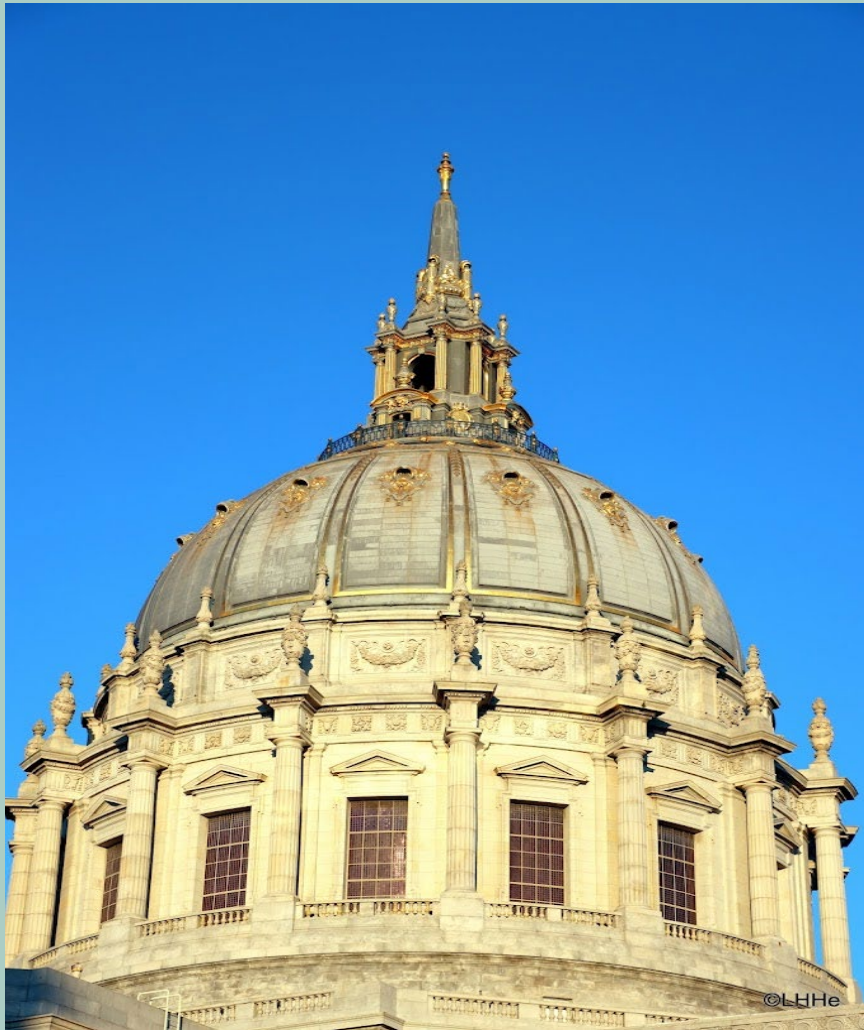


# SAN FRANCISCO BOARD OF APPEALS ANNUAL REPORT FY23



# 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. Participants can attend in-person at City Hall or remotely via Zoom.
- 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)

## Comparison to Previous Years

Fiscal Year	Number of Meetings	Total Hours
FY 23	29	90
FY 22	29	84
FY 21	29	78
FY 20	25	96
FY 19	30	89
FY 18	29	105
FY 17	31	80

From FY17 through FY23, the Board had an average of 29 meetings per year and spent an average of 89 hours per year conducting hearings.

# BOARD MEMBERSHIP IN FY23

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.

<i>Commissioner</i>	<i>Appointing Authority</i>	<i>Appointment Date</i>	<i>Term Expires</i>
<i>Rick Swig</i>	Mayor	April 2, 2015	July 1, 2024 <sup>3</sup>
<i>Jose Lopez</i>	Mayor	July 27, 2021	July 1, 2024 <sup>4</sup>
<i>John Trasviña</i>	Mayor	July 26, 2022	July 1, 2026
<i>Alex Lemberg</i>	Board of Supervisors	July 12, 2022 <sup>5</sup>	July 1, 2024
<i>J.R. Eppler</i>	Board of Supervisors	September 27, 2022	July 1, 2026



From Left to Right: Rick Swig, Jose Lopez, John Trasviña, Alex Lemberg and J.R. Eppler

<sup>3</sup> For FY16-FY20, Commissioner Swig was an appointee of the President of the Board of Supervisors. For FY21, he was an appointee of the Mayor (London Breed).

<sup>4</sup> Commissioner Lopez was appointed to complete the term of former Commissioner Santacana, who resigned on April 14, 2021.

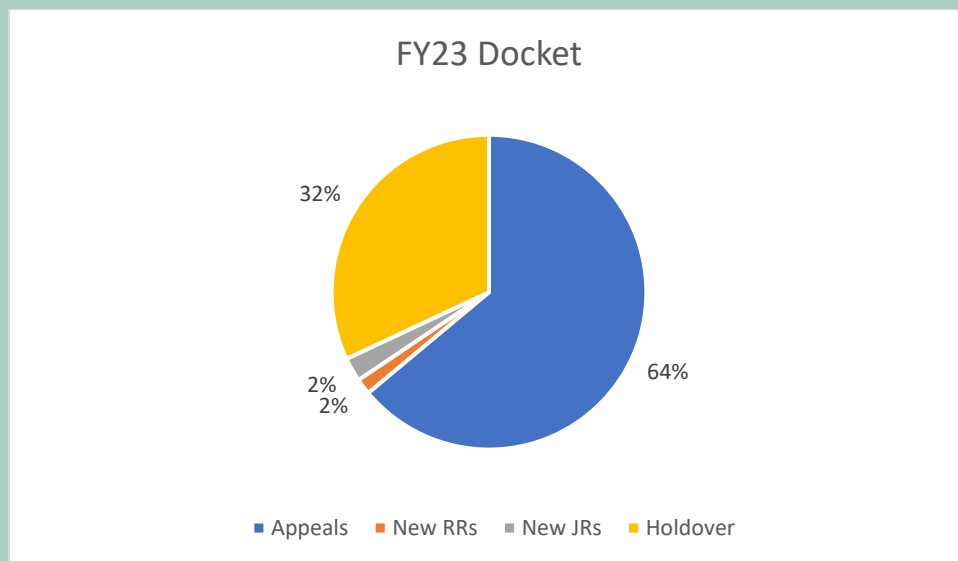
<sup>5</sup> Commissioner Lemberg was appointed to fill the remainder of the unexpired term of Commissioner Honda, who resigned from the Board on May 6, 2022.

# APPEAL EXPERIENCE

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

- New matters filed:
  - 78 appeals.
  - 2 rehearing requests (RRs).
  - 3 jurisdiction requests (JRs).
- 39 pending or continued matters carried forward from prior years.

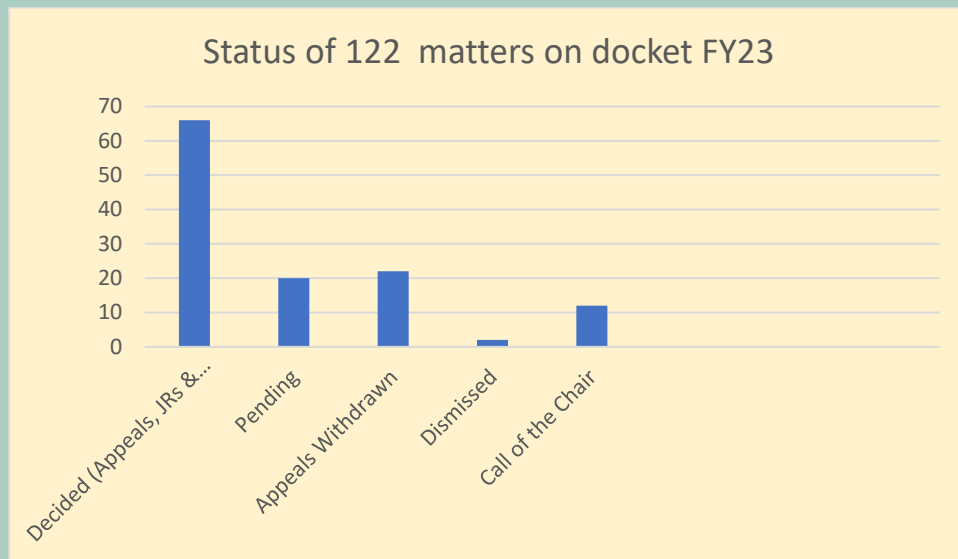


## 66 matters were decided by the Board:

- 61 appeals.
- 2 rehearing requests.
- 3 jurisdiction requests.

## 56 matters were not heard:

- 20 pending appeals<sup>6</sup>.
- 22 appeals withdrawn.
- 12 appeals remained or were placed on Call of the Chair (these appeals did not have a scheduled hearing date).
- 2 appeals were dismissed (the appeal was moot because a permit was canceled, or a suspension was released).

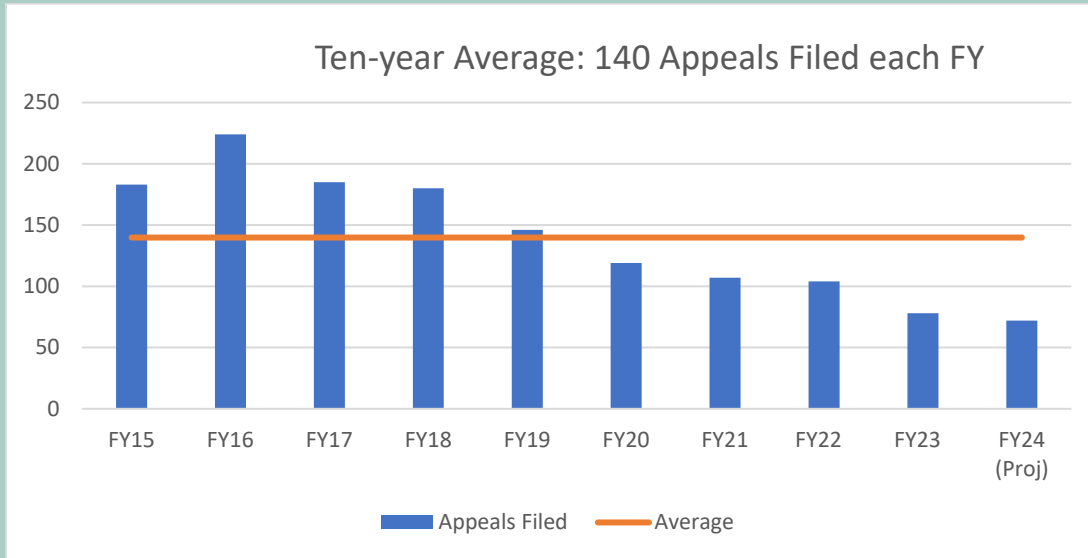


<sup>6</sup> Pending appeals for the purpose of this report are those that had scheduled hearing dates and were decided/resolved in FY24. The pending appeals do not include cases that are on the Call of the Chair.

# Appeal Volume

**78** new appeals

**Below** the ten-year average of 140 appeals filed per fiscal year.



Appeal volume is generally related to the volume of permit issuance. Since FY19, building permit issuance is down approximately 43%<sup>7</sup> and Planning Department decisions are down approximately 54%.

Changes in appeal volume from year to year can also be attributed to other 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.

For example, the lower volume in wireless box permit appeals (relative to previous fiscal years) can be attributed to the legislative changes to Article 25 of the San Francisco Public Works Code. Article 25 sets forth the local regulations governing wireless facility permits. On June 30, 2019, in Ordinance No. 19-019, the Board of Supervisors amended Article 25 and made significant changes (effective September 9, 2019): Carriers are no longer required to get a permit from Public

<sup>7</sup> In FY19, 36,888 building permits were issued. In FY23, 21,097 building permits were issued. [Note, these numbers do not include plumbing or electrical permits].



Works to install wireless facilities on SFPUC and SFMTA poles. The use of these poles will be through a license which is not appealable to the Board of Appeals. Public Works will only issue permits for facilities on PG&E poles. Appeals of these permits must be made directly to the Board of Appeals as Public Works is no longer required to hold a public hearing for these wireless permits.

Fiscal Year	Number of wireless permit appeals	Total number of all appeals filed	% of appeals of wireless permits
FY23	2	78	3%
FY22	9	104	9%
FY21	0	107	0%
FY20	6	119	5%
FY19	25	146	17%
FY18	26	180	14%

#### Volume of Appeals, RRs & JRs by Fiscal Year

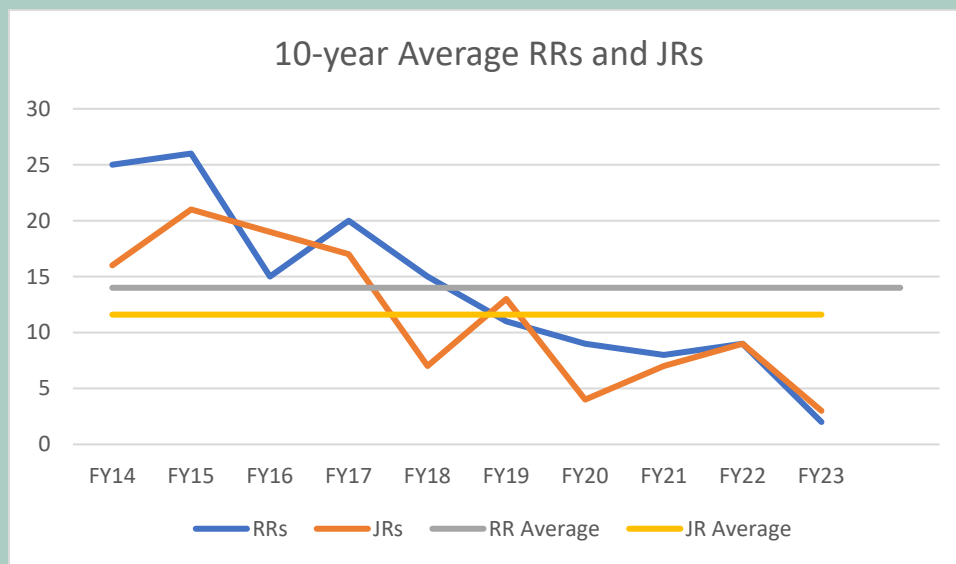
Fiscal Year	No. of Matters on the Board's Docket	No. of New Appeals	No. of New RRs	No. of New JRs	No. of Pending or Continued Cases from Prior Years
FY23	122	78	2	3	39
FY22	157	104	9	7	37
FY21	164	107	8	9	40
FY20	188	119	9	7	53
FY19	212	146	11	4	51
FY18	237	180	16	13	28
FY17	262	185	12	7	58

# 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.

**2** new Rehearing Requests and **3** new Jurisdiction Requests



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

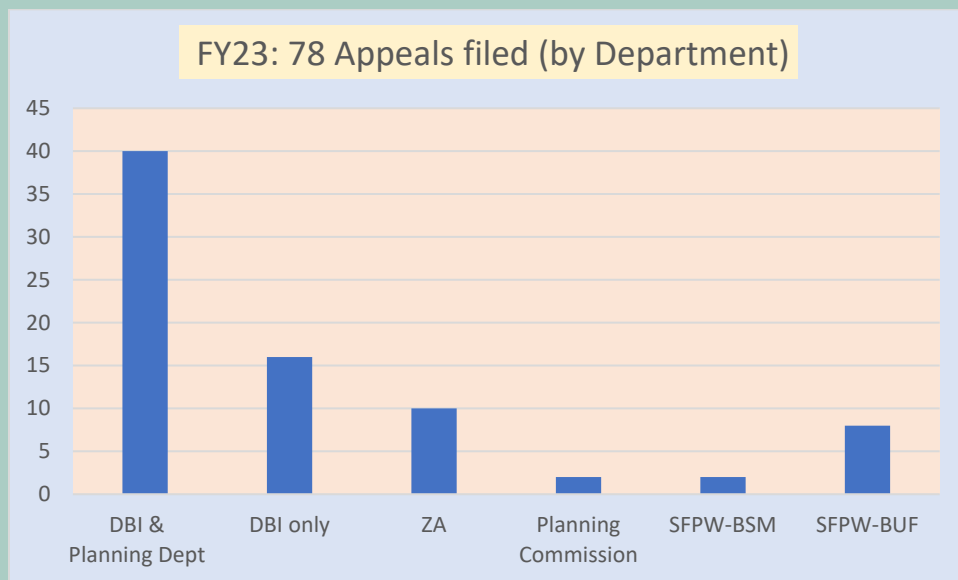
- The ten-year average for rehearing requests: 14
- The ten-year average for jurisdiction requests: 12

# Subject Matter

88% 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): 10%.
- San Francisco Public Works, Bureau of Street Use & Mapping (SFPW-BSM): 2%.



Department	% BOA Cases FY17	% BOA Cases FY18	% BOA Cases FY19	% BOA Cases FY20	% BOA Cases FY21	% BOA Cases FY22	% BOA Cases FY23
DBI and Planning Department	71%	76%	66%	70%	82%	63%	88%
SFPW-BUF	4%	6%	8%	20%	15%	15%	10%
SFPW-BSM	20%	14%	19%	6%	1%	10%	2%
DPH	3%	<4%	6%	3%	1%	6%	0%
SFMTA	1%	<1%	<1%	0%	1%	6%	0%
ARTS COMM.	<1%	0%	<1%	1%	0%	0%	0%
SFPD	<1%	<1%	0%	0%	0%	0%	0%



Typical land use cases involve:

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



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

- Most of these appeals protested the issuance of building permits. These appeals are typically filed by individuals or groups of neighbors concerned that proposed construction will negatively impact their property or neighborhood.
- One appeal protested the disapproval of a building permit.

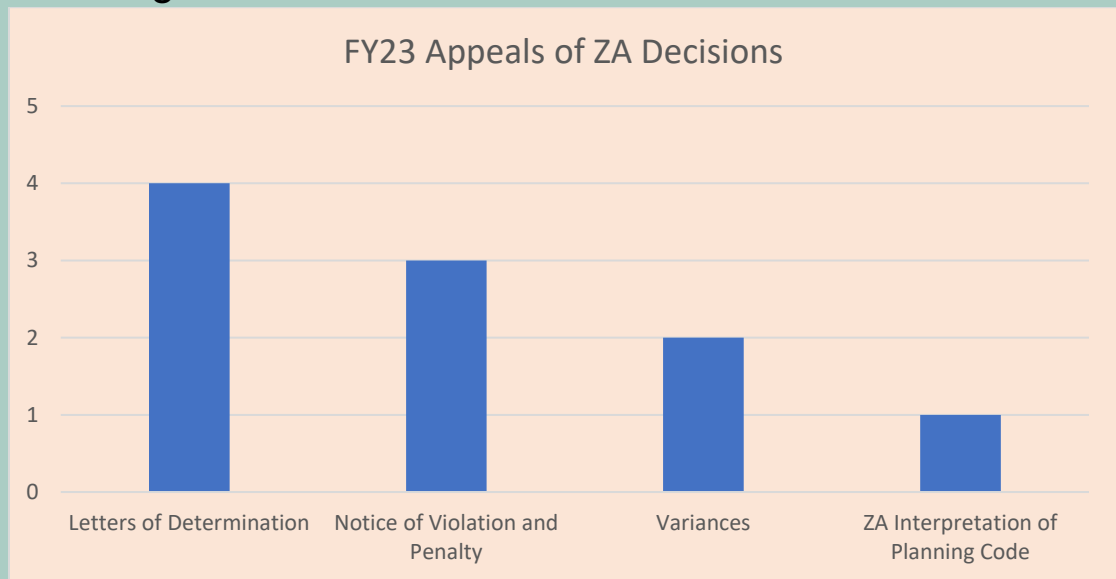
**16** appeals filed were of decisions made solely by DBI (Planning Department approval was not required).



**10** appeals filed were of decisions by the Zoning Administrator:

- 4 appeals protested the issuance of Letters of Determination.
- 3 appeals protested the issuance Notices of Violation and Penalty Decisions.

- 2 appeals protested the issuance of Variance Decisions
- 1 appeal protested the ZA's Interpretation of the Planning Code.



2 appeals were of Planning Commission decisions:

- **Planning Commission**
  - 1 appeal of a Section 309 Downtown Project Authorization.
  - 1 appeal of a Section 329 Large Project Authorization.





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

Tree removal orders: Most appeals heard from Public Works involve tree removal orders. The Bureau of Urban Forestry represents SFPW at these hearings.

Wireless box permits: The Board no longer hears a large volume of appeals of wireless box permits due to a change in the Public Works Code. For the few cases that come before the Board, SFPW is represented by the Bureau of Street Use and Mapping.



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

- 8 appeals protested the issuance or denial of orders or permits related to tree removal.
- 2 appeals protested the issuance of Wireless Box Permits.



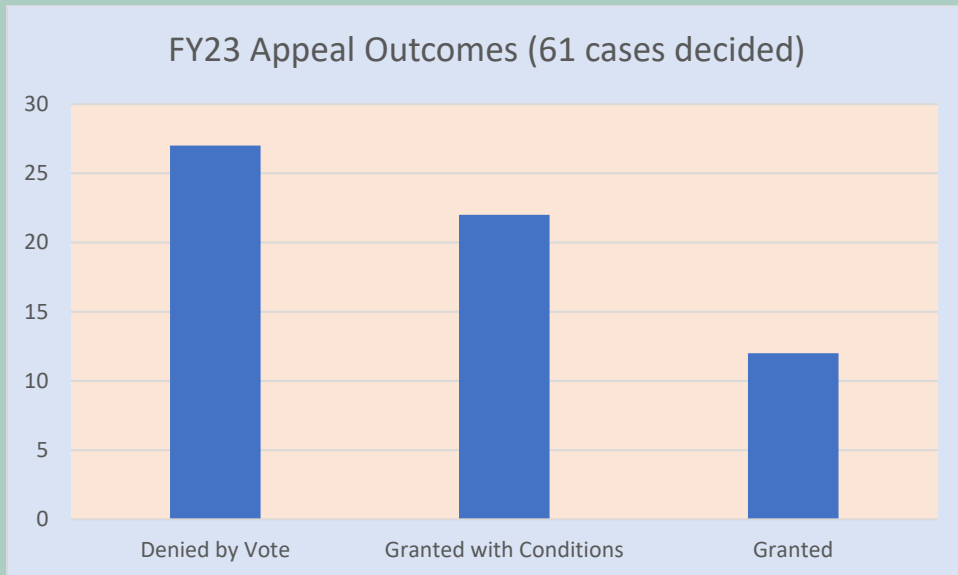
# Outcome: 61 Appeals Decided

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

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

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

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



## Outcome: Rehearing & Jurisdiction Requests

3 Rehearing Requests were on the Board's docket in FY23<sup>8</sup>:

- 3 denied.

2 Jurisdiction Requests were on the Board's docket in FY23

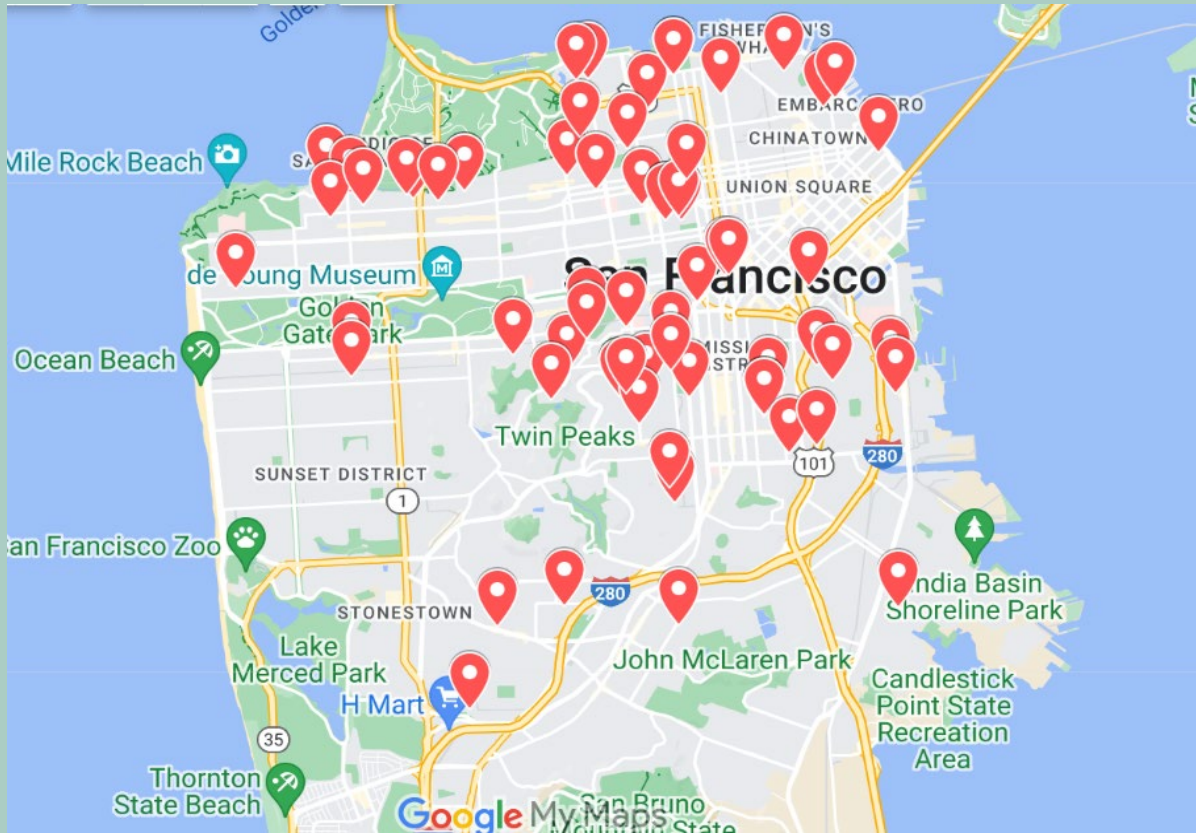
- 1 denied.
- 1 granted.

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<sup>8</sup> One RR was filed in FY22 (Appeal No. 22-032) and was heard in FY23.

# Geographic Distribution

The appeals heard by the Board during the year involve properties located in most of San Francisco's neighborhoods.



**Geographic Distribution of Appeals Filed in FY23**

# 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 excluding those cases continued or rescheduled at the request of the parties<sup>9</sup> (cases decided in FY23).
  - The Board decided 61 appeals in FY23.
  - The FY23 target was to decide 80% of the cases within 75 days of filing.<sup>10</sup>
  - The Board exceeded the FY23 target: 81% of the cases (46 appeals) were decided within 75 days of the appeal being filed, excluding those cases rescheduled or continued at the request of the parties.<sup>11</sup>
  - With respect to the 15 cases that were decided more than 75 days after an appeal was filed:
    - Delays were caused when matters were rescheduled by the parties (4 appeals)
    - Decisions were delayed for a variety of reasons: e.g., the Board directed the parties to work on a solution, or the Board requested that a department/determination holder come back with a different plan (11 appeals).

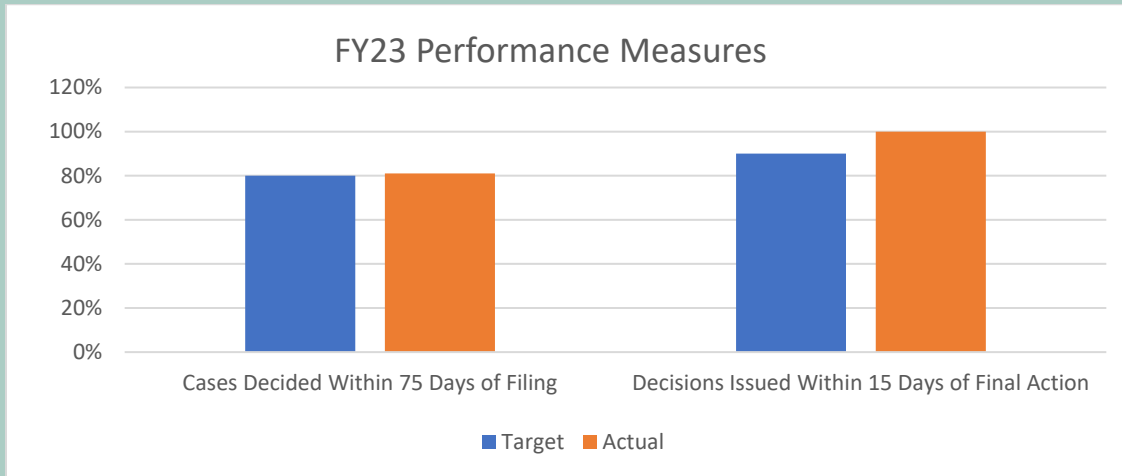
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<sup>9</sup> This metric was modified for FY23. Previously the metric did not exclude cases that were rescheduled or continued at the request of the parties.

<sup>10</sup> In FY22 the target was 70%. From FY11-FY21 the target was 60%.

<sup>11</sup> 46 out of 57 cases (4 cases were rescheduled at the request of the parties) = 81%.

- **Measure Two: Percentage of written decisions<sup>12</sup> that are issued within 15 days of final Board action.**
  - The FY23 target was to issue 90% of the written decisions within 15 days of final action.<sup>13</sup> A total of 61 decisions were issued in FY23.
  - The Board exceeded its target and issued 100% of the written decisions within 15 days of final action.



<sup>12</sup> Written decisions are issued 13 days after a decision is made at a hearing if the parties have not made a request for a rehearing.

<sup>13</sup> The target for FY22 was 70% and the target for FY11-FY21 was 60%.

## **FY23 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 (97% 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 (3% of the budget).

### **PROJECTED REVENUE**

**\$1,195,116** was the projected revenue budget:

- \$1,160,116 in projected surcharge revenue collected by permit issuing departments on new permit applications.
- \$35,000 in projected filing fee revenue collected by the Board when new appeals are filed.

### **ACTUAL REVENUE**

**\$1,133,680** in actual revenue was collected:

- Surcharges: \$1,115,730
- Filing fees: \$17,950

**\$61,436** shortfall from *projected revenue*

## **EXPENDITURES OVERVIEW**

### **PROJECTED EXPENDITURES**

**\$1,195,116**

### **ACTUAL EXPENDITURES**

**\$1,209,520** was spent by the Board.

<b>Expenditures</b>		
Operating	Projected Budget	\$1,195,116
	Actual Expenditures	\$1,209,520
	Overspending from projected budget	(\$14,404)

#### **Breakdown of Actual Expenditures:**

- \$783,716 for salaries and fringe benefits.
- \$403,441 for the services of other City departments, such as the City Attorney, Department of Technology, SFGovTV, and Real Estate (rent).
- \$16,876 for specialized services such as software licensing fees, interpreters, parking, and office management costs such as, photocopier and postage.
- \$5,487 for food and office supplies.

<b>FY23 Budget</b>		
Operating Budget	Total Actual Revenues	\$1,133,680
	Total Actual Expenditures	\$1,209,520
	Shortfall	(\$75,840)

- The shortfall in the budget was balanced with funds from the General Fund.



## 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 FY24 there are no changes to the surcharge amounts.~~

Department	FY18	FY19	FY20	FY21	F22	FY23	FY24
Planning	\$18.50	\$18.50	\$19.00	\$20.00	\$22.50	\$37.00	<del>\$37</del> 9.00
DBI	\$18.50	\$18.50	\$19.00	\$20.00	\$22.50	\$37.00	<del>\$37</del> 9.00
DPH	\$43.00	\$43.00	\$44.50	\$46.00	\$50.50	\$45.00	<del>\$45</del> 8.00
SFMTA (TAXI)	\$2.00	\$2.00	\$2.00	\$2.00	\$2.00	\$2.00	N/A <sup>14</sup>
SFPW	\$6.50	\$6.50	\$6.50	\$7.00	\$9.00	\$9.00	<del>\$9</del> 10.00
SFPD	\$6.00	\$6.00	\$6.00	\$6.00	\$6.00	\$3.00	\$3.00
ENT. Comm.	\$4.00	\$4.00	\$4.00	\$4.00	\$4.00	\$2.00	\$2.00

[Correction Note: On January 29, 2024, subsequent to the Annual Report being adopted by the Board, Executive Director Rosenberg corrected the FY24 surcharge amounts (corrections reflected with strikethrough and red font).]

<sup>14</sup> On 4/20/23, SFMTA Director of Transportation Jeffrey Tumlin gave notice to the Board of Appeals that the SFMTA was discontinuing the informal practice of allowing the Board of Appeals to hear appeals related to taxi permit decisions. Consequently, the Board of Appeals will not hear these appeals and surcharges will not be imposed on SFMTA taxi permits.

## 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 challenging the Board's determinations.

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

In two separate lawsuits, 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. There was no record filed with petition or requested for either case.

### **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 and there has been no further action on the writ petition. In a related action prosecuted by the City Attorney's Office against the Care Center and related defendants, the trial court issued a statement of decision in defendants' favor on certain issues, but also finding that defendants violated the Building Code and imposing penalties under the State's Unfair Competition Law. The City Attorney's Office moved for a new trial, which was partially granted. Judgment was entered on March 2, 2023 and satisfaction of judgment was acknowledged and filed on June 5, 2023. Petition remains unresolved but unlikely to be prosecuted.

### **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 been 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. The subdivision map has been issued and permitting is underway. One of the parties to the settlement has just informed the court of its desire to back out of the deal, as the property can no longer be appraised for the value established in the settlement. The trial court set a further settlement conference to discuss possible resolution and the City is exploring whether a modified agreement is possible.

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

Two separate lawsuits were filed by the property owner for this matter. The property owner 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 must include replacement PDR space at a ratio of .75 square feet for every one square foot removed. The ZA 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 that 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. On May 20, 2022, the ZA issued a second Letter of Determination finding that lack of notice was a procedural oversight but did not invalidate permit or prejudice the permit holder. The Board upheld the second Letter of Determination on July 20, 2022. The Property owner then filed the second lawsuit – a writ petition with constitutional damage claims. The property owner is challenging the second Letter of Determination, finding that the lack of Planning Code 312 notice did not invalidate the building permit. Parties are exploring settlement options. The City will begin preparation of the record if/when settlement discussions terminate.

**Pending: Turon v. City and County of San Francisco, et al.**

A property owner is challenging suspension of building permits for renovation of his two-unit flat at 2722-2724 Folsom Street. The owner alleges that the Department of Building Inspection approved the work and that the Planning Department is retaliating for an earlier dispute. This action follows a settlement of an earlier case that was also before the Board of Appeals regarding the property's legal dwelling units. The property owner is seeking a writ of mandate and alleging constitutional claims. The City has moved to dismiss. Trial was scheduled for May 2023. The parties have entered settlement discussions and executed a term sheet. The Court entered a stipulated order for stay and a stipulated order to extend and stay to November 9, 2023. A case management

conference is set for November 16, 2023. The property owner has submitted a proposed ADU configuration that Planning and DBI are reviewing.

**Pending: Pluta v. City and County of San Francisco, et al.**

A pro se litigant is challenging the denial of a proposed variance to subdivide and redevelop residential property at 4300 17th Street. The proposed project would retain an existing two-unit building, add an ADU, and build two new units on a new lot. The project requires a conditional use authorization and a variance, but the plaintiff is only challenging the denial of the variance. The plaintiff alleges violation of the Housing Accountability Act, abuse of discretion, takings, violation of the Equal Protection Clause, and fair housing violations. Plaintiff has not prosecuted the case so far. Plaintiff tried to file a Builder's Remedy project on February 1, 2023, but was informed by Planning that HCD certified the Housing Element making a Builder's Remedy project unavailable. Plaintiff declined to file the application.

**Pending: Memarzadeh v. Board of Appeals**

In two separate lawsuits, the property owner is challenging the denial of a street-tree permit and a variance for a vertical addition to an existing rear-yard structure on a sloped lot at 408–412 Cortland Avenue. The City is discussing settlement of the street tree case. The case challenging the denial of the variance is in the initial stages. Both writs were untimely served and are unlikely to survive demurrer if petitioner proceeds with litigation. Negotiations to persuade the petitioner to dismiss lawsuits have been unsuccessful.

**Pending: Susy Chen v. San Francisco Board of Appeals, et al.**

The Petitioner is challenging her neighbor's residential addition at 436 Eureka Street. The petition alleges there is a lack of the required 311 notice and that the project does not comply with the Planning Code or design guidelines. The petition also alleges denial of fair hearing, and violation of due process. The petitioner has not requested the administrative record or otherwise advanced the litigation. The City is monitoring the case, and will revisit its status. The Petitioner claims she has the right to prepare the administrative record and has sought leave to amend her First Amended Petition to add a CEQA claim. On January 23, 2023 the Court denied Petitioner's motion for leave to

amend. The Court granted Petitioner's second motion to supplement with the understanding that City would file demurrer on statute of limitations grounds.

**New: 2700 Sloat Holding, LLC v. CCSF**

The property owner has filed two separate lawsuits following the Board of Appeals' upholding the Zoning Administrator's code interpretation and application. The first lawsuit challenges the City's: (1) interpretation of State Density Bonus Law in form-based districts; (2) requirement for affordable housing fees for State Density Bonus Law projects; and (3) affordable housing tiering regulations. The property owner is seeking declaratory judgment and injunction. The court has scheduled an initial case management conference in this lawsuit for January 24, 2024. In the second lawsuit, the property owner is petitioning for writ of mandate and declaratory relief regarding ZA's bulk code interpretation. The property owner alleges violations of the Housing Crisis Act and CEQA. The parties are scheduled to meet with the court's CEQA settlement commissioner on November 15, 2023, and will have a case management conference with the judge on December 22, 2023.