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# CITY AND COUNTY OF SAN FRANCISCO BOARD OF APPEALS



# ANNUAL REPORT

July 1, 2013 – June 30, 2014

# HIGHLIGHTS

## APPEAL VOLUME

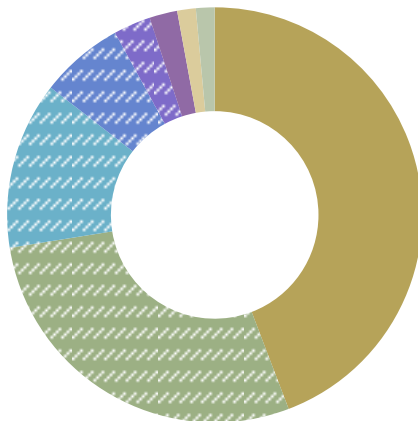
**222** New Appeals Filed

**30%** Increase in Appeals Filed

**182** Matters Heard

## CASE ORIGINATION

Appeals stem from decisions made by a wide range of City departments and Commissions, depicted below. The land use-related cases (52%) are shaded.

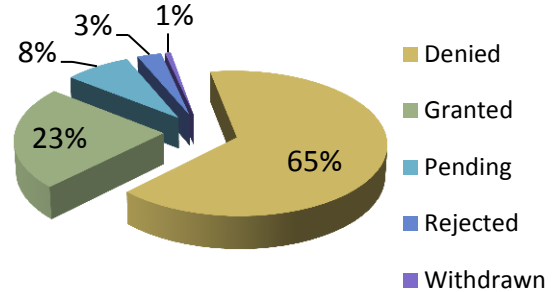


Public Works	45%
Building Inspection & Planning	28%
Building Inspection Only	13%
Zoning Administrator	7%
Planning Commission	3%
Public Health	1%
Municipal Transportation Agency	2%
Entertainment Commission	1%

Percentages have been rounded.

## BOARD ACTION

Of the 138 appeals heard, the Board denied 90 and granted 32.



## BOARD MEETINGS & MEMBERSHIP

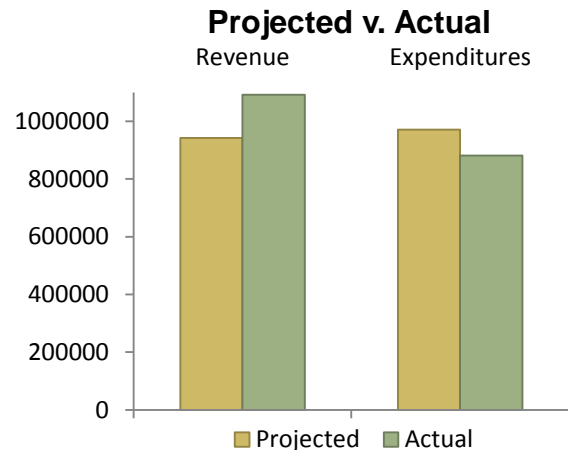
102 Meeting Hours  
91% Board Attendance

Current Board members:

- Ann Lazarus, President
- Arcelia Hurtado, Vice President
- Frank Fung, Commissioner
- Darryl Honda, Commissioner
- Bobbie Wilson, Commissioner

## BUDGET

The Board generated \$1,092,115 in total revenue, exceeding projections by 16%. Expenditures of \$881,520 were 9.2% less than projected.



**Total Surplus \$210,595**

## 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, Commissions 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.

## 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 approval (by majority vote) of the Board of Supervisors.

Board officers are elected for one-year terms at the first regular meeting held after January 15<sup>th</sup> each year.<sup>1</sup> At the Board's annual elections this year, Commissioner Ann Lazarus was elected Board President and Commissioner Arcelia Hurtado as Vice President. Commissioner Chris Hwang left the Board in July 2014 at the end of her four year term. Board of Supervisors President David Chiu then nominated Bobbie Wilson to fill that seat.

Current Board membership is as follows:

<b>Commissioner</b>	<b>Appointing Authority</b>	<b>Appointed</b>	<b>Term Expires</b>
Ann Lazarus President	Mayor	July 25, 2014	July 1, 2018
Arcelia Hurtado Vice President	Board of Supervisors	February 23, 2012	July 1, 2016
Frank Fung <sup>2</sup>	Mayor	October 19, 2004	July 1, 2016
Darryl Honda	Mayor	December 4, 2014	July 1, 2016
Bobbie Wilson	Board of Supervisors	September 30, 2014	July 1, 2018

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

<sup>2</sup> Commissioner Fung also served on the Board from January 1988 to June 1988.

## MEETINGS OF THE BOARD

During the fiscal year, the Board met 28 times, totaling over 102 meeting hours. There was a member absent at twelve of the meetings, giving the Board a 91% attendance record.

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

- Elected officers (February 26, 2014);
- Adopted the Board's two-year budget covering fiscal years 2014-15 and 2015-16 (February 19, 2013); and
- Entered into a Memorandum of Understanding with the San Francisco Port Commission to facilitate the transfer of permit appeal-related duties for Port Entertainment Permits from the Port Commission to the Board. (June 4, 2014).

Unless otherwise noticed, Board meetings are held on Wednesdays starting at 5:00 p.m. in City Hall.<sup>3</sup> Meetings 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 City department(s) and then 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 also be viewed on-demand.<sup>4</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>5</sup> In July 2014, the Board began posting appeal briefs and other case-related materials on its website as well.

## APPEAL EXPERIENCE

During the year, 293 cases were on the Board's docket. Of these, 268 were new matters filed with the Board this year, consisting of 222 appeals, 21 requests for late jurisdiction and 25 rehearing requests.<sup>6</sup> The Board heard 182 matters: 138 appeals, 19 requests for late jurisdiction and 25 rehearing requests.

Of the 111 matters that the Board did not hear, 57 were withdrawn by the appellant, ten were dismissed by the Board when the underlying permit was canceled by the permit holder, 43 were filed late enough in the year that they will be heard in the subsequent year, and one was rejected by the Board.<sup>7</sup>

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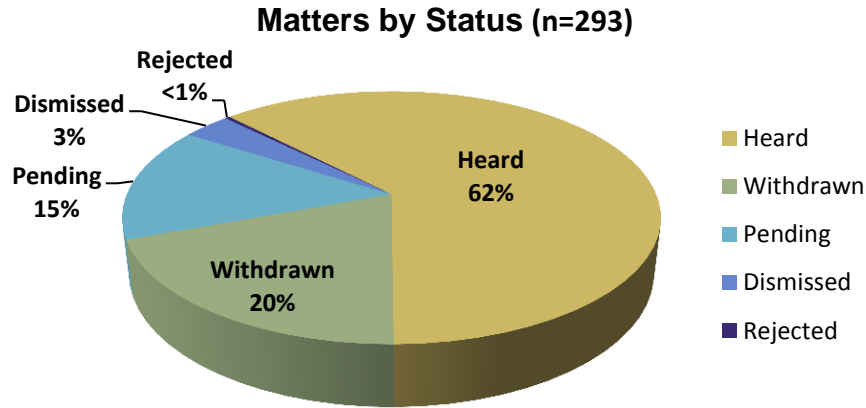
<sup>3</sup> The Board's annual meeting schedule is available at the Board office and on the web at: <http://sfgov.org/bdappeal/meetings>.

<sup>4</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>5</sup> The Board of Appeals website is found at: [www.sfgov.org/boa](http://www.sfgov.org/boa).

<sup>6</sup> The 25 additional matters were carried over from the prior year.

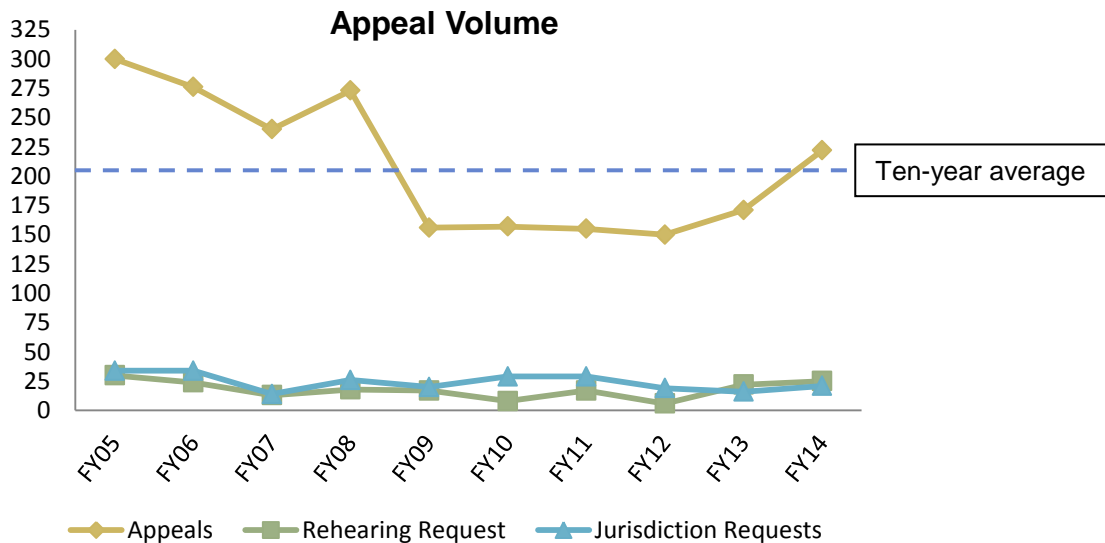
<sup>7</sup> Cases may be rejected after filing when further research determines that the Board lacks jurisdiction over the subject matter being appealed, for instance, where an attempt is made to appeal a building permit for a project that has been given a Conditional Use Authorization.



The Board’s jurisdiction and appeal process are described in Appendix A. Information about the specific appeals heard by the Board during the reporting year may be found in Appendix B

### Volume

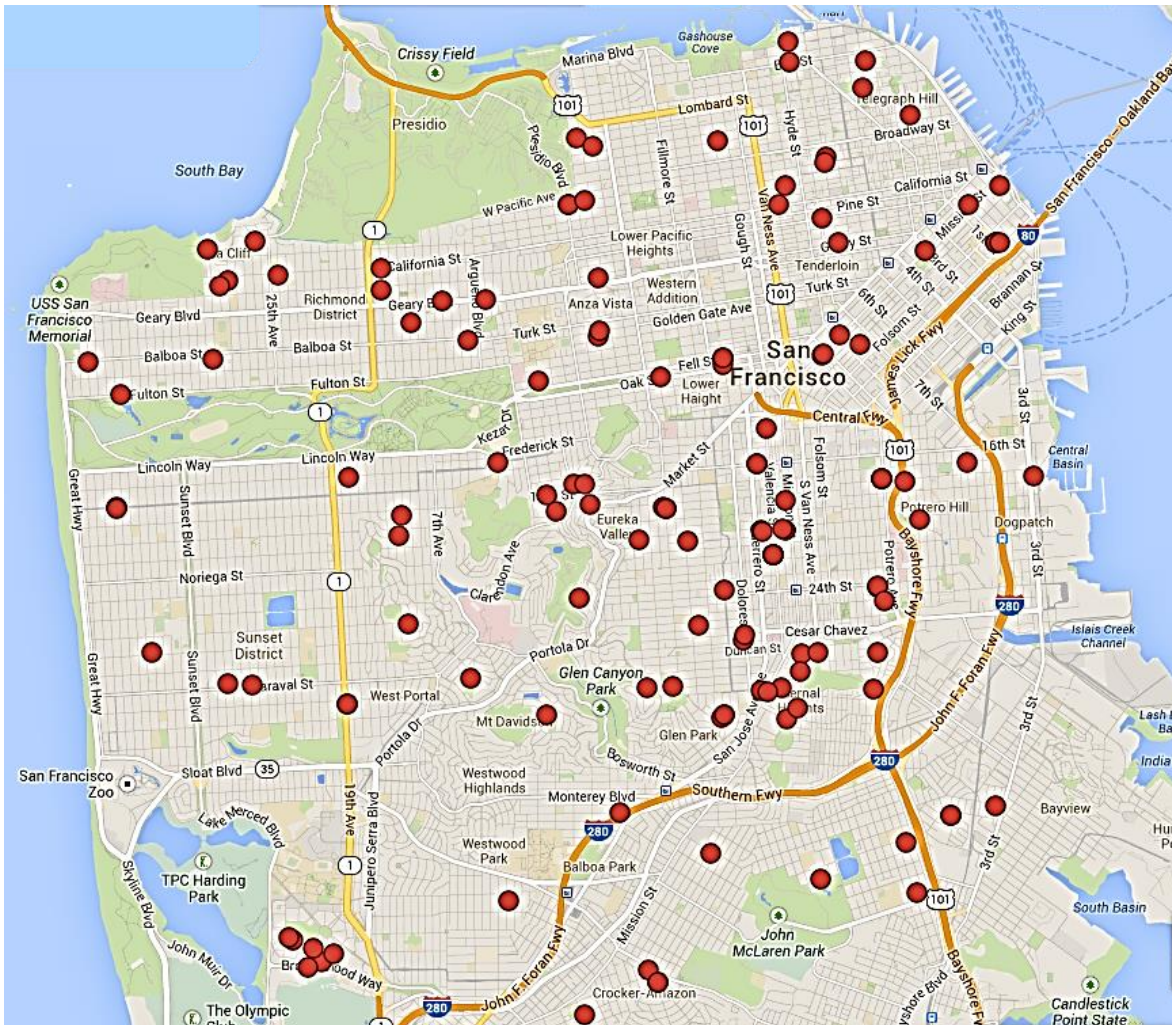
Appeal volume increased 30% this year. This marked a continuing upward trend for the second year in a row, following four years of below average appeal volume experienced during the recent economic downturn. Over the past ten years, the Board has seen an average of 210 new appeals filed annually, fluctuating largely based on the health of the economy. The 222 new appeals filed in the current year reflect the first time since 2008 that appeal volume exceeded the ten year norm (by 5.7%). The number of rehearing requests and jurisdiction requests has remained relatively constant over time.



**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 disbursement of appeals was less concentrated than in recent years, in part due to the large number of appeals of excavation permits for AT&T utility boxes, which AT&T seeks to place throughout the City.

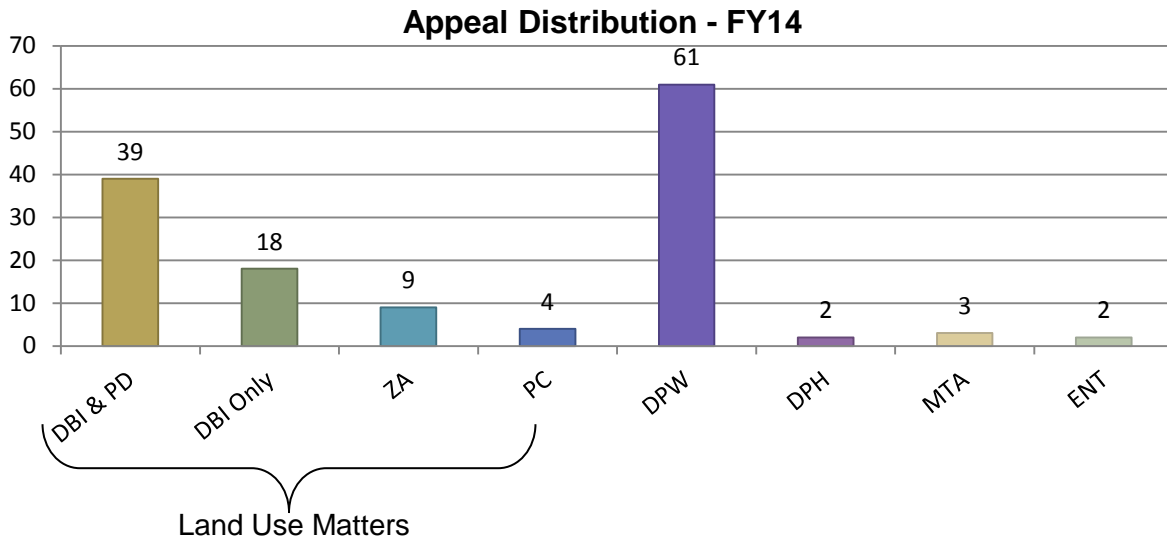
**Geographic Distribution of Appeals Heard**



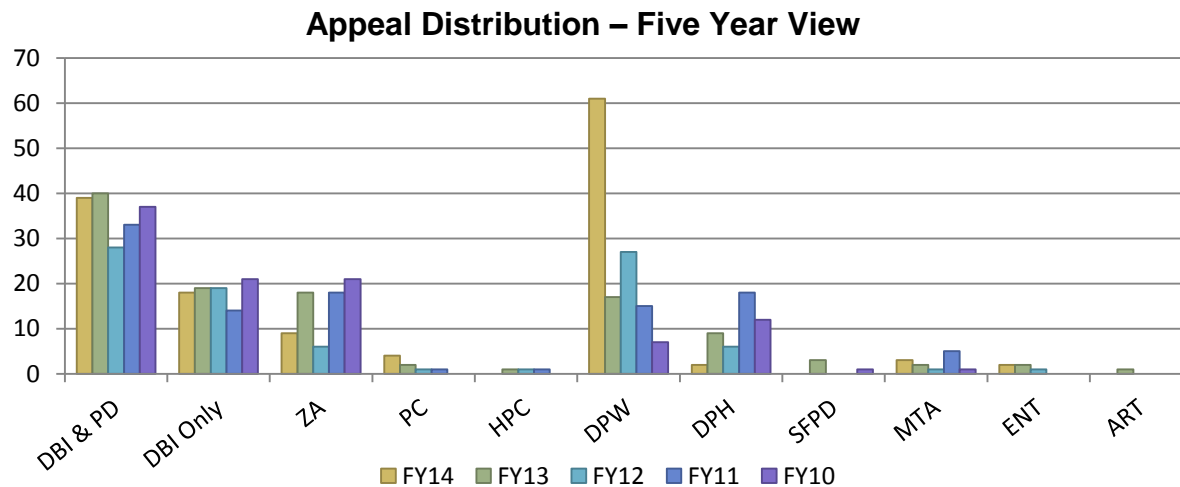
**Subject Matter**

Seventy of the appeals heard during the year were of land-use related determinations made by the Department of Building Inspection, the Planning Department, Planning Commission or the Zoning Administrator. These cases, representing just over half of the matters heard, constitute a lower percentage of appeals heard than in recent years. Typically, land-use matters have represented 60-75% of the Board’s docket. The large number of appeals filed on Department of Public Works (DPW) determinations shifted the Board’s focus this year – mostly due to appeals of permits for the placement of AT&T utility boxes in the public right-of-way. Of the cases heard by the Board, 44% (61 appeals) were of DPW determinations. The AT&T appeals comprised 28% of the cases heard by the Board this year and 62% of the DPW-related matters.

The remaining cases include three appeals of determinations made by the Municipal Transportation Agency and two appeals each from the Department of Public Health and the Entertainment Commission. A detailed description of the appeals heard can be found in Appendix B. The chart below depicts the 138 appeals heard by the Board by source.<sup>8</sup>



Appeal volume from each source varies from year-to-year. A five year view is set out in the chart below. Until this year, appeals stemming from land-use sources dominated the Board’s calendar. The spike in DPW-related appeals seen this year is a result of AT&T’s effort to obtain excavation permits required for the installation of utility boxes it will use to provide television service. This is the most recent example of how business trends and changes in business practices can influence the types of appeals that come before the Board. Similarly, legislative changes can cause a fluctuation in a particular type of appeal, as was seen in fiscal year 2012 when the City implemented new laws regulating mobile food facilities (food trucks) and the Board saw a spike in related appeals.

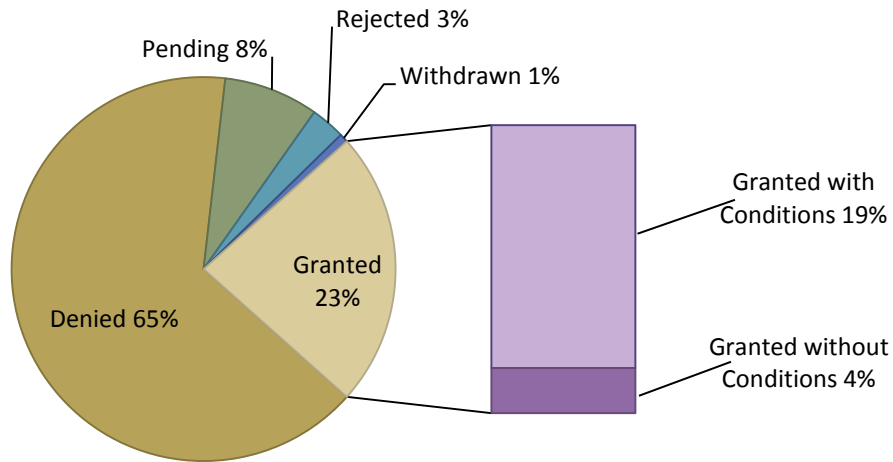


<sup>8</sup> DBI = Department of Building Inspection; PD = Planning Department; ZA = Zoning Administrator; PC = Planning Commission; HPC = Historic Preservation Commission; DPW = Department of Public Works; DPH = Department of Public Health; SFPD = Police Department; MTA = Municipal Transportation Agency; ENT = Entertainment Commission; ART = Arts Commission.

**Summary of Action Taken**

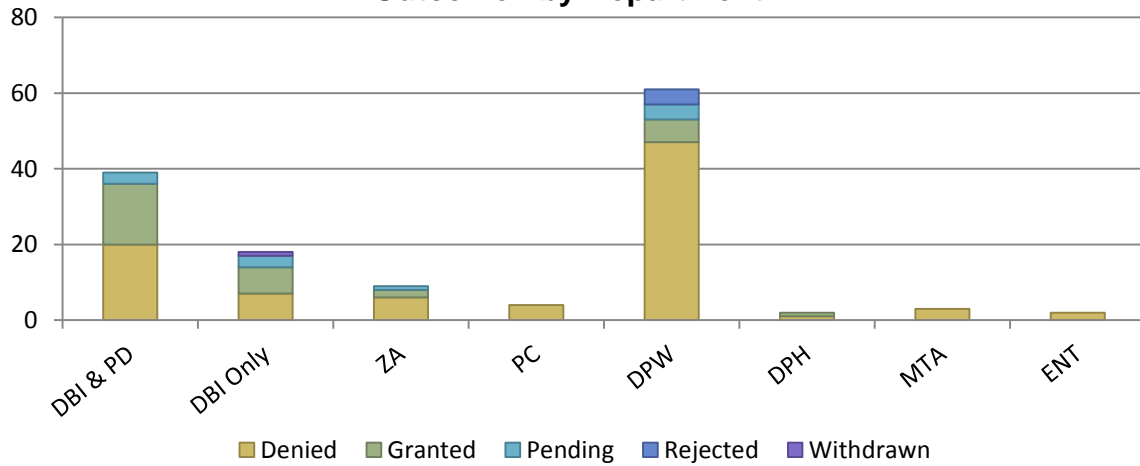
Of the 138 appeals heard during the year, the Board denied the appeal and upheld the underlying departmental decision in 90 cases (65%). The Board granted the appeal and overruled the departmental decision in 32 (23%) cases. Conditions were imposed by the Board in 27 of the granted appeals. Eleven cases (8%) were pending at the end of the year,<sup>9</sup> four (3%) were rejected<sup>10</sup> and one (1%) was withdrawn.

**Outcome of Appeals Heard**



The chart below depicts how appeals were decided by the Board relative to each department from which determinations originated. This is described in more detail in Appendix B.

**Outcome - by Department**

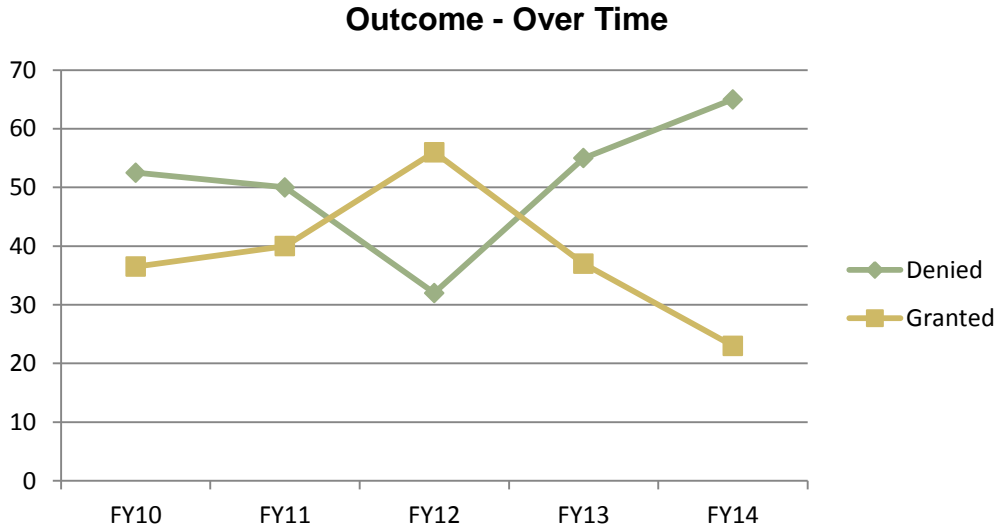


<sup>9</sup> Three of the pending cases were sent to the Board’s Call of the Chair calendar. This calendar is used for cases the Board puts on hold because some factor suggests that the matter is best decided at a later, unknown time. Here, one case is awaiting the outcome of litigation and two are on hold to allow the underlying departments to resolve related issues.

<sup>10</sup> Cases may be rejected when the Board decides it does not have jurisdiction over the matter. This may happen if the matter is not yet ripe for appeal or if the Board determines that the subject matter at issue is not within the Board’s purview.



The chart below sets out how the Board decided appeals over the past five years. This depicts how Board decision-making fluctuates significantly from year to year. The spike seen in the number of denied appeals in the current year stems from the large number of appeals of DPW determinations that presented nearly identical factual and legal issues. The Board denied the majority of these appeals, leaving the original DPW determination intact.

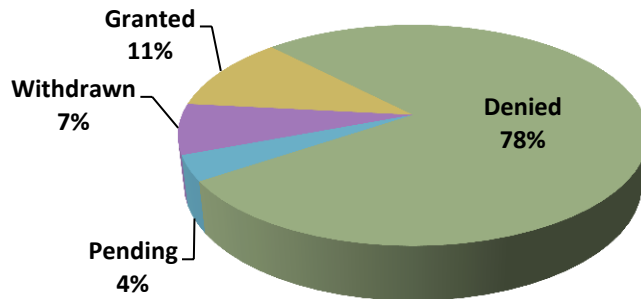


**Other Matters Heard**

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>11</sup> Pursuant to the Board’s Rules, upon the vote of a supermajority of Board members, a motion for rehearing may be granted to prevent manifest injustice or 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>12</sup> There were 27 rehearing requests on the Board’s docket during the year; three (11%) were granted and twenty-one (78%) denied. Of the remaining three, one (4%) was pending at the close of the year and two (7%) were withdrawn.



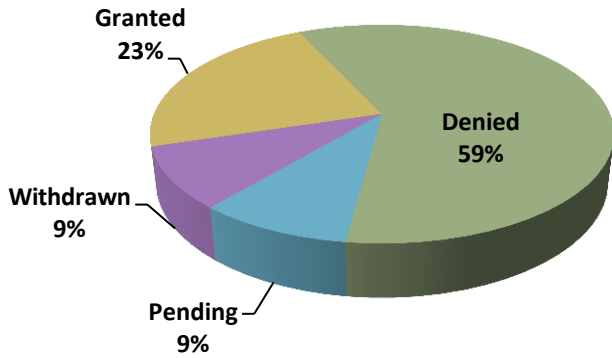
<sup>11</sup> See San Francisco Business and Tax Regulations Code, Article 1, §16; and Rules of the Board of Appeals, Article V, §9.

<sup>12</sup> Rules of the Board of Appeals, Article V, §9(b).

**Jurisdiction Requests**

The Board may allow an appeal to be filed after the relevant appeal period has expired based upon a showing that some error on the part of the City caused the failure to file on time.<sup>13</sup> For example, City error may occur where neighborhood notification of a construction project is required under the Planning Code and this notice failed to properly describe the scope of work, or where such notice wasn't sent to all of 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. Twenty-two jurisdiction requests were before the Board during the year. Five requests (23%) were granted and thirteen (59%) were denied. Two requests (9%) were pending at the close of the year and two (9%) were withdrawn.



**LITIGATION**

Parties dissatisfied with a Board determination may seek further review and relief in Superior Court. During the year, three new lawsuits were filed in which the Board of Appeals was named as a party. During this time, five lawsuits were resolved – three in favor of the City, one against and one case settled. In addition to the three new matters, eight previously filed cases remain pending.

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

**BUDGET**

The Board's budget experience in fiscal year 2013-14 clearly evidenced the City's continuing economic improvement. The Board closed the year with a surplus of \$210,595, derived from revenues that exceeded projections and expenditures that were less than projected, as described in the budget detail below.

**Revenue Detail**

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>14</sup> The remaining 5% comes from fees paid by individuals, community groups and businesses at the time a new appeal is filed. Each year,

<sup>13</sup> See Franklin v. Steele, 131 Cal. App. 3d 558 (1982); Rules of the Board of Appeals, Article V, §10.

<sup>14</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.

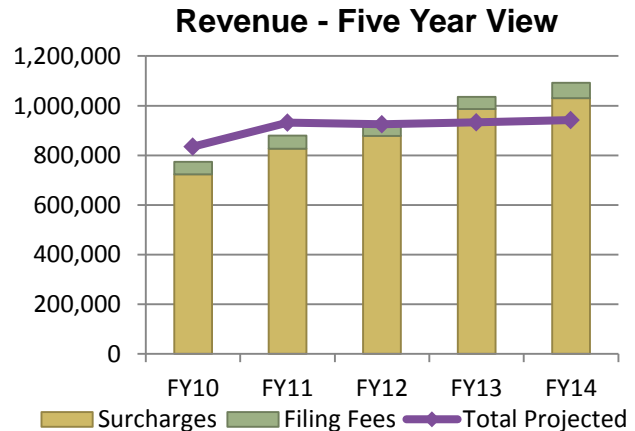
in preparing the coming year’s budget, the Board and Controller’s Office work together to determine whether any adjustments to the surcharge rates are needed in order to provide sufficient revenue to cover the Board’s actual operating expenses. Any adjustment beyond inflation requires legislative action,<sup>15</sup> as does any change to filing fees.<sup>16</sup>

Going into fiscal year 2013-14, no adjustments were made to surcharge rates or filing fees. Instead, it was assumed that the City’s continuing economic recovery would prompt an increase in permit application volume which would, in turn, generate sufficient additional surcharge revenue to cover the increase in the Board’s expenditure budget. This assumption proved correct; the Board ended the year with surplus surcharge revenue. Filing fee revenue also increased, in large part due to an increase in appeal volume.

**Projected v. Actual Revenue – FY13-14**

	Projected	Actual	Surplus (\$)	Surplus (%)
Surcharge Revenue	\$896,048	\$1,029,740	\$133,692	15%
Filing Fee Revenue	\$46,037	\$62,375	\$16,338	35%
<b>Total Revenue</b>	<b>\$942,085</b>	<b>\$1,092,115</b>	<b>\$150,030</b>	<b>16%</b>

Since nearly all of the Board’s revenue budget is tied to permit application volume, the health of the City’s economy has a strong correlation with the health of the Board’s budget. As would be expected, the 2008 economic decline caused a marked drop in Board revenue, and the gradual improvement in the City’s economic health since that time has been reflected in revenue improvements. This year continues this trend, with the Board’s revenue budget exceeding projections for the second year in a row. The chart (right) depicts the Board’s projected total revenue budgets for the past five years against actual revenue from the Board’s two funding sources in each year.



**Expenditure Detail**

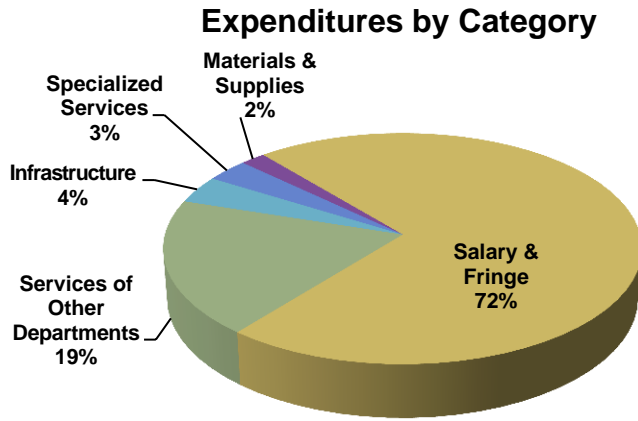
Board expenses were less than projected in all expenditure categories. The largest savings were in non-personnel services, where the Board reduced costs by using the Department of Technology to provide support for the Board’s appeal tracking database instead of contracting with a private firm for these services. In addition, other operating expenses (such as interpretation and delivery services) came in under budget. Another significant source of savings was the Board’s spending on the services of other departments, most notably City Attorney expenses which closed the year 14% under

<sup>15</sup> San Francisco Administrative Code Chapter 10G.

<sup>16</sup> Board fees are found in San Francisco Business and Tax Regulations Code Article 1, §8.

budget. Overall, expenses were reduced by 9.2% (\$89,447) from the projected expenditure budget of \$970,967.<sup>17</sup>

As the chart below reflects, almost three-quarters (72% or \$634,206) of the Board’s actual expenditures (\$881,520) paid for the salaries and fringe benefit expenses of Board employees. Nineteen percent (\$168,013) paid for services provided by other 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.

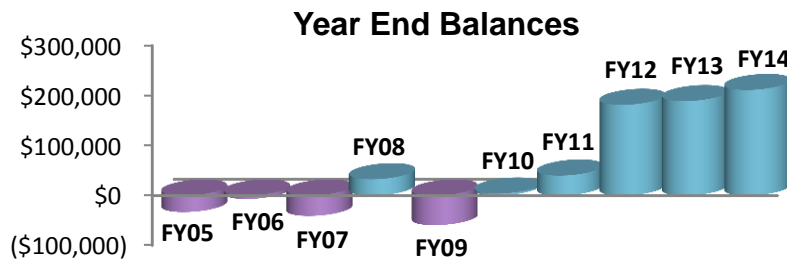


Infrastructure costs such as rent, phones and the rental of a photocopier, represented 4%

(\$34,147) of the Board’s expenses for the year. Three percent (\$28,330) paid for specialized services such as the 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% (\$16,824) of the Board’s expenditures, paying for commodities such as postage, paper and other office supplies.

**Budget Management**

Economic factors outside the Board’s control influence the number of new permit applications and how many appeals are filed. Even though the Board’s budget projections are carefully considered and spending is monitored closely, the Board will close some budget years with a deficit and other years with a surplus, as seen in the chart below.



<sup>17</sup> The Board’s projected revenue and projected expenditure budgets are not always balanced at the start of the fiscal year, and were not balanced this year. This discrepancy is due to expenditure changes (such as modifications to salaries resulting from new labor agreements and increases to health insurance rates) that are made close to the end of the City’s budget process, after the revenue budget and surcharge rates have been set. When a discrepancy is relatively small, the Controller’s Office assumes that increased expenses will either be covered by revenue exceeding projections, or by an allocation from the Board’s rainy day fund. Because revenue exceeded projections this year, an allocation from the rainy day fund was not needed.

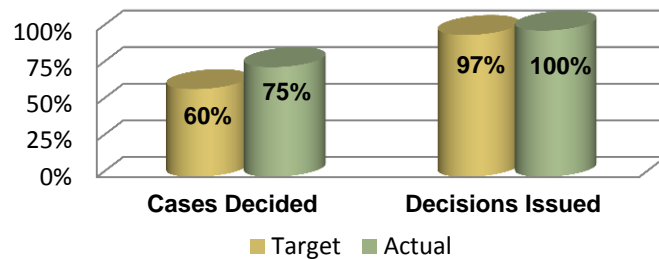
To accommodate this variability, a ‘rainy day’ fund (deferred credit account) was established to capture any dollars remaining at the close of each year. This allows the Board to apply reserved dollars in future years where the cost of service exceeds revenue. Previously, in deficit years the Board would rely on an allocation from the City’s General Fund to balance its budget, and in years with a surplus, the additional dollars would be deposited into the General Fund as a form of reimbursement. The new ‘rainy day’ fund acknowledges the inherent fluctuation in the Board’s revenue streams; it allows the Board to be self-sufficient and to avoid relying on General Fund dollars in lean revenue years.

## 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 60% target was set for this measure. In fact, the Board decided 75% 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 seeking 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.

**Performance Measures: Target v. Actual**



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.

## BOARD STAFF

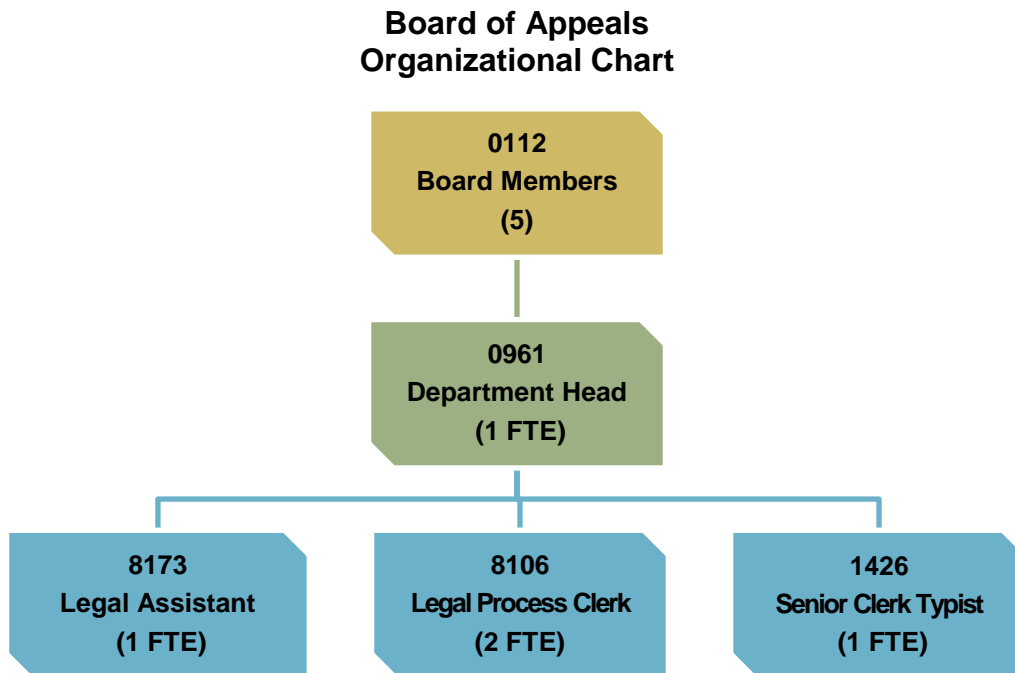
The work of the Board is supported by an Executive Director, Legal Assistant, two Legal Process Clerks and a Senior Clerk Typist. Staff is responsible for managing many facets of the appeal process, including the intake of new appeals, providing staff support at Board meetings, and preparing the Board’s Notices of Decision which articulate the final determination made by the Board members at hearing.

Staff members manage the large amount of paperwork submitted to the Board by the parties to appeals and by interested members of the public, ensuring that these documents comply with the Board’s Rules and that each Board member is given the

materials needed to decide the matters presented at each meeting. In July 2014, staff also began posting meeting materials on the Board’s website in order to make them more accessible to the public.

In the current year, the clerks at the Board finished a multi-year effort to electronically scan the thousands of Board of Appeals decisions released since the Board’s inception in 1932. This information has been shared with the Planning Department for inclusion in the City’s on-line Property Information Map.<sup>18</sup> Now, when research is performed on a piece of property, any Board decision affecting that property will be readily available to the public.

Depicted below is the Board’s current organization structure.



<sup>18</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 OVERVIEW

### *Board Jurisdiction & Types of Appeals*

Most of the appeals heard by the Board are filed pursuant to the authority given to the Board in the San Francisco Charter. Charter Section 4.106(b) reads:

The Board shall 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....”

Excluded from the Board’s Charter authority are appeals of building and demolition permits for projects that have been granted a conditional use authorization by the Planning Commission<sup>19</sup> and determinations made by the Recreation and Park Commission or Department, or by the Port Commission.<sup>20</sup>

In addition to appeals heard by the Board pursuant to the City Charter, there are other City laws that give the Board the authority to hear specific types of appeals. For example, the Planning Code authorizes the Board to hear appeals of certain Planning Commission determinations, such as Large Project Authorizations under Section 329, exceptions to the Planning Code granted under Section 309, and decisions about office developments under Section 322. Other examples of Code-authorized appeals include certain Certificates of Appropriateness issued by the Historic Preservation Commission, as well as some disputes over Project Development Fees assessed by the Department of Building Inspection.<sup>21</sup>

The authority to hear appeals not otherwise under the Board’s jurisdiction may be delegated to the Board through a memorandum of understanding (MOU) entered into with another City department or entity. This year, the Port Commission and Board entered into an MOU for the purpose of transferring to the Board the Port Commission’s decision-making authority over appeals of Port-related entertainment permits.

Most appeals are heard by the Board *de novo*, without giving deference to the legal conclusions or assumptions made by the underlying decision-maker such as a departmental hearing officer or Commission. The Charter specifies, however, that in order to overturn a decision of the Zoning Administrator, the Board must find either an error in the Zoning Administrator’s interpretation of the Planning Code or an abuse of discretion. This ‘error or abuse of discretion’ standard is also applied to the Board’s review of some Planning Commission decisions, where required by Code.

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 have been reviewed by the Planning Department or result from discretionary review decisions of the Planning Commission

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<sup>19</sup> Appeals of the underlying conditional use authorization may be made to the Board of Supervisors.

<sup>20</sup> San Francisco Charter §4.106(b).

<sup>21</sup> Planning Code §1006.7 and Building Code §107A.13.9.2, respectively.

- Actions by the Zoning Administrator (ZA), such as variance decisions, Letters of Determination, Suspension Requests and Notices of Violation and Penalty
- Excavation permits issued or denied by the Department of Public Works (DPW) for the placement of surface mounted facilities in the public right-of-way
- Tree planting and tree removal permits issued or denied by DPW
- Suspensions of tobacco sales permits issued by the Department of Public Health (DPH)

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

- Planning Commission determinations dealing with large downtown developments
- The suspension or revocation of DPH-issued permits for restaurants and massage establishments
- Appeals protesting the issuance by DPH of Medical Cannabis Dispensary permits
- Mobile food facility permits issued by DPW
- Wireless site permits issued by DPW for the installation of cellular telephone transmission equipment in the public right-of-way
- 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, often appealed in conjunction with related building permits

### ***Appeal Process***

The San Francisco Business and Tax Regulations Code<sup>22</sup> sets out many of the parameters of how appeals are handled by the Board. This includes the cost to file an appeal, the Board's obligation to notify various parties and neighbors when an appeal is filed, when determinations that have been appealed should be suspended pending the outcome of the Board process, and other procedural matters. The Rules of the Board of Appeals provide additional requirements for the appeal process. This includes guidelines on how parties and members of the public may communicate with members of the Board in order to ensure the appeal process is fair to all involved.

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>23</sup>

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

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<sup>22</sup> Article 1, §8, *et seq.*

<sup>23</sup> Rules of the Board of Appeals, Article V, §10.



establishing deadlines for these submittals and are advised of the Board's requirements on length and formatting.<sup>24</sup> Members of the public who are not affiliated with a party to the appeal 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>25</sup>

After reviewing the written file, Board members conduct a public hearing 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 grant or deny the appeal. When an appeal is granted, the underlying departmental determination is either completely overruled or conditioned in some way. A denied appeal upholds the underlying departmental determination.

The types of conditions that may be imposed by the Board are wide-ranging. Most typically, they include:

- Modifications to building plans, for example:
  - Adding a privacy screen such as lattice or plantings to a new deck to limit sightlines into neighboring windows
  - Setting back a portion of an addition, deck 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
- Changing the length of the suspension imposed on a tobacco sales permit or massage establishment permit, 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 mitigate competition to neighboring restaurants
- Modifying the financial penalties imposed for construction work performed without a permit
- Altering the number or size of replacement trees when allowing trees to be removed

In addition, the Board may adopt revised construction plans or other permit modifications that have been agreed to by the parties as part of a private settlement.

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.

The Charter<sup>26</sup> requires the vote of a supermajority of Board members in order for an appeal to be granted and the underlying department decision to be overruled or

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<sup>24</sup> Rules of the Board of Appeals, Article V, §4.

<sup>25</sup> San Francisco Business and Tax Regulations Code Article 1, §12.

<sup>26</sup> See San Francisco Charter §4.106(d).

conditioned.<sup>27</sup> When fully seated, this means four out of five votes are required. When there is a vacancy on the Board, three votes are needed for this purpose. A supermajority of votes is also needed in order for the Board to grant a rehearing request or a request to file a late appeal (jurisdiction request).

## **APPENDIX B – 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**

Thirty-nine of the 138 appeals heard by the Board during the year stemmed from determinations made by the Department of Building Inspection (DBI) that also involved Planning Department review. These appeals constitute 28% of the appeals heard and focused on both Planning Code and Building Code issues.

- Thirty-eight appeals protesting the issuance of a building or demolition permit:
  - Protest appeals are typically filed by neighbors or community groups concerned that proposed construction will negatively impact their property or neighborhood. Appeals often focus on how a home expansion or new deck may create sightlines into a neighbor's windows, restrict access to light and air, or obstruct the mid-block open space. Demolition permits often are appealed in conjunction with building permits but sometimes such appeals stand alone. In those cases, the allegations often focus on how the demolition work may be disruptive or dangerous to neighbors or that it will destabilize the foundation of a neighboring building.
- One appeal of a denied building permit:
  - 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. Permit 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 Guidelines.<sup>28</sup>

The Board denied 51% (20) of these appeals and granted 41% (16), placing conditions on the underlying permits in 15 of the appeals granted. The remaining 8% (three cases) were pending at the close of the year.

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

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

- Fourteen appeals protesting the issuance of a building or demolition permit.

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<sup>27</sup> Some Planning Commission determinations may be modified or overturned based on the vote of a simple majority.

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

- Four 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 denied 39% (7) of these appeals and granted 39% (7), imposing conditions in six of the appeals granted, including all of the penalty-related matters. The remaining 22% (four cases) were either pending (3) at the close of the year or withdrawn (1).

### **Zoning Administrator**

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

- Four appeals protesting variance decisions: three protesting the granting of a variance and one appealing the denial of a variance.
- Two 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 piece of property. For example, an LOD may address whether alcohol may be sold by a store in a particular zoning district, whether a previously granted entitlement has expired, or what the legal dwelling unit count is for a particular parcel.
- Three appeals of ZA actions on the viability of a permit: one of a Request for Revocation, one of a Request for Suspension, and one of a Release of Suspension.

The Board denied 67% (6) of the appeals of Zoning Administrator determinations, and granted 22% (2), imposing conditions in one case. The remaining case (11%) was pending at the close of the year.

### **Department of Public Works**

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

- Thirty-eight were of utility excavation permits sought by AT&T. Thirty-five of these were filed by AT&T challenging DPW's denial of a permit. The remaining three were protest appeals filed by residents objecting to the granting of a permit to AT&T.
- Nine appeals were of tree removal permits. Five of these protested the issuance of a permit to remove trees and four protested the denial of such permits.
- Four appeals were of mobile food facility permits, one of which protested the issuance of a permit, two appealed permit denials and one appealed conditions placed on a permit.
- Three appeals were filed by AT&T protesting the denial of Surface Mounted Facility permits but the Board rejected these appeals based on a lack of subject matter jurisdiction. Under the law at the time, permits for surface mounted

facilities were not appealable to the Board. The correct vehicle for appeal was the related excavation permit.

- Two appeals of minor side encroachment permits.
- Two temporary street space occupancy permits were appealed.
- Two appeals dealing with the establishment of a parklet.
- One appeal of a wireless site permit.

The Board denied 77% (47) of the DPW-related appeals and granted 10% (6), imposing conditions in all but one of the appeals granted. Four of the remaining cases were pending at the close of the fiscal year and as noted above, four were rejected.

### **Planning Commission**

There were four appeals of Planning Commission decisions. Two protesting a large project authorization granted under Planning Code Section 329 for a development in the Eastern Neighborhoods plan area; one protesting the allocation of office space under Code Section 309; and one protesting exceptions granted to a downtown development under Code Sections 320-325, including exceptions dealing with shadows. The Board denied all of these appeals.

### **Department of Public Health**

Two appeals were filed on determinations made by the Department of Public Health (DPH), both dealing with massage permits. One was an appeal of the revocation of a massage establishment permit, which the Board denied; the other was an appeal of the suspension of a massage practitioner permit, which the Board granted.

### **Entertainment Commission**

The Board heard two appeals of permits issued by the Entertainment Commission: one protesting a Place of Entertainment permit and the other a Limited Live Entertainment permit. Both appeals were filed by residential neighbors of restaurants that were seeking permits to add musical entertainment. The Board denied both appeals, upholding the determination of the Entertainment Commission in both cases.

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

The Board heard three appeals stemming from SFMTA actions: two taxi-related appeals dealing with the revocation of taxi medallions and a third appeal protesting a Special Traffic Permit that would be used to close a street to allow tree removal to take place in the Park Merced area. The Board denied these appeals, upholding the SFMTA determination in all three cases.

## APPENDIX C – 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**

**UPHELD.** 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 an earlier permit for this location in April 2011. In October 2013, the Court upheld the Board's decision, ruling that the Board did not abuse its discretion in finding that Crown Castle's permit failed to satisfy the "Planning Protected Location Compatibility Standard" and "Zoning Protected Location Compatibility Standard" under Article 25 of the San Francisco Public Works Code. However, due to the outcome of a related case (see *NextG Networks*, below) the facility is allowed to remain at the site based on the Court upholding the earlier permit. No appeal was filed from the Superior Court's decision and this matter is now final.

### **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 a 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.**

**UPHELD.** This case challenged, among other matters, the Board's March 2011 decision against taking jurisdiction over three permits for a renovation project that were given Conditional Use Authorization by the Planning Commission. The City prevailed at the trial court level and again on appeal. Final judgment was entered in April 2014.

**Sharon Hassan v. City & County of San Francisco, et al.**

**NEW.** The owner of a coffee cart filed a lawsuit after the Board decided on October 23, 2013 to uphold a DPW decision to deny the renewal of her Mobile Food Facility permit. The cart had been permitted to operate in the Fisherman's Wharf area and the renewal was denied on the grounds that the permit holder failed to demonstrate she had been operating her cart during the pendency of permit. The matter has yet to be briefed or heard.

**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.**

**SETTLED.** 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. In December 2013, Mr. Nale filed a second lawsuit in federal court alleging violations of the Americans with Disabilities Act. Both suits have been dismissed as a result of settlement.

**Neighbors for Preservation and Progress, et al v. San Francisco Board of Appeals et al.**

**NEW.** A lawsuit was filed in July 2014, challenging the Board's decision on an appeal of a permit for the construction of a five story 12-unit residential building with a ground floor commercial use at 1050 Valencia Street. The suit was filed by a group of neighbors dissatisfied with the Board's February 26, 2014 decision to reduce the size of the project, but not to the degree desired by the plaintiffs. Briefing and a hearing on the merits have yet to be scheduled.

**NextG Networks of California, Inc. (aka Crown Castle) v. City & County of San Francisco, et al.**

**OVERRULED.** This case challenges the Board's decision on April 20, 2011 to deny a wireless site permit that had been issued by the Department of Public Works for a facility on 27<sup>th</sup> Avenue. Before the appeal was filed, the Board granted late jurisdiction to the appellant on the basis that no notice of the permit had been given to the neighboring property owners and occupants. In April 2014 the Superior Court ruled that the Board didn't have jurisdiction to accept a late-filed appeal because the lateness was not a result of the City's intentional or inadvertent acts. Under the Code in effect at the time, no notice was required for the issuance of the wireless site permit. The City did not appeal the Court's ruling and this case is now final.

**Pacific Bell Telephone Company v. City of San Francisco et al.**

**NEW.** In May 2014, AT&T California (dba Pacific Bell) filed a lawsuit challenging the Board's decisions to uphold the Department of Public Works' denials of excavation permits for the placement of utility boxes in the public right-of-way in various locations throughout the City. The suit also challenges a Board decision to overturn DPW's grant of an excavation permit on Prague Street. Some of these appeals were decided by the Board after new permitting legislation took effect and the Board found the permit

applications failed to meet the requirements of the new law. The matter has yet to be briefed or heard.

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

**PENDING.** 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. Since the lawsuit was filed, the property was sold and the new owner has indicated no intent to develop the parcel as an "Internet Services Exchange." A stay of action is being negotiated with an expectation that the matter will become moot.

**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. The Superior Court dismissed the writ petition in December 2013 and an appeal has been filed. Briefing for the appeal should be complete by mid-October 2014; a hearing not yet been scheduled.

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

**PENDING.** This case challenges the City's decision to approve the 706 Mission Street – Mexican Museum Project to construct a high rise residential building in the Yerba Buena Neighborhood. Among the claims is a challenge to a Board decision 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. Also challenged is 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 won a motion to bring the suit to San Francisco. A hearing on the merits is scheduled for October 2014.

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

**PENDING.** 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.**

**UPHELD.** 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 in March 2014 this judgment was affirmed on appeal. The California Supreme Court denied further review.