

# SAN FRANCISCO BOARD OF APPEALS ANNUAL REPORT FY21



# MISSION

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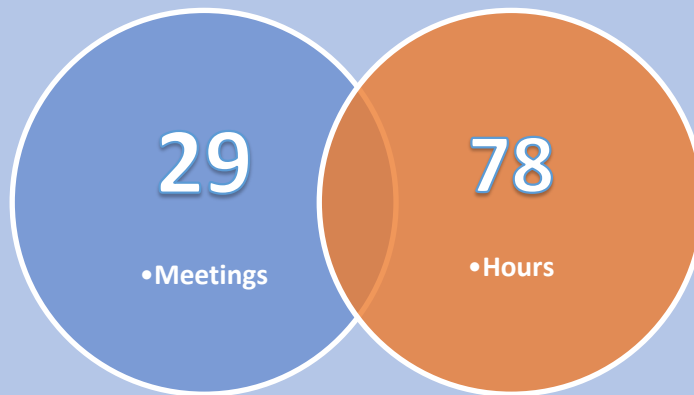
***To provide an efficient, fair and expeditious public hearing and decision-making process before an impartial panel.***

- Created in 1932 under the San Francisco Charter.
- Quasi-judicial body.
- Provides the final administrative review for a wide range of City determinations.
- Appeals may be taken on decisions to grant, deny, suspend, revoke or modify permits, licenses, and other use entitlements issued by most of the departments, Commissions and other entities of the City and County of San Francisco.



# BOARD MEETINGS

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- Open to the public and broadcast on the City’s government television channel and on the Board’s website.<sup>1</sup>
- Held on most Wednesdays starting at 5:00 p.m. In FY21, all hearings were conducted via the Zoom video platform due to the City’s Health Orders related to COVID-19 which prohibited in-person Board meetings.
- Conducted in accordance with the Rules of the Board of Appeals.
- Closed-captioned on TV.

Meeting agendas, minutes, and appellants’ and respondents’ briefs and other materials associated with the cases heard are posted on the Board’s website.<sup>2</sup>

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<sup>1</sup>SFGovTV: [http://sanfrancisco.granicus.com/ViewPublisher.php?view\\_id=6](http://sanfrancisco.granicus.com/ViewPublisher.php?view_id=6)

<sup>2</sup>[www.sfgov.org/boa](http://www.sfgov.org/boa)

# BOARD MEMBERSHIP

The five-member Board is comprised of three members appointed by the Mayor and two by the President of the Board of Supervisors. All appointments are to staggered, four-year terms and require approval by the Board of Supervisors.

<b>Commissioner</b>	<b>Appointing Authority</b>	<b>Appointment Date</b>	<b>Term Expires</b>
<i>President Darryl Honda</i>	Board of Supervisors	December 4, 2012	July 1, 2024 <sup>3</sup>
<i>Vice President Rick Swig</i>	Mayor	April 2, 2015	July 1, 2024 <sup>4</sup>
<i>Ann Lazarus</i>	Mayor	July 25, 2012	July 1, 2022
<i>Tina Chang</i>	Board of Supervisors	December 11, 2021	July 1, 2022 <sup>5</sup>
<i>Eduardo Santacana</i> <sup>6</sup> (resigned April 14, 2021)	Mayor	July 31, 2019	
<i>Rachael Tanner</i> (resigned October 29, 2020)	Board of Supervisors	October 30, 2018	



(L to R) Commissioner Ann Lazarus, Commissioner Darryl Honda, Commissioner Rachael Tanner, Commissioner Rick Swig, Commissioner Eduardo Santacana and Commissioner Tina Chang

<sup>3</sup> For FY13-FY20, President Honda was an appointee of the Mayor. For FY21, he was an appointee of the President of the Board of Supervisors (Norman Yee).

<sup>4</sup> For FY16-FY20, Vice President Swig was an appointee of the President of the Board of Supervisors. For FY21, he was an appointee of the Mayor (London Breed).

<sup>5</sup> Commissioner Chang was appointed by the President of the Board of Supervisors (Norman Yee) on December 11, 2020 to complete the term of former Commissioner Rachael Tanner who resigned on October 29, 2020. Ms. Tanner resigned because she was appointed by Mayor Breed to the Planning Commission.

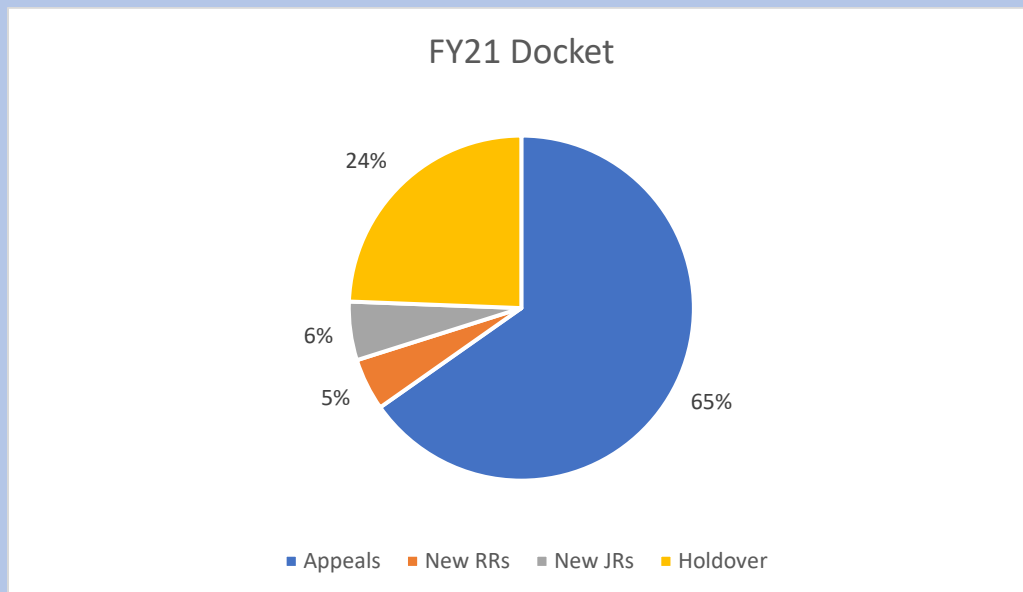
<sup>6</sup> Commissioner Santacana was initially appointed to complete former President Frank Fung's term which expired on July 1, 2020. For FY21, Commissioner Santacana was reappointed by Mayor London Breed for a term ending July 1, 2024.

# APPEAL EXPERIENCE

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**164** matters were on the Board's docket during the year:

- New matters filed:
  - 107 appeals.
  - 8 rehearing requests (RRs).
  - 9 jurisdiction requests (JRs).
- 40 pending or continued matters carried forward from prior years.

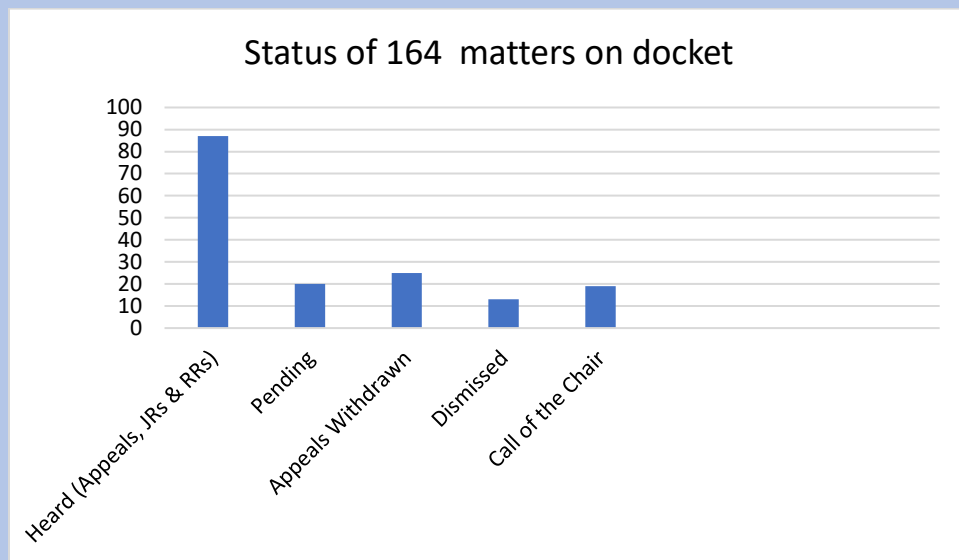


**87** matters were decided by the Board:

- 72 appeals.
- 8 rehearing requests.
- 7 jurisdiction requests.

**77** matters were not heard:

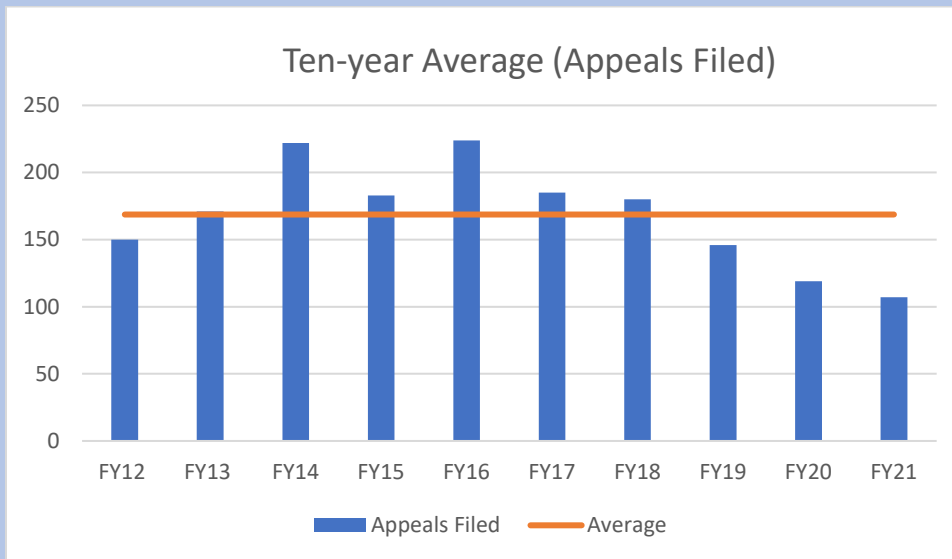
- 20 pending appeals.
- 25 appeals withdrawn.
- 19 appeals remained or were placed on Call of the Chair.
- 13 appeals were dismissed (the appeal was moot because a permit was canceled or a suspension was released).



# Appeal Volume

**107** new appeals

**Below** the ten-year average of 169 appeals per fiscal year.



10-year average = 169 appeals

Changes in appeal volume from year to year can be attributed to a variety of causes, such as fluctuations in the health of the City's economy, new permitting legislation or business trends that trigger a spike or drop in a particular type of appeal. In FY21, the restrictions set forth by the various Health Orders related to COVID-19 were still in place. Vaccines for COVID-19 started to be administered in Q3 and became widely available in Q4. This may have resulted in an increased number of appeals filed in Q4.

Q1: 25 appeals filed

Q2: 22 appeals filed

Q3: 26 appeals filed

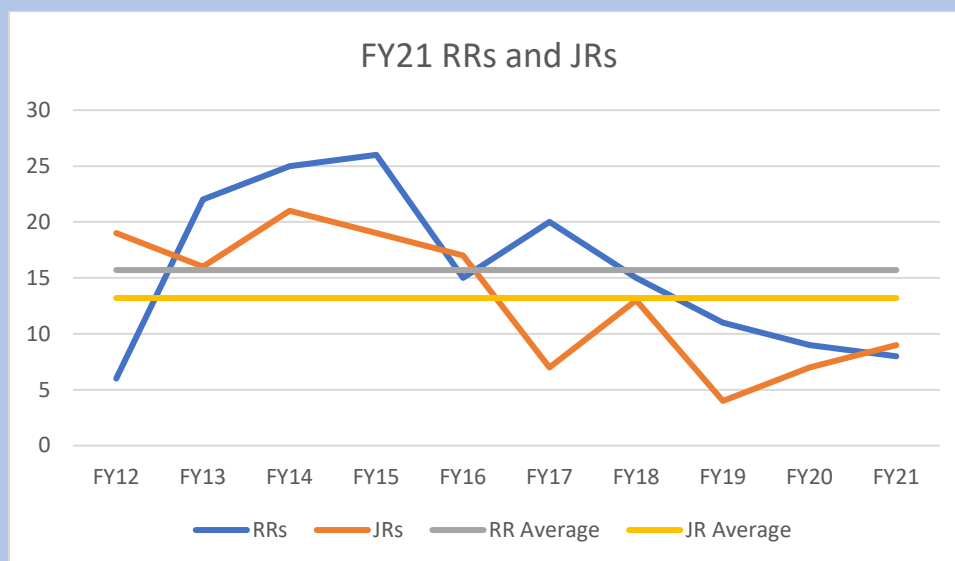
Q4: 34 appeals filed

# Rehearing & Jurisdiction Requests Volume

Rehearing Requests (RRs) ask the Board for a new hearing to reconsider a hearing decision. The Board may grant a Rehearing Request only upon a showing that there is new evidence that could have affected the outcome of the original hearing or to prevent manifest injustice.

Jurisdiction Requests (JRs) ask the Board to allow an appeal to be filed late on the basis that the City intentionally or inadvertently caused the requestor to be late in filing an appeal.

**8** new Rehearing Requests   **9** new Jurisdiction Requests



The volume of rehearing requests and jurisdiction requests has remained relatively low each year.

- The ten-year average for rehearing requests: **16**
- The ten-year average for jurisdiction requests: **13**

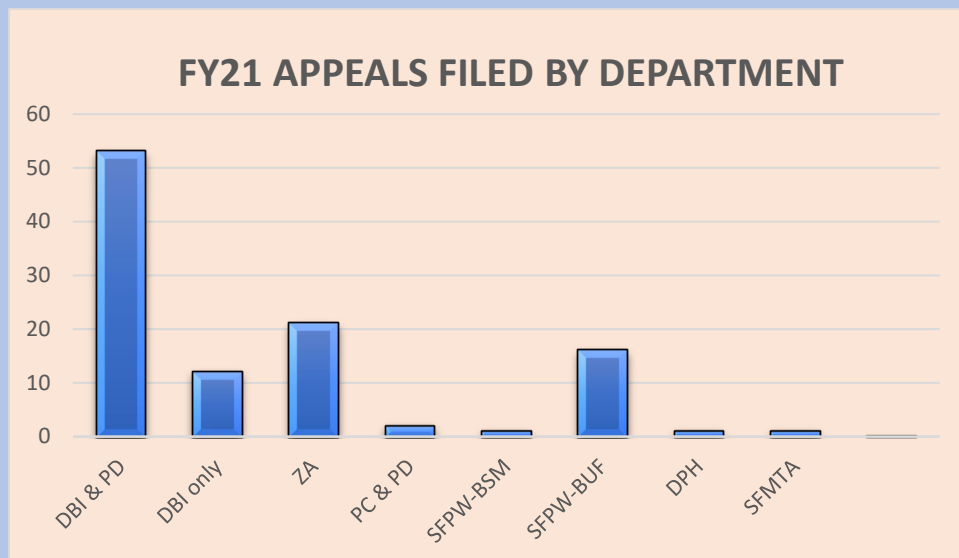


# Subject Matter

82% of appeals filed were of land-use decisions made by the Department of Building Inspection (DBI), the Planning Department (PD) the Planning Commission (PC) and the Zoning Administrator (ZA).

Other permit appeals came from:

- San Francisco Public Works, Bureau of Urban Forestry (SFPW-BUF): 15%
- San Francisco Public Works, Bureau of Street Use & Mapping (SFPW-BSM): 1%
- Department of Public Health (DPH): 1%
- San Francisco Municipal Transportation Agency (SFMTA): 1%





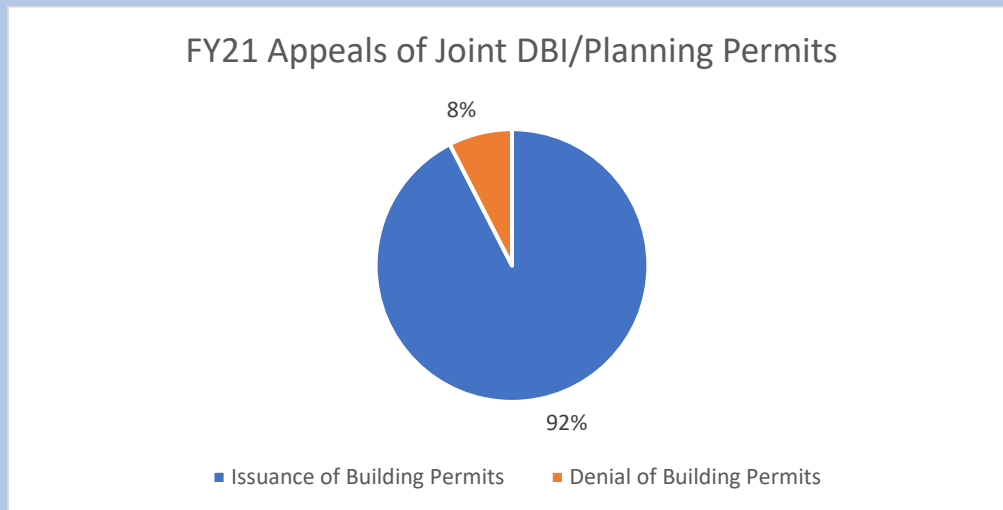
## Typical land use cases involve:

- Building Permits (site and alteration permits)
- Accessory Dwelling Units
- Zoning Administrator Decisions:
  - Variances
  - Letters of Determination regarding permitted uses
  - Notices of Violations and Penalties
  - Requests for Suspension of Building Permits
- Planning Commission Actions



**53** appeals filed were of decisions made jointly by DBI and the Planning Department:

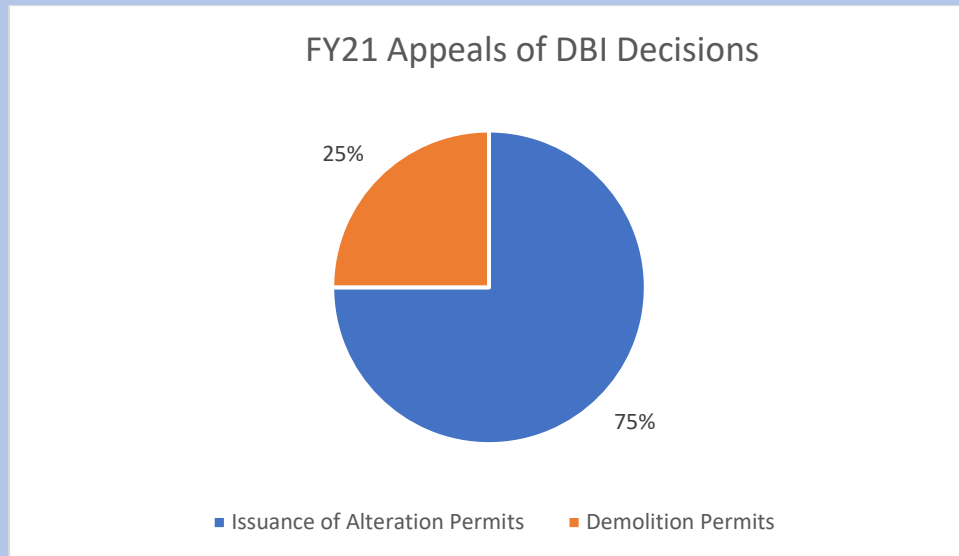
- 49 appeals protested the issuance of building permits (including 3 demolition permits); these appeals are typically filed by individuals or groups of neighbors concerned that proposed construction will negatively impact their property or neighborhood.
- 4 appeals protested the disapproval of building permits.



Joseph Duffy, Deputy Director, DBI

12 appeals filed were of decisions made solely by DBI:

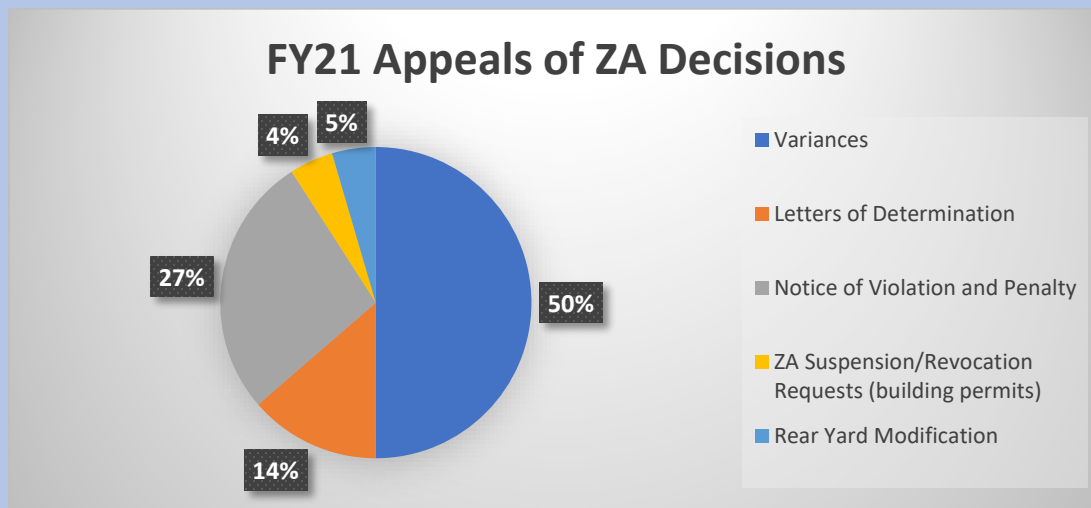
- 9 appeals protested the issuance of alteration permits.
- 3 appeals protested the issuance of demolition permits.



22 appeals filed were of decisions by the Zoning Administrator:

- 11 appeals protested the issuance of Variance Decisions (3 appeals of denied variances and 8 appeals of granted variances).

- 6 appeals protested Notices of Violation and Penalty Decisions.
- 3 appeals protested Letters of Determination.
- 1 appeal protested the ZA's Request to Suspend a building permit.
- 1 appeal protested the issuance of a Rear Yard Modification.



Scott Sanchez, Deputy Zoning Administrator, San Francisco Planning  
Department

1 appeal was of a Planning Commission decision:

- **Planning Commission**
  - 1 Section 328 Home-SF Project Authorizations.





## Types of Cases from San Francisco Public Works (SFPW)

### SFPW Bureau of Urban Forestry: Tree Removal Orders



Chris Buck, Urban Forester, SFPW-BUF

**17** appeals filed were of decisions made by San Francisco Public Works:

- 16 appeals protested the issuance or denial of orders or permits related to tree removal.
- 1 appeal protested the issuance of a Utility Excavation Permit



## SFPW Bureau of Street Use and Mapping:

- Wireless Facility Permits (no appeals in FY21)
- Mobile Food Truck (no appeals in FY21)

## Appeals from Determinations of Other City Departments:

### Department of Public Health

- 1 appeal related to Tobacco Sales Establishment Permits.

### SFMTA

- 1 appeal by the SFMTA of a hearing officer's decision to allow the renewal of a taxi medallion (appeal was ultimately withdrawn).





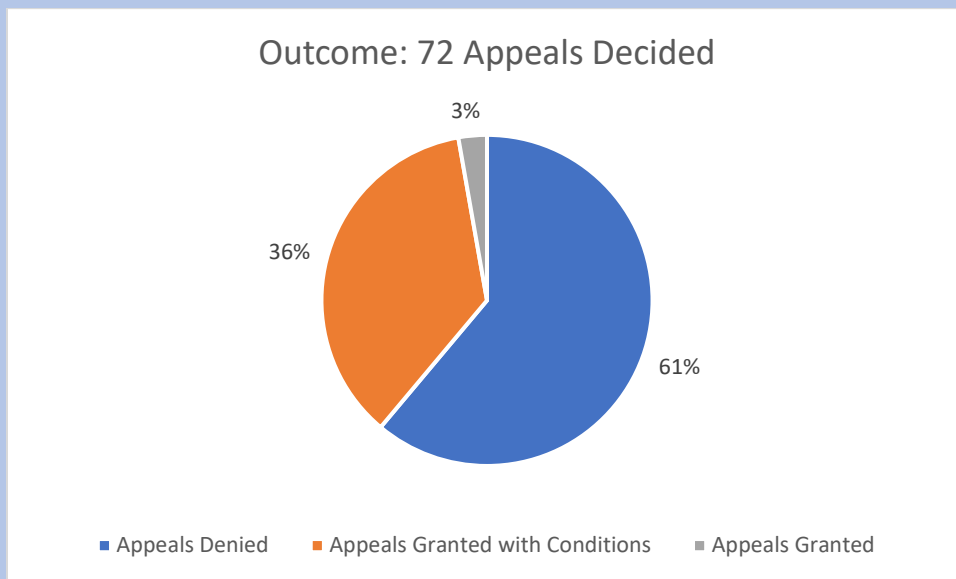
## Outcome: 73 Appeals Decided

Given the supermajority vote required to grant an appeal, the Board typically denies more appeals than it grants.

**44** appeals were denied by vote resulting in the underlying departmental decision being upheld.

**26** appeals were granted with conditions by the Board: The underlying departmental decision was conditioned or modified in some way.

**2** appeals were granted by the Board with the underlying departmental decision completely overturned.



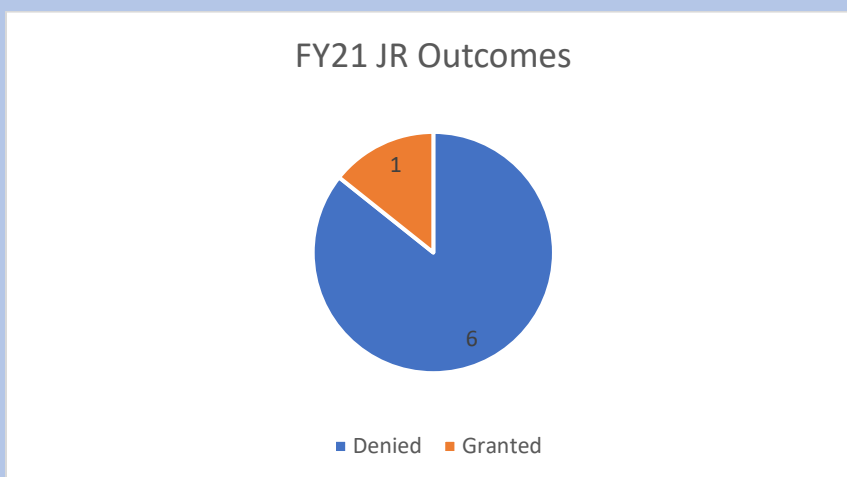
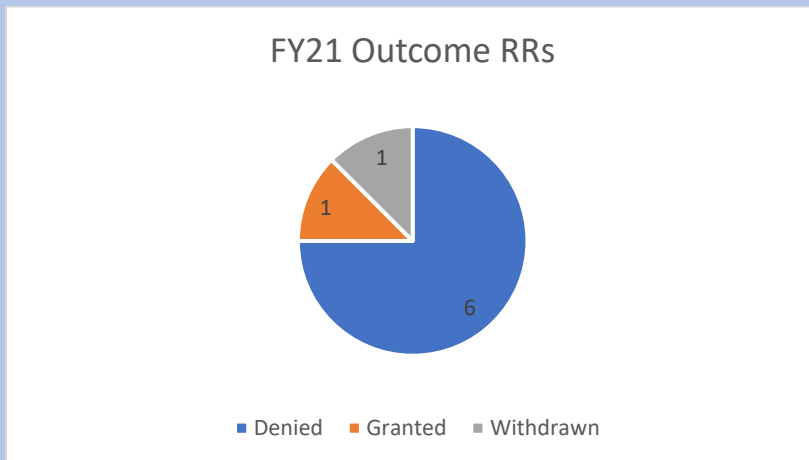
## Outcome: Rehearing & Jurisdiction Requests

8 Rehearing Requests were on the Board's docket in FY21:

- 6 denied.
- 1 granted.
- 1 withdrawn.

7 Jurisdiction Requests were on the Board's docket in FY21

- 6 denied.
- 1 granted.



# Geographic Distribution

The appeals heard by the Board during the year involve properties located in most of San Francisco's neighborhoods. The highest concentration of appeals is seen in the northeast quadrant.

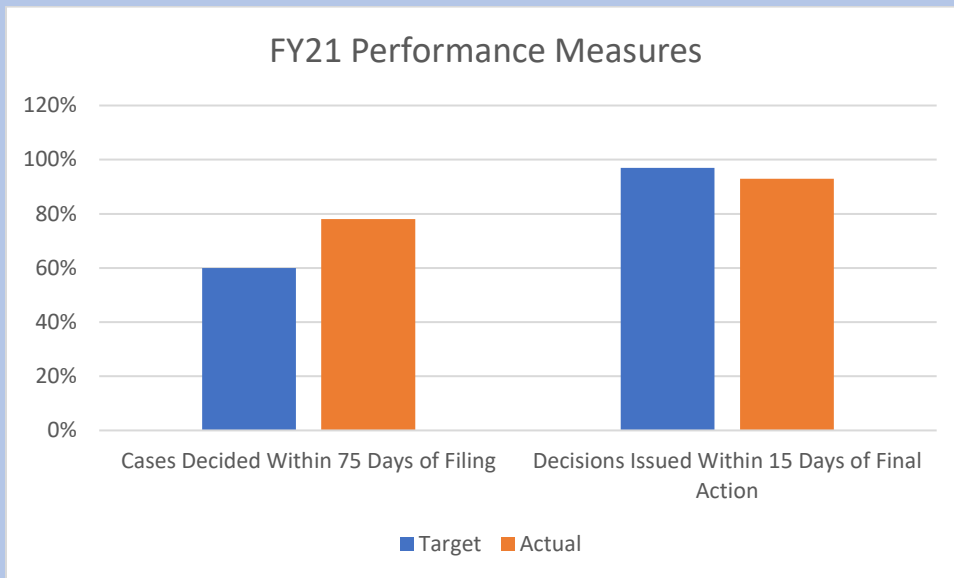


**Geographic Distribution of Appeals Filed in FY21**

## PERFORMANCE MEASURES

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

- Measure One: Percentage of appeals that are decided within 75 days of filing (cases decided in FY21).
  - The Board decided 72 appeals in FY21
  - The FY21 target was to decide 60% of the cases within 75 days of filing.
  - The Board exceeded this target: 78% of the cases (56 cases) were decided within 75 days of the appeal being filed.
  - With respect to the 16 cases that were decided more than 75 days after an appeal was filed:
    - Delays were caused when matters were rescheduled by the parties.
    - Other cases were continued by the Board so that DBI or the Planning Department could conduct site visits and/or work with the parties.
- Measure Two: How often written decisions are issued within 15 days of final Board action.
  - The FY21 target was to issue 97% of the written decisions within 15 days of final action. A total of 69 decisions were issued in FY21.
  - The Board issued 93% of the written decisions within 15 days of final action (64 decisions issued within 15 days of final action)
  - The Board issued 7% of the written decisions more than 15 days after the final action (5 decisions issued more than 15 days after final action).



# BUDGET

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## **FY21 BUDGET**

### **REVENUE OVERVIEW**

The Board has two sources of revenue:

- (1) Surcharges placed on permits which are designed to generate the revenue needed to cover operating expenses (96% of the budget)
  - a. Surcharges are collected on new and renewed permits.
  - b. The rates are based on the percentage of cases originating from each underlying department and anticipated permit application volume. These rates are analyzed annually and adjusted if needed.
- (2) Filing fees which are collected when new appeals are filed (4% of the budget).

### **PROJECTED REVENUE**

\$1,177,452 was the projected revenue budget:

- \$1,131,415 in projected surcharge revenue collected by permit issuing departments on new permit applications.
- \$46,037 in projected filing fee revenue collected by the Board when new appeals are filed.

### **ACTUAL REVENUE**

\$1,045,172 in actual revenue was collected:

- Surcharges: \$979,950.
- Filing fees: \$29,450.
- Federal CARES Act \$35,772

\$132,280 shortfall from *projected revenue*

## **EXPENDITURES OVERVIEW**

### **PROJECTED EXPENDITURES**

\$1,177,452

### **ACTUAL EXPENDITURES**

\$1,008,190 was spent by the Board.

<b>Expenditures</b>		
Operating	Projected Budget	\$1,177,452
	Carried forward Budget from FY20	\$17,431
	Actual Expenditures	\$1,004,480
	Savings	\$190,404
	Carried forward to FY22	\$47,276

Continuing	Carried forward Budget from FY20	\$94,288
	Actual Expenditures	\$3,710
	Savings	\$90,578
	Carried forward to FY22	\$90,578

### Breakdown of Expenditures:

- \$776,004 for salaries and fringe benefits.
- \$201,485 for the services of other City departments, such as the City Attorney, Department of Technology, SFGovTV, and Real Estate (rent).
- \$26,749 for specialized services such as neighborhood notification, data production, interpreters; and office management costs such as, photocopier, telephones, and postage.
- \$3,951 for materials and supplies.

<b>FY21 Budget</b>		
Operating Budget	Total Revenues	\$ 1,045,172
	Total Expenditures	\$1,008,190
	Savings	\$36,982

## Surcharges

- The surcharges imposed on appealable permits are intended to recover costs for the Board's expenses.
- Each Spring the Controller's Office does a surcharge analysis to determine if surcharge amounts need to change.
- For FY22 there will be increases in the surcharge amounts for four departments.



## Surcharges

Department	FY18	FY19	FY20	FY21	F22
Planning	\$18.50	\$18.50	\$19.00	\$20.00	\$22.50
DBI	\$18.50	\$18.50	\$19.00	\$20.00	\$22.50
DPH	\$43.00	\$43.00	\$44.50	\$46.00	\$50.50
SFMTA (TAXI)	\$2.00	\$2.00	\$2.00	\$2.00	\$2.00
SFPW	\$6.50	\$6.50	\$6.50	\$7.00	\$9.00
SFPD	\$6.00	\$6.00	\$6.00	\$6.00	\$6.00
ENT.	\$4.00	\$4.00	\$4.00	\$4.00	\$4.00

## LITIGATION

Parties dissatisfied with a Board determination may seek further review and relief in court. Set forth below is a description of the lawsuits that were filed, pending or resolved during the year, in which the Board is named as a party.

### **Resolved: Frear Schmid v. CCSF**

The Historic Preservation Commission granted a Certificate of Appropriateness finding the Arts Commission's proposal to remove a statue entitled "Early Days" from the Pioneer Monument, located in the Fulton Street right of way between the Main Library and the Asian Art Museum, complied with the Planning Code, the Secretary of Interior's Standards for Rehabilitation, and the General Plan. Petitioner appealed the Certificate of Appropriateness to the Board, and the Board denied the appeal and upheld the Historic Preservation Commission's decision. Petitioner filed suit challenging the City's decision to remove the statue on a variety of grounds, including challenging the Board's decision on the appeal of the Certificate of Appropriateness. The Superior Court sustained the City's demurrer to the complaint, finding that the Board did not act in excess of its jurisdiction nor did it abuse its discretion in affirming the Certificate of Appropriateness. The Superior Court entered judgment against Petitioner, and Petitioner appealed. On April 7, 2021, the Court of Appeal issued a decision affirming the Superior Court's order sustaining the demurrer and dismissing the case. The plaintiff did not seek review in the California Supreme Court.

### **Resolved: Contest Promotions, LLC v. City & County of San Francisco, et al.**

In July 2014, the Board of Supervisors approved a settlement of Contest Promotions' previous lawsuit challenging the constitutionality of Planning Code section 602.3, which defines onsite business signs. The Board of Supervisors then amended section 602.3, which clarified that Contest Promotions' signs in San Francisco do not qualify as business signs, but are prohibited general advertising signs. On January 20, 2016, the Board upheld the Planning Department's denial of 35 sign permit applications. Contest Promotions contends that San Francisco breached the settlement agreement when it amended section 602.3 and when it denied Contest Promotions' sign permit applications. Federal and state courts have dismissed all of Contest Promotions' constitutional claims against the amended section 602.3. On March 26, 2019, the Superior Court granted summary judgment to San Francisco on Contest Promotions'

remaining claims for breach of contract. The parties agreed that San Francisco's compensable attorneys' fees through entry of judgment was \$500,000. Contest Promotions appealed the dismissal of its contract claims, and on April 28, 2021, the Court of Appeal upheld the Superior Court's order granting summary judgment in favor of the City.

**Resolved: Robert E. Gonzales v. San Francisco Board of Appeals**

A lawsuit was filed in Superior Court by an adjacent property owner challenging the Board's August 26, 2015 decision to uphold a permit to erect a building at 333 Pennsylvania Avenue. On January 6, 2016, the Court denied the petitioner's motion for immediate relief, stating it failed to establish that the Planning Code or Residential Design Guidelines were violated. The petitioner made no further effort to pursue this matter, and on April 27, 2021, the Superior Court granted the City's motion to dismiss the case for failure to prosecute.

**Pending: David Donofrio v. City & County of San Francisco, et al.**

A neighbor challenged the approvals of a home expansion project at 11 Gladys Street in Bernal Heights. After filing a writ petition in the Superior Court, the petitioner has taken no further steps to litigate.

**Pending: San Francisco Care Center v. CCSF**

The petitioners in this case allege that the City improperly denied a building permit. In 2000, petitioners entered into a development agreement with the City to build an assisted living facility with 112 units. In 2007, after the project was complete, petitioners made unpermitted improvements to remove several assisted living units and create two master administrator suites. The Department of Building Inspection issued a Notice of Violation in 2017. Petitioners sought a permit to legalize the work. The Planning Commission disapproved the permit, and the Board of Appeals upheld that determination in 2018. The petitioners have requested that the City prepare the administrative record. On February 2, 2019, the City demanded that petitioners provide a deposit for the preparation of the record. Petitioners have not responded.

**Pending: 1049 Market Street, LLC v. City & County of San Francisco, et al.**

Six lawsuits were filed by the owners of a six-story building challenging, among other things, the Board's April 8, 2015 decision to grant an appeal filed by residential tenants protesting the Zoning Administrator's (ZA) Release of Suspension Request on a permit to convert live-work units to commercial space, and the Board's April 5, 2017 decisions related to the revocation of that permit. One case was filed in federal court and the others were filed in state court.

The state cases assert claims under CEQA, a vested rights theory and several constitutional claims. The federal case focuses on federal constitutional claims. Because the state and federal suits challenge the same conduct and seek the same damages, the federal court agreed to have the state court resolve the issues of local land use law before it determines whether any federal constitutional issues remain. On this basis, the federal lawsuit has been stayed pending the outcome in state court.

In April 2016, the City won the first of the five state court cases on all issues except the jurisdictional issue relating to whether the Board had properly considered the validity of the permit. The court remanded the matter to the Board for reconsideration of whether the ZA erred or abused his discretion in determining that the property's principally permitted use as an office had not been abandoned, but left the Board the option to apply recently adopted legislation requiring a Conditional Use Authorization. The City has since prevailed in the appeal of this case, and that ruling is now final.

Another of the state court cases, which challenges on CEQA grounds the permanent zoning controls adopted by the Board of Supervisors, is before the Court of Appeal but has not yet briefed. In August 2017, another of the state court cases was rejected based on the petitioner's failure to timely serve. The two most recently filed cases, stemming from the Board's 2017 decisions, are still before the trial court.

The parties have reached a settlement and the execution of the settlement is ongoing.

**New: 1900 Bryant Street Investors, LLC, v. City and County of San Francisco, et al.**

The property owner in this matter sought a Letter of Determination from the Zoning Administrator concerning whether space at 535 Florida Street could be converted to a cafeteria for employees of a laboratory at a neighboring property, and whether this change of use would be subject to Planning Code Section 202.8 (Prop X, 2016). Section 202.8 requires that in the zoning district where 535 Florida Street is

located any project proposing to convert more than 5,000 square feet of production, distribution, and repair (PDR) space into a new use to include replacement PDR space at a ratio of .75 square feet for every 1 square foot removed. The Zoning Administrator reviewed the permit history for the existing catering and retail use at the property and determined that the project proposed converting more than 5,000 square feet of PDR space to a new use despite some accessory office space at the property, and thus Section 202.8 of the Planning Code applied to the proposed employee cafeteria project. The Board upheld the ZA's determination on February 17, 2021, finding the ZA did not err or abuse his discretion in the Letter of Determination. The property owner filed a writ in the Superior Court on May 18, 2021, alleging that the Board abused its discretion in upholding the ZA's Letter of Determination.