

REVISED LEGISLATIVE DIGEST

(5/20/2013, Amended in Committee)

[Administrative Code - California Environmental Quality Act Procedures, Appeals, and Public Notice Requirements]

Ordinance amending Administrative Code, Chapter 31, to reflect revisions in the California Environmental Quality Act and to update and clarify certain procedures provided for in Chapter 31, including without limitation: codifying procedures for appeals of exemptions and negative declarations; revising noticing procedures for environmental impact reports and negative declarations for plan area projects exceeding 20 acres; expanding noticing requirements for certain exempt projects; clarifying existing noticing requirements for exempt projects; and making environmental findings.

Existing Law

The City of San Francisco, in accordance with the requirements of California Environmental Quality Act, Public Resources Code Section 21000 *et seq.* ("CEQA"), and CEQA Guidelines, Title 14, California Code of Regulations, Section 15000 *et seq.* has adopted local procedures for administering its responsibilities under CEQA. These procedures are codified in San Francisco Administrative Code Chapter 31. These procedures tailor the general provisions of the CEQA Guidelines to the specific operations of the City and incorporate by reference the provisions of CEQA and the CEQA Guidelines.

Amendments to Current Law

The proposed ordinance establishes procedures for appeal of exemption determinations and negative declarations to the Board of Supervisors and updates some of the procedures in San Francisco Administrative Code Chapter 31 to reflect revisions to CEQA and the CEQA Guidelines and to codify certain administrative procedures that the San Francisco Planning Department has found workable in practice. The primary updates to Chapter 31 are as follows:

- Section 31.04.
 - Deletes a no longer relevant reference to the San Francisco Redevelopment Agency.
 - Clarifies certain administrative functions of entities within the City and County to reflect actual practice and changes in local law, including activities of the Clerk of the Board, the Historic Preservation Commission and the Environmental Review Officer ("ERO") in transmitting notices to the County Clerk.

- Provides for notices electronically unless someone requests a hard copy or if otherwise specified by CEQA.
- Adds Section 31.04(h) to define “Approval Action,” “Building Permit,” “Date of the Approval Action,” and “Entitlement of Use for the Whole of the Project,” all of which relate to describing the approval action for a project that triggers the ability to file an appeal of a CEQA determination to the Board of Supervisors.
- Defines “Approval Action” for an exempt project as:
 - (1) for private projects:
 - (A) the first approval of the project in reliance on the exemption at a noticed public hearing at the Planning Commission, or, if no such hearing is required,
 - (B) the first approval in reliance on the exemption that grants an entitlement for the whole of the project, either by another commission, board or official after a public hearing or by any official of the City without a public hearing.
 - (2) for City’s own projects (e.g. not private projects):
 - (A) the first approval in reliance on the exemption of the project at a noticed public hearing, or
 - (B) if approved without a public hearing, the decision in reliance on the exemption that commits the City to a definite course of action in regard to the project.
- Defines “Approval Action” for projects covered by a negative declaration to mean the approval of the project by the first City decision-making body that adopts the negative declaration.
- Defines “Approval Action” for projects covered by an EIR to mean the approval of the project by the first City decision-making body following the certification of the completion of the EIR by the Planning Commission as provided in Section 31.15(d).
- Adds new Section 31.04(i) to require the Planning Department or its delegees to identify the Approval Action for each project as part of the CEQA decision and make that information available to the public. At a minimum, Planning must post this information for each project on its web site.

- Section 31.05. Clarifies existing practice, which is that all projects subject to CEQA are referred to the ERO unless the ERO has delegated specified exemption determinations to another City entity.
- Section 31.08. Clarifies the procedures for handling exemptions from CEQA, including:
 - Updates the ordinance to be consistent with existing Planning Department practice, which is to apply Chapter 31 procedures for projects covered by statutory exemptions, categorical exemptions, community plan exemptions and general rule exclusions.
 - Provides that when other departments are delegated authority to issue exemptions, that they inform Planning of any determinations. Provides for Planning to make such information available to the public on its website to the same extent that it makes such information available to the public about exemptions it issues.
 - Updates existing ordinance language as to when public notice of an exemption determination is required by: (1) clarifying the definition of projects involving historic resources for which notice is required, and (2) defining demolition projects for which notice is required to be consistent with Planning Code Section 317. Projects involving historic resources that require noticing of an exemption determination include those involving sites or districts listed on the California Register, listed in Planning Code Articles 10 or 11, listed on an historic resource survey that has been adopted or officially recognized by the City, and any other resource that the ERO determines to be an historic resource under CEQA criteria.
 - Updates the ordinance language to be consistent with existing Planning Department practice to produce a written determination for any project for which a notice is required and by posting the determinations on its website.
 - Requires in Section 31.08(f)(1) that public hearing notices inform the public if the City will take an Approval Action that triggers the ability to file an appeal of a CEQA exemption determination to the Board of Supervisors. Such notices must advise the public of the exemption determination, how to obtain a copy, and the consequences of failing to timely raise objections to the exemption.
 - Requires in Section 31.08(f)(2) that when the Planning Department provides notice under Planning Code Sections 311 and 312 (advising of the right to request a discretionary review hearing) the notice shall contain the information in Section 31.08(f)(1) and advise those noticed that if a discretionary review hearing is requested and the project is approved by the Planning Commission, such approval will be the Approval Action that triggers the ability to file an appeal of the CEQA

exemption determination. If a discretionary review hearing is not requested, the issuance of the Building Permit will trigger the Approval Action.

- Requires in Section 31.08(g) that when City entities take an Approval Action on a City project (e.g. a project not involving private entitlements) without a noticed public hearing, the City entity shall arrange for Planning to post a notice on Planning's website informing the public that the CEQA exemption may be appealed to the Board of Supervisors within 30 days after the first date of posting of the notice.
- Provides in Section 31.08(i) that the ERO has the authority, as provided for in Section 31.19, to reevaluate the application of an exemption to a project in the event the project changes after the Approval Action. In such a case, following a new Approval Action for the project, the new exemption determination may be appealed to the Board under Section 31.16 as to those issues associated with the project changes. Clarifies that Planning must reevaluate its CEQA decision when a modified project exceeds the scope of the original project for any aspect of the project regulated under the Planning Code, or introduces a new use not previously included in the project. As explained below, Section 31.19 is revised to clarify the process for reevaluation of exemption determinations when a project is modified.
- Sections 31.09 and 31.10.
 - Makes minor clarifying revisions to these sections to reflect actual practice of the Planning Department in its initial evaluation of projects.
 - Clarifies in Section 31.10(f) as to when a negative declaration, a mitigated negative declaration, and an environmental impact report are required. The language used is drawn from CEQA Guidelines Sections 15064(f) and 15070 and explains that the phrase used in CEQA Sections 21080(b) through (d) "substantial evidence in light of the whole record, that a project may have a significant impact on the environment" has been judicially interpreted to mean substantial evidence to support a fair argument of a significant impact. Although it does not change the meaning of the current wording, similar "fair argument" language has been included in Sections 31.11(g), 31.16(d)(3) and 31.16(d)(5). Language now in Section 31.12 regarding when to prepare an EIR is deleted.
- Section 31.11.
 - Updates notice and publication provisions for negative declarations to reflect CEQA requirements and Planning Department practices.

- Provides in Section 31.11(c)(4) that for rezonings, area plans or general plan amendments covering 20 acres or more, Planning is not required to mail a notice of intent to adopt a negative declaration to each property owner within the project area or within 300 feet of the exterior boundaries of the project area, but, requires Planning to post all negative declarations on its website.
- Provides in Section 31.11(d) that the notice of intent shall inform the public that only persons appealing the preliminary negative declaration to the Planning Commission will be permitted to appeal the final negative declaration to the Board of Supervisors.
- Provides in Section 31.11(h) that a notice proposing to adopt the negative declaration and take the Approval Action for the project shall advise the public of its appeal rights to the Board of Supervisors following the Approval Action in reliance on the negative declaration.
- Provides in Section 31.11(j) and also in Section 31.15(e) that Planning shall file a notice of determination with the County Clerk, upon the payment of any required fees for such filing.
- Sections 31.12 – 31.15.
 - In addition to deleting language at the beginning of Section 31.12 concerning when to prepare an EIR as explained previously, updates and clarifies the noticing, posting and distribution requirements of CEQA and the practices of the Planning Department with respect to environmental impact reports (EIRs).
 - Provides in Section 31.14(a)(5) that for rezonings, area plans or general plan amendments covering 20 acres or more, Planning is not required to mail a notice of availability of the Draft EIR to each property owner within the project area or within 300 feet of the exterior boundaries of the project area, but provides that Planning shall post all draft EIRs on its website.
 - Provides in Section 31.14(b)(3) that the notice of availability shall inform the public that only commenters on the Draft EIR will be permitted to file an appeal of the certified EIR to the Board of Supervisors.
 - Provides in Section 31.15(c) that a phonographic reporter record all public hearings on draft EIRs.
 - Provides in Section 31.15(d) that the notice of the certification hearing shall inform the public of the expected Date of the Approval Action on the project and of its appeal rights to the Board of Supervisors after such date.

- Section 31.16. Deletes existing Section 31.16 pertaining to appeals of final EIRs and proposes a new Section 31.16 to address appeals of exemption determinations, negative declarations and environmental impact reports. The key provisions of the new section include:
 - Provides in Section 31.16(a) that exemption determinations, negative declarations and environmental impact reports may be appealed to the Board of Supervisors.
 - Specifies the period in which appeals must be filed:
 - (1) For an EIR, after certification and within 30 days of the Date of the Approval Action.
 - (2) For a negative declaration, after the Planning Commission approves the negative declaration and within 30 of the Date of the Approval Action taken in reliance on the negative declaration.
 - (3) For exemptions, after an exemption is issued and within one of these periods as applicable:
 - (A) For a private project seeking a permit, license or other entitlement for which the City provides a separate appeal process for the entitlement, within 30 days of the Date of the Approval Action, even where the appeal period for the entitlement is shorter. Departments that grant entitlements supported by an exemption determination shall take steps to advise applicants that the appeal period for exemption determinations is 30 days after approval of the entitlement.
 - (B) For the City's own projects not involving a private entitlement, if the Approval Action is taken at a public hearing, within 30 days of the Date of the Approval Action; if the Approval Action is taken without a public hearing, within 30 days of the posting on Planning's website of a notice as provided in Section 31.08(g).
 - Specifies the requirements for filing an appeal: one must pay a fee, and the person filing the appeal must have submitted comments during the public comment period on the draft EIR if the appeal is of an EIR; if the appeal pertains to a negative declaration, one must have first appealed the negative declaration to the Planning Commission. The grounds for the appeal must be filed with the appeal.
 - Provides that the Planning Department shall advise the Clerk of the Board in three working days after an appeal is filed whether the appeal is timely. The Clerk will

have seven working days to advise the appellant whether the appeal complies with all of the ordinance requirements, including whether it was timely filed.

- Specifies that for projects requiring multiple approvals, while the appeal is pending at the Board, other City agencies and officials may not carry out or approve the project once the Clerk has scheduled the appeal for a hearing, except for taking essential actions to abate hazards to public health and safety. The Board must affirm the CEQA decision before it approves the project but may hold hearings on the project and pass proposed approval actions out of committee without recommendation so that the project approvals and CEQA appeal may be consolidated before the full Board. If the Board reverses the CEQA determination of Planning, all approvals taken by other City agencies and officials, including those taken during the pendency of the appeal, are void.
- Specifies the time frame for the ERO to transmit the environmental documents to the Board and to provide the Board with lists of interested parties.
- Directs the Clerk to schedule the appeal hearing before the full Board. The Clerk shall schedule the CEQA appeal hearing no less than 30 and no more than 45 days following the expiration of the time for filing the appeal and provide at least a 14 day notice of the appeal hearing.
- Specifies when materials related to the appeal may be submitted to the Clerk: the appellant and members of the public may submit written materials to the Board up to 11 days, and Planning may submit written materials up to 8 days, before the hearing. The Board shall act within 30 days of the scheduled hearing date but may extend this to not more than 90 days from the deadline for filing the appeal under specified circumstances.
- Specifies the actions that the Board may take for each kind of appeal and the process for then completing the CEQA document in the event the Board reverses the decision of the Planning Commission or Planning Department. If the Board upholds the CEQA decision, prior approval actions are valid. If the Board reverses the CEQA decision, prior approval actions are void.

(1) In the case of EIRs, if the Board reverses Planning's certification, any further appeals of the revised EIR are limited to revised portions, including any new information, and an appellant must comment on the revised EIR at any earlier public hearing on the revisions.

(2) In the case of a negative declaration, if the Board reverses Planning's approval, the Board may remand the negative declaration to Planning for revision and if so, further appeals of the revised negative declaration are limited to the revised portions. The Board may alternatively require preparation of an EIR, in

which case, Planning shall prepare the EIR in accordance with CEQA and the requirements of this Chapter 31.

- Revises Section 31.19(b) to clarify the process Planning will follow when an exempt project is modified after the Approval Action. Planning will determine if the project still fits within the scope of the project description in the original application for any aspect of the project regulated under the Planning Code and proposes the same uses as previously included in the project. If it is consistent, Planning will put a written note to this effect in the file and provide notice of this determination. If it is not consistent, Planning will prepare a new CEQA decision – either an exemption determination or an initial study, and if necessary, an EIR. The new CEQA decision is subject to appeal to the Board as provided for in Section 31.08(i).
- Includes in Section 4 of the ordinance findings expressing an intent by the Board of Supervisors to reaffirm the policies and objectives stated in Chapter 31, Section 31.02, and to not change any policies or objectives in CEQA, or to limit any rights of appeal under CEQA or the authority of the Board of Supervisors or the Planning Commission to hear and decide CEQA appeals as provided in Chapter 31.
- Provides in Section 5 of the ordinance for an effective date.
- Provides in Section 6 of the ordinance for an “Operative Date” of no earlier than September 1, 2013, and not until after the Planning Department has demonstrated to the Planning Commission that it has updated its website to provide up-to-date information to the public about each CEQA exemption determination in a format searchable by location, such as through the “Active Permits In My Neighborhood” tool now used by the Planning Department and the Building Department.

Background Information

The ordinance is proposed to update the City’s existing CEQA procedures so that they conform to current provisions of CEQA and CEQA Guidelines, reflect current Planning Department practices; provide for codified procedures for appealing EIRs, negative declarations and exemption determinations to the Board; and provide for enhanced noticing of CEQA decisions. The provisions concerning appeals to the Board are intended to respond to requirements in the CEQA statute that if the Board, as the elected body of the City, does not make the final decision regarding a CEQA decision, and instead, such decisions are made by the Planning Commission or Planning Department, the public has the right to appeal those decisions of Planning to the elected Board.

Prior to 2003, the CEQA statute provided for appeals of EIR certifications to the elected decision-making body where a non-elected decision-making body certified the project. In response to this earlier provision of CEQA, the City codified an appeal process for EIRs,

which is currently found in Administrative Code Chapter 31.16. The Legislature amended the CEQA statute in 2003 to provide that where a non-elected decision-making body of a lead agency adopts a negative declaration or makes a determination that a project is exempt from CEQA, the negative declaration or CEQA exemption may be appealed to the lead agency's elected decision-making body, if any, after the project is approved. Since 2003, the City has not amended Chapter 31 to provide for an appeal process for negative declarations or exemption determinations. Instead, the City has relied on interim guidelines issued by the Clerk's Office, City Attorney opinions on ripeness and timeliness of appeals and Board Rules of Order for conducting land use appeal hearings.

The Land Use Committee amended this ordinance on April 22, 2013, to include these changes:

- Requires all hearings on CEQA appeals to be heard before the full Board.
- Minimizes changes to the existing EIR appeal process and keep the status quo on submitting documents for appeal.
- Adds clarifying language in two places regarding the "fair argument" standard.
- Requires Planning to identify the Approval Action, which triggers an appeal right to the Board, for all projects and make the information available to the public.
- Clarifies actions that Planning should take when an exempt project is modified and clarifies that when Planning determines a modified project is still within the scope of the original project, it should put a note in the file to that effect.
- Allows exemption and negative declaration appeals to be filed in the window between the CEQA decision and within 30 days of the Approval Action, although the Clerk will not schedule the appeals until the appeal period expires.
- Provides that anyone may request hard copies of notices in lieu of electronic copies, even where Planning has an electronic address.
- Provides that the ordinance does not take effect until an online notice system is up and running for all exemptions, even those issues over-the-counter.

The Land Use Committee further amended this ordinance on May 6, 2013, to include these changes:

- Clarifies that when Planning identifies the Approval Action for a CEQA decision it shall post that information on its website, in addition to any other manner that Planning chooses to make the information available.

- Provides that departments other than Planning that issue exemptions shall inform Planning and provide Planning with copies and Planning shall make information about such exemptions available on its website to the same extent that it does for other exemptions.
- Further clarifies that if an exempt project is modified, an additional CEQA decision is required if the modified project exceeds the scope of the original project for any aspect of the project regulated under the Planning Code or introduces a new use not previously included in the project.
- Adds a requirement that Planning provide notice when it determines that a project modification is sufficiently minor not to trigger a new CEQA decision.
- Provides that Planning is not required to file a notice of determination until the Project Sponsor has paid any required fees for such filing.
- Provides that once the Clerk has scheduled an appeal for hearing, other City boards and commissions shall not take action to carry out or approve the project.
- Requires that Planning advise the Clerk on the timeliness of appeals within three working days of the date the appeal is filed; provides that the Clerk has seven days from the date the appeal is filed to determine if the appeal complies with the requirements in the ordinance for filing an appeal, including whether it is timely.

The Land Use Committee further amended this ordinance on May 13, 2013, to include this change:

- In Section 31.16, deletes a provision that said materials submitted less than eight days before an appeal hearing would not be distributed and replaced it with a provision that provides that materials submitted less than eight days before an appeal hearing other than Planning Department responses to an appeal will not be part of the record unless five members of the Board agree at the appeal hearing or before, subject to the Board's Rules of Order, to include such written materials in the record.

The Land Use Committee further amended this ordinance on May 20, 2013, to include this change:

- **Section 31.16.** Added various amendments requested by the Clerk's Office to clarify certain appeal procedures, including Planning's role in determining timeliness of appeals, process for Board members to request late submittals be included in the record, and schedule for Clerk to set appeal hearings when Board is in recess.