

Analysis and Concerns with Proposed CEQA Legislation
Administrative Code Text Amendment 2021-000541PCA. ,¹ BOS File 201284

EXECUTIVE SUMMARY

This Ordinance will undermine the effectiveness of the California Environmental Quality Act (CEQA) in San Francisco. CEQA serves to identify the potential environmental risks associated with a project, to inform the public and their elected officials, and to provide decision-makers with that information prior to approving the decision, so that such risks can be avoided or mitigated.

Unfortunately, the proposed legislation would undermine CEQA in two ways:

- First, by allowing work to proceed on a project during an appeal. It is illegal to allow project construction to commence during the pendency of a CEQA appeal. Allowing a City department to proceed without a rigorous environmental review may lead to long-lasting environmental damage. This legislation will affect thousands of City-owned properties - our parks, streets, the Port properties, the airport and SFPUC lands - all will be put at risk. Furthermore, once this precedent has been set, it may be used to argue for extending the same practice to private projects.
- Second, this legislation raises barriers to the public's participation in environmental review. Depriving the public of their rights to a CEQA review by requiring 50 signatures is illegal. Over and above the question of legality, the signature requirement is burdensome to all San Franciscans. Underserved communities, which already face many day-to-day challenges, may be hampered by the additional difficulty of dealing with the 50-signature requirement.

One reason given for modifying the CEQA appeals process in San Francisco is that the number of appeals has been a burden to City government, both in terms of time and finances. However, over the last five years, CEQA appeals in San Francisco comprised only .5% (or ½ of 1 %) of all the categorical exemptions; this is not an onerous burden for City government. In addition, despite inquiries to the City, no actual facts have been provided that show this is a financial burden for a City budget of over \$13.7 Billion. In fact, the impact of environmentally-damaging projects can be much more costly in the long run, both in terms of remediation and, even more importantly, impacts on human and environmental health.

The legislation proponents cite a few examples of benevolent current projects that might have experienced fewer delays under the new legislation. No one can predict the kinds of projects that will be proposed in the future. Even one bad project can do severe environmental damage. In addition, some of the 'benevolent' projects have not proven to be universally positive for the residents. The best way to protect the City and its residents from environmentally-damaging projects is to maintain a consistent and rigorous CEQA process.

Over and above the specific problems with this ordinance, the legislation also adds credence to the pro-development mantra that CEQA is somehow a problem for City governance. If there are problems with the CEQA process in San Francisco, then those problems should be addressed in an open and inclusive conversation with the public and a wide variety of stakeholders.

¹ SF Planning Department, "Executive Summary - Administrative Code Text Amendment, for Planning Commission hearing, February 25, 2021."

DETAILED BACKGROUND FOR THE ABOVE STATEMENTS

The proposed legislation allows for continued actions on public projects during an appeal.

"The Way it Would Be:

Other City commissions/boards outside of the Board of Supervisors would now be able to proceed with certain projects while a CEQA appeal is pending at the Board of Supervisors. This proposed amendment only applies to public projects for which the respective commission or department head (or designee) demonstrates in writing that such projects meet one of the following criterion: [From the Planning Department's Executive Summary].²

(ii) actions that are undertaken by the San Francisco Municipal Transportation Agency, the Airport, Port, Public Utilities Commission, San Francisco Public Works, or the Recreation and Parks Department, and the appropriate commission or department head or their designee has determined in writing that the action is one of the following:

a. a safety, health, or remedial measure necessary to protect the public, public employees, or public property or to allow the existing use of public property to continue; or

b. a temporary activity that will be removed or will cease within 180 days following the commencement of said activity; or

c. a reversible action wholly implemented and operated by a City department or agency, or a City department's or agency's contractor, that either does not involve physical construction activities or is limited to additions that can be removed or reconditioned without damage to the site. [FILE 201284, Legislation]³

Concerns:

- It is flatly illegal to allow project construction to commence during the pendency of a CEQA appeal. One of the fundamental requirements of CEQA is that CEQA review must occur prior to project approval and construction. CEQA review is required prior to the first agency approval of a project, when the agency commits itself to a definite course of action. (Save Tara v. City of West Hollywood (2008) 45 Cal. 4th 116, 137-138). The Supreme Court stated, "the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made." (Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 449-450).
- Allowing City departments to be "able to proceed with certain projects while a CEQA appeal is pending" is a dangerous precedent to set for City projects. Any of the categories listed in the legislation has the potential to create serious and even long-lasting environmental damage. Letting a project go forward while under appeal and before a decision is made defeats the purpose of CEQA, which is to allow public input and to inform public officials of the consequences of their decisions.
- Once this precedent has been set, it may be used to argue for extending the same practice to private projects.

² op. cit., SF Planning Department, page 1

³ FILE 201284, Administrative Code, CEQA Appeals. page 4, 5 We have listed quotes from two sources, as the Planning Department document does not quote the exact language of the legislation.

- The language " *a safety, health, or remedial measure necessary to protect the public...etc.*" is too vague. Who decides what is 'necessary?' Based on what information? The purpose of CEQA is to give the public and the decision-makers information so that an informed decision can be made and decision-makers can be held accountable for that decision. CEQA does not leave it up to the unelected bureaucracy to decide unilaterally what is the right thing to do without a full public process.
- This legislation assumes that a City department will always do 'the right thing' by implying that if a department head (or designee) writes a report justifying a project, that that report is disinterested, factual, and complete. Unfortunately, that is not always the case. How can the public trust the City, when the city has already allowed construction activities on Cortese sites, such as 1776 Green Street?
- It is much more difficult to fight a project in the courts if the project has proceeded and funding has been spent on it. Many courts will look at a completed or even a partially completed project and feel that there is no point to ruling in favor of that appeal.
- A great deal of damage can be done in 180 days. That is one-half of a year!
- Because this statement of 180 days is followed by "OR", the project can last more than 180 days. There is no outside time limit for projects called out in the legislation.
- "*A temporary activity lasting no more than 180 days,*" or "*A reversible action . . . that does not involve physical construction activities or is limited to additions that can be easily removed or reconditioned without damage to the site.*" Because of the "or" in this statement, does that mean that an activity that lasts no more than 180 days can involve physical construction activities or additions that cannot be easily removed without damaging the site?
- How does this requirement interact with requests for extensions of the timeline for a project? If the city approves projects on a "temporary" basis, is the City able to "modify" the project further to extend for 4 years, as was done with the Ferris Wheel in Golden Gate Park? If so, the modification would fall under Administrative Code Section 31.19 (not 31.16), which does not allow appeal to the Board of Supervisors. The public would then be deprived of the right to appeal to the elected body, the Board of Supervisors, as is required under CEQA. And the Board of Supervisors would also lose the right to make a final decision on the project.
- Since the appeals under Administrative Code Section 31.19 are made to the Environmental Review Officer, the decisions on a project would circle back to the very department that made the environmental determination in the first place. It is unlikely that the ERO would nullify its own department's decisions. In other words, under this scenario, the Planning Department would be making those decisions unilaterally, and both the public and the Board of Supervisors would be left out of these decisions completely.

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Most City Departments with jurisdiction over our City lands are covered by this legislation and would be able to proceed with projects that fulfilled the criteria listed before the appeal was decided.

"This change would only impact those public projects (undertaken by the SFMTA, the Airport, Port, Public Utilities Commission, San Francisco Public Works, or the Recreation and Park Department) for which the respective commission or department head (or designee) demonstrates they meet the criterion to promote the general health and safety of the public or are temporary in nature." ⁴

[Planning Dept. Exec. Summary]

⁴ op. cit., SF Planning Department, page 3

Concerns:

- "Only impact those public projects?" This covers thousands of acres of our public spaces. Let us consider for a moment the public resources that this legislation would impact. Rec and Park alone manages over 4,100 acres with 220 parks, marinas, recreation centers, clubhouses, and Camp Mather in the Sierras.⁵ San Francisco has over 1,100 miles of streets under DPW, which has no public commission.⁶ The Airport is approximately 4,900 acres.⁷ The area under the Port Commission's control comprises nearly eight miles of waterfront lands, commercial real estate and maritime piers from Hyde Street on the north to India Basin in the southeast.⁸ The SFPUC has tens of thousands of acres under its control.⁹
- Some commissions and departments may take advantage of this to pursue their own agendas in the name of such measures. The burden of proof that a project does not comply with the criteria listed in the legislation will then fall on the public.
- The Recreation and Park Department has shown recently that it is not sensitive to habitat and wildlife concerns. Any actions in our parks can have long-term, irreversible environmental impacts; parks deserve full protection under CEQA.
- DPW is under investigation for irregularities by the Department Head, and there are no guarantees that this would not happen again in the future.
- In short, City Agencies have their own agendas and regrettably cannot always be trusted to make beneficial decisions about environmental impacts; if this were not the case, the public and the environment would not have needed CEQA in the first place.
- When an appeal finally reaches the BOS, work on the project will have taken place and the BOS will have the unenviable task of either shutting it down and possibly even removing work that has been done, with the attendant costs.

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The legislation modifies the signature threshold for a limited class of public projects - SFMTA and Port of San Francisco

"Public projects sponsored or approved by the San Francisco Municipal Transportation Agency (SFMTA) or properties under leases from the Port Commission would now require 50 San Francisco residents or five Supervisors to subscribe to the notice of appeal. . . ." [Planning Department's Executive Summary].¹⁰

Concerns:

- It would violate state law to require 50 signatures for an appeal. CEQA section 221151(c) states: *"If a nonelected decision-making body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, or determines that a*

⁵ Department of Recreation and Park website

⁶ <https://www.sfchronicle.com/bayarea/heatherknight/article/SF-property-owners-maintain-streets-that-city-13991425.php>

⁷ <https://sfgov.org/realestate/real-property-owned-city-and-county-san-francisco-parcels-outside-city-and-county-boundaries>

⁸ Port of San Francisco, wikipedia. https://en.wikipedia.org/wiki/Port_of_San_Francisco

⁹ <https://sfgov.org/realestate/real-property-owned-city-and-county-san-francisco-parcels-outside-city-and-county-boundaries>

¹⁰ op. cit., SF Planning Department. page 2

project is not subject to this division, that certification, approval, or determination may be appealed to the agency’s elected decision-making body, if any.” The proposed ordinance would deny this right unless the appellant is able to obtain 50 signatures.

- Filing a CEQA appeal is not a simple process. Unless a member of the public is already familiar with the notification system, it is difficult to learn about the existence of a project, as well as the CEQA determinations. Learning about a project, learning how to file an appeal, finding an attorney to help with the appeal, writing the appeal, and getting all the documents to the City within the 30-day deadline, are daunting tasks for most members of the public. Requiring 50 signatures adds to the difficulty.
- Organizations such as labor unions or neighborhood groups will be able to meet this requirement easily. It will not prevent them from filing a CEQA appeal. In fact, it is possible to envision a group set up just for the purpose of providing multiple signatures for CEQA appeals to individuals that need them.
- However, for other communities, it will be difficult to meet this 50-person requirement. People who have not previously taken part in the CEQA process and underserved and sensitive communities may not have the resources to organize and oppose an appeal before the 30-day deadline has passed. In this same short time period, they would also have to find 50 people to sign onto it, which means convincing friends and neighbors to put their names on a legal document.
- It is certainly also possible for an SFMTA project to pose environmental risks to one or just a few individuals. A 50-signature requirement could effectively disenfranchise those residents.
- The signature requirement appears to have been introduced solely for the purpose of preventing a few individuals from filing unpopular appeals. That is a minor reason for changing the CEQA appeal process in San Francisco in such a way that it makes it more difficult for other members of the public who have serious concerns about a project to file an appeal.

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The Appeals Metrics given in the Planning Department report are lacking information and make unsubstantiated assumptions.

"The Department pulled data on all CEQA appeals filed on between 2015 and 2020 and summarized the findings in Table 1.

Table 1: Summary of CEQA Appeals Filed from 2015-2020

	<i>Appeal Denied</i>	<i>Appeal Upheld</i>	<i>Pending</i>	<i>Withdrawn</i>
<i>Subtotal</i>	53	8	2	34
<i>Grand total</i>				97

*"Out of the 97 CEQA appeals filed from 2015-2020, only eight were upheld. This means that the Board of Supervisors denied the vast majority of appeals they heard. If the same pattern continued, there would be no major harm if other City commissions or boards act on public projects before the Board of Supervisors makes their final determination on the appeal. "*¹¹ [The Planning Department's Executive Summary

¹¹ Op. Cit., SF Planning Dept. page 3

Concerns:

- The prior table shows that eight appeals were upheld and 34 were withdrawn. Most of the appeals were withdrawn due to settlements that resolved community concerns. Thus, of the 97 appeals, 42 (almost half) were resolved in favor of the appellant in some fashion. This is an extremely high rate showing that many meritorious appeals are being filed and that the city staff is frequently abusing its discretion and issuing improper or illegal CEQA exemptions. The purpose of CEQA is to identify these risks and to inform both the public and the decision-makers before they make their decision.
- The Planning Department's table omits important data -- it neglects to include the number of categorical exemptions that the Planning Department approved in approximately the same time period. The Appeals Table below shows these figures from 2015 to 2020. ¹²

Appeals Table
(Planning Department Data: October 2020)

	2015	2016	2017	2018	2019	2020*	TOTAL
Total Appeals	4	12	23	20	14	24	97
Appeals Denied	3	3	8	13	9	16	52
<i>% of Total Appeals</i>	75%	25%	35%	65%	64%	67%	54%
Appeals Upheld	0	1	4	0	2	0	7
<i>% of Total Appeals</i>	0%	8%	17%	0%	14%	0%	7%
Pending	0	0	0	1	0	6	7
<i>% of Total Appeals</i>	0%	0%	0%	5%	0%	25%	7%
Withdrawn	1	8	11	6	3	2	31
<i>% of Total Appeals</i>	25%	67%	48%	30%	21%	8%	32%
Total Exemptions		4200	4600	5000	5500	2005	21,305
<i>% change</i>			10%	9%	10%	-64%	
Appeals as % of Exemptions		0.3%	0.5%	0.4%	0.3%	1.2%	0.5%
<i>% change</i>			75%	-20%	-36%	370%	

* 2020 data updated through October only

- During this time period, the data available showed that the Planning Department granted 21,305 categorical exemptions.
- Only 97 appeals were filed. This was ½ of 1% (or only .5 percent) of the total number of exemptions given. This is hardly an overwhelming number of appeals for the BOS to handle in its weekly meetings.
- In fact, it is apparent that the large number of categorical exemptions needs to be looked at more closely if a further study is done of the CEQA process in San Francisco.

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¹² Data source, SF Planning Department, through BOS request.

Delays in process seen in the early stages of COVID, have been addressed.

"The proposed Ordinance supports the Community Safety Element's goal to comply with current life safety standards by allowing the City to respond to future emergencies more quickly. . . "
[The Planning Department's Executive Summary]. ¹³

Concerns:

- The timeframe for appeals was delayed by the COVID virus; it took time to put a new remote system in place. But BOS hearings are now done online; this system can be reactivated quickly in the future, should we be so unfortunate as to have to go through another pandemic.
- CEQA allows for waiving certain requirements during emergencies. The CEQA determination was appealed and the appeal was rejected by the BOS on those grounds. This is how CEQA should work.

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The Racial and Social Equity Analysis in the Planning Report does not support the requirement for 50 signatures.

"The Ordinance, however, does increase the barriers to filing a CEQA appeal, and this could disproportionately impact communities that are less organized and knowledgeable about City process. Raising the CEQA appeal filing requirement from one resident to 50 residents potentially poses a greater task in neighborhoods that do not have active neighborhood associations. Further, the other appeal path, requiring five Supervisors to subscribe to the notice of appeal, may also hinder those less versed in navigating San Francisco's political landscape. This is particularly true when reaching out to Supervisors outside their district; however, such issues could be mitigated if the District Supervisor advocates on the concerned resident's behalf. "
[The Planning Department's Executive Summary] ¹⁴

"Overall though, the projects that would be subject to additional appeal barriers are limited to a small subset of projects. " [Planning Department's Executive summary] ¹⁵

Concerns:

- We agree completely with the Planning Department that this legislation puts up barriers to underserved communities. This in itself is a reason this legislation should not be approved.
- ". . . are limited to a small subset of projects" Short of acquiring a crystal ball, the City has no idea of the number or type of projects that could be approved under this legislation in the future. Adding 'additional appeal barriers' is not acceptable for underserved communities in San Francisco

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The General Plan Compliance section in the Planning report leaves out Policy 1.4 - environmental standards.

The proposed Ordinance is consistent with the following Objectives and Policies of the General Plan: ¹⁶ [Planning Dept General Plan Compliance Section]

¹³ op. cit., SF Planning Department, General Plan Compliance, page 4

¹⁴ Ibid. page, Executive Summary, page 4

¹⁵ Ibid.

¹⁶ Ibid., SF Planning Dept, General Plan. Compliance, page 8 (under Planning Commission Draft Resolution)

Concerns:

- The following section of the General Plan policy is completely left out of the Planning Department's analysis. [Planning Department's Draft Resolution]

POLICY 1.4

Assure that all new development meets strict environmental quality standards and recognizes human needs.

In reviewing all proposed development for probable environmental impact, careful attention should be paid to upholding high environmental quality standards. Granted that growth provides new economic and social opportunities, uncontrolled growth can also seriously aggravate environmental deterioration. Development projects, therefore, should not disrupt natural or ecological balance, degrade the visual character of natural areas, or otherwise conflict with the objectives and policies of the General Plan. ¹⁷

- Certainly, Policy 1.4 should be over-riding when the City makes decisions about how to approach environmental reviews.

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Planning Code Section 101 Findings ¹⁸ assume future projects will not entail environmental damage.

The Planning Department Findings lists current benefits from this ordinance that would happen, giving examples of current 'beneficial' projects and stating that therefore all will be well in the future.

Concerns:

- Without knowing the specifics of the projects that will be proposed in the future, there is no way of saying that they will all have positive results.
- Not all of the projects that have been installed during COVID without environmental review have been either 100% beneficial or positive experiences for the neighborhoods. On the contrary, in many cases there have been negative results from the short-cuts that various City departments have taken under COVID
 - The Slow Streets program has had a partially negative effect on the neighborhood character of the Twin Peaks area, with increased crowding, vandalism, and a news cameraman being robbed at gunpoint.
 - The neighborhood surrounding the Great Highway has been severely impacted by the closure of the Great Highway. There has been a tremendous increase in traffic in the surrounding neighborhoods, speeding, more accidents, and loss of neighborhood parking to an influx of visitors. The problems have been so severe, that the District Supervisor has had to demand that the City look further into extensive traffic calming and crowd control measures. Many of these problems could have been avoided and solutions worked out before there were problems, if there had been a healthy environmental review process.

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¹⁷ https://generalplan.sfplanning.org/I6_Environmental_Protection.htm#ENV_GEN_1_4

¹⁸ op. cit., SF Planning Dept. Planning Code sections findings, page 9

The financial Impact of appeals has not been justified with hard figures

Statements from Supervisor Haney's office, the sponsor of the legislation, discuss the cost to the City of CEQA appeals.¹⁹ Cost concerns were discussed in interviews with MUNI Director Jeff Tumlin in the SF Chronicle.²⁰ Various statements were quoted in that interview, including: "

" . . . each Safe Streets appeal will cost about 100 hours of work by his staff, "

" . . . each hearing at the Board of Supervisors . . . costs a combined \$10,000 in city officials' and attorneys' time. " and

" . . . each appeal is taking more time and money than it took to create the emergency programs in the first place."

Concerns:

- In an effort to get more details on these figures, a member of the public submitted Disclosure Requests to MUNI for the spreadsheets and other reports that led to the figures quoted in the interviews. The only response to three exhaustive requests for back-up data was:

" There's no detailed SFMTA spreadsheet or financial analysis. It's simply an estimate of staff hours x fully burdened hourly rate for staff time. " ²¹

- In other words, the claims made in the SF Chronicle were guesses as to the costs involved. If the City does its research properly to arrive at a categorical exemption, then it should have already done most of the work necessary to defend a categorical exemption. The incremental cost to defend the City's decision should not be that large.

Environmental review is too important to be held hostage to minor, undocumented claims, especially in a city with a budget of over \$13.7 billion dollars. Furthermore, the impact of environmentally-damaging projects can be much more costly in the long run, both in terms of remediation and, even more importantly, impacts on human and environmental health.

¹⁹ "Common Sense CEQA Appeal Procedures for Public Projects," Office of Supervisor Haney, December 2020. "Prevent Costly....Delays." page 2.

²⁰ SF Chronicle, 9-13-20, Heather Knight.

²¹ Emails from SFMTA in response to Disclosure Request. Please request copies.