determination in five cases (56%), overruled the department in four cases (44%) and placed conditions on three of the overruled matters.

### **Police Department**

The Board heard three appeals of Police determinations, overturning the denial of a tow car operator permit and of a fortuneteller permit, and also overturning the issuance of a second hand dealer permit. No conditions were imposed in any of these matters.

### **Entertainment Commission**

The Board heard two appeals related to Place of Entertainment permits issued by the Entertainment Commission, upholding the Commission's determination in both cases. One case was a protest appeal objecting to a new, temporary entertainment venue at Piers 27-29 in conjunction with the running of the America's Cup yacht races. The other was filed by a club operator protesting conditions placed on his permit limiting hours of operations and imposing other mitigation measures after objections were lodged by neighbors regarding noise levels.

### **Planning Commission**

There were two appeals filed protesting the Planning Commission's issuance of a coastal zone permit needed for the City to move forward with its plan to apply a synthetic surface and make other changes to soccer fields at the western edge of Golden Gate Park. The Board upheld the Commission's issuance of this permit.

### **Municipal Transportation Agency – Division of Taxis and Accessible Services**

The Board heard two taxi-related appeals, the revocation of a taxi medallion and suspension of a ramp taxi medallion. In both cases, the departmental determination was overruled; the Board overturned the revocation and reduced the length of the suspension.

### **Historic Preservation Commission**

The Board decided one Historic Preservation Commission decision, a protest appeal filed by the American Legion War Memorial Commission objecting to the granting of a Certificate of Appropriateness for exterior alterations of the City's War Memorial Veterans Building. The Board technically overruled the HPC by imposing additional conditions on the Certificate, but agreed with the HPC's granting of the determination.

### **Arts Commission**

The Board heard one appeal of an Arts Commission determination, overruling the Commission's denial of a Street Artist Certificate. At the close of the fiscal year this matter was pending due to the filing of a rehearing request by the Commission. That request was subsequently withdrawn and the Board's determination stands.

## **APPENDIX B – LITIGATION DETAIL**

Set out below is a description of the lawsuits in which the Board is named as a party, that were filed, pending or resolved during the year.

### **Clear Channel Outdoor, Inc. v. Board of Appeals of the City & County of San Francisco**

- **PENDING.** A challenge was filed to the issuance of a permit to reconstruct a sign located at 2283-2297 Market Street. Clear Channel filed a permit application to remove a billboard. The permit was issued, and the property owner appealed. On October 28, 2008, the Board granted the appeal, revoked Clear Channel's permit and authorized a revision of the building permit to allow the property owner to reinstall a billboard. The City won this case on demurrer at the trial court. On February 25, 2011, the Court of Appeal reversed the trial court, in part, concluding that Clear Channel had standing to challenge the Board's decision to overturn its permit, but not its decision to grant the property owners the right to reinstall and maintain a sign on their property. Clear Channel has not yet indicated whether it intends to pursue this ruling further.

### **Crown Castle NG West Inc. v. City & County of San Francisco**

- **NEW.** A challenge was filed to the Board's decision on August 23, 2012 to overturn the Department of Public Works and deny a wireless site permit on 27th Avenue. The subject permit was applied for after the Board revoked a similar permit for this location in April 2011. That permit is the subject of related litigation (see NextG Networks of California v. CCSF, below). A hearing on the merits is scheduled for early October 2013.

### **Fisherman's Wharf Community Benefit District v. City & County of San Francisco, et al.**

- **PENDING.** A challenge was filed to the Board's decision on April 12, 2012 to overturn the Department of Public Works and issue a mobile food facility permit for the operation of food cart serving coffee and tea at 2801 Leavenworth Street. Briefing and a hearing on the merits have not yet been scheduled.

### **Robert Michael Friedman v. San Francisco Taxi Commission, et al.**

- **PENDING.** This lawsuit challenges the Board's decision on July 23, 2008 to uphold the Taxi Commission's revocation of a taxi driver permit and taxi medallion. A hearing in Superior Court has not yet been scheduled.

### **Friends of the Landmark Filbert Street Cottages, et. al., v. City & County of San Francisco, et al.**

- **PENDING.** This case challenges, among other matters, the Board's denial on March 16, 2011 of late jurisdiction on three permits for a project that was given Conditional Use Authorization by the Planning Commission. The City prevailed at the trial court level. Petitioners appealed. The matter has been briefed in the Court of Appeal and Petitioners have requested oral argument. No date for oral argument has been set. Petitioners have also filed a writ petition in the Court of Appeal for a stay of the construction of the project, and briefs have been filed on that petition. The Court has issued a temporary stay, pending its decision on the writ petition.



**Tu Lam v. San Francisco Municipal Transportation Agency, et al.**

- **PENDING.** A challenge was filed to the Board's decision on May 29, 2009 to revoke Mr. Lam's taxi driving permit and taxi medallion. On December 7, 2009, the Court denied the petitioner's request for a stay of the revocation of his driving permit and medallion while his legal claims are pending. A hearing on the merits of the underlying writ petition has not yet been scheduled.

**David Scott Nale v. City & County of San Francisco, et al.**

- **NEW.** A challenge was filed to the Board's denial on March 13, 2012 of an appeal of a Zoning Administrator Letter of Determination that refused to grant additional extensions of a variance decision associated with the proposed construction of a garage on Fillmore Street. This litigation has been put on hold pending Mr. Nale's attempt to get a new permit for the garage.

**NextG Networks of California, Inc. v. City & County of San Francisco, et al.**

- **PENDING.** This case challenges the Board's decision on April 20, 2011 to revoke a wireless site permit issued by the Department of Public Works to a telecommunications services provider. After the Superior Court refused to grant NextG's application for a temporary restraining order, NextG appealed. Court of Appeal granted NextG's request for a stay, which prevented DPW from requiring NextG to remove the facility. A hearing on the merits is expected by the end of the calendar year.

**Nob Hill Association, et. al., v. City & County of San Francisco, et al.**

- **UPHELD.** This lawsuit challenges the Board's decision on January 13, 2010 that effectively affirmed a Letter of Determination issued by the Zoning Administrator stating that the existing entertainment-related use of the California Masonic Memorial Temple is a lawful non-conforming use and that the operators of the Temple may apply for a conditional use authorization which could intensify the entertainment-related use of the property. The Superior Court issued a decision overturning the Board's decision that the proposed renovation of the Masonic Memorial Temple could be approved through conditional use authorization and the City and Masonic Temple appealed. Before the Court of Appeal issued its opinion, the Masonic Temple and Nob Hill Association reached a settlement. Despite a request from the parties that the appeal be withdrawn, the Court of Appeal ruled on the merits in the City's favor and issued an unpublished opinion that found the Superior Court had erred in setting aside the Letter of Determination.

**Mica I. Ringel v. City & County of San Francisco, et al.**

- **NEW.** This lawsuit challenges, among other things, the Board's August 14, 2013 decision to deny a request to file a late appeal of a Zoning Administrator Letter of Legitimization. The Letter legitimizes an existing "Internet Services Exchange" use in a building located on Potrero Avenue. The matter has yet to be briefed or heard.

**San Francisco Architectural Heritage v. City & County of San Francisco, et al.**

- **DISMISSED.** A challenge was filed to the Board's decision on April 15, 2010 to uphold the issuance of permits that allow the demolition of the building located at 1450 Franklin Street and the construction of a new 13-story mixed-use project at that site. This project was part of a Redevelopment Agency Plan that expired shortly before the Board heard this appeal. In June 2013, the developer and petitioner settled the case for undisclosed terms and the petitioner dismissed its claim.

**San Francisco Coalition for Children's Outdoor Play, Education and the Environment v. City and County of San Francisco, et al.**

- **PENDING.** This lawsuit challenges the environmental determination associated with the coastal zone permit upheld by the Board on September 13, 2012. The permit was issued in conjunction with the proposed renovation of the athletic fields at the western end of Golden Gate Park. A hearing on the merits was held in Superior Court in August 2013 and a decision is expected before the end of the calendar year.

**765 Market Street Residential Owners Association, et al., v. City & County of San Francisco, et al.**

- **NEW.** This case challenges the City's decision to approve the development of a high rise residential building in the Yerba Buena neighborhood of San Francisco known as the 706 Mission Street – Mexican Museum Project. This includes the Board of Appeals decisions on July 31, 2013 to reject a request that it hear an appeal of a Planning Commission Motion made under Planning Code Section 295 (dealing with shadows on public land) and the Board's upholding of a Planning Commission determination granting exceptions under Planning Code Section 309. The case was filed in Sacramento and the City has joined a motion to bring the suit to San Francisco, which will be argued in October 2013. Briefing and a hearing on the merits have not yet been scheduled.

**United Taxicab Workers, et al. v. San Francisco Municipal Transportation Authority, et al.**

- **NEW.** A lawsuit was filed challenging both the SFMTA's adoption of a Resolution authorizing the lease of 150-200 taxi medallions to taxi companies and the Board of Appeals decision on November 17, 2012 to deny the United Taxicab Workers' request that the Board accept jurisdiction over its appeal of this SFMTA Resolution. Briefing and a hearing on the merits have not yet been scheduled.

**Winfield Design International, Inc. v. San Francisco Planning Department, et al.**

- **PENDING.** A lawsuit was filed challenging the Board's November 29, 2011 decision to uphold a Zoning Administrator Notice of Violation and Penalty that found a residential development project at 3000 23rd Street (aka 2690 Harrison Street) in violation of the Planning Code due to its non-compliance with Conditional Use requirements that the project provide seven Below Market Rate housing units. The City won on a demurrer in Superior Court and the plaintiffs have appealed. The matter has been fully briefed and the parties are awaiting a hearing date. *Note:* the Board of Appeals is not a named defendant in this action.

**Yerba Buena Consortium LLP v. City & County of San Francisco**

- **NEW.** A second lawsuit was filed challenging the City's approval of the 706 Mission Street – Mexican Museum Project, alleging violations of the California Environmental Quality Act (CEQA). Petitioners in this challenge allege that the pedestrian traffic study in the Project's Environmental Impact Report is flawed. Briefing and a hearing on the merits have not yet been scheduled.