# Fact Sheet on Supervisor Wiener's Amendments to SF's CEQA Procedures

Late last year, right before the winter holidays, Supervisor Wiener introduced legislation to significantly change San Francisco's existing CEQA procedures without any outreach to neighborhood or environmental organizations.

While there is general agreement that fair and timely procedures should be adopted for appeals of negative declarations and exemption determinations made by a non-elected body or official to the Board of Supervisors, Supervisor Wiener's proposed amendments go much further – they even reduce and limit the rights contained in existing Chapter 31 for appealing EIRs to the Board of Supervisors.

The Wiener Amendments created a great deal of controversy and met with stiff resistance from a large array of organizations, generating letters of opposition from UC Hasting College of the Law, the Sierra Club, SF Architectural Heritage, San Francisco Tomorrow (SFT) and others. A broad coalition of organizations interested in fair and sensible CEQA reform was formed to urge an alternative to Wiener's far-reaching proposal.

Supervisor Wiener has since made a number of amendments to his original proposal but the legislation is still fundamentally flawed.

Following are examples of negative impacts of Supervisor Wiener's proposal:

1. Denial of the Right to Appeal to Full Board of Supervisors.

Supervisor Wiener's legislation would deny the public's right to have appeals of CEQA documents and determinations heard by the full Board of Supervisors by allowing a Committee of the Board to hear such appeals pursuant to "the Board's Rules of Order."

CEQA provides that appeals must be allowed to "the" elected decision-making body, not a committee. In San Francisco, "the" elected decision-making body is the Board of Supervisors.

This aspect of Supervisor Wiener's legislation violates state law and due process considerations. All other appeals to the Board of Supervisors are heard by the full Board.

2. Elimination of the Right to Appeal CEQA Documents and Determinations if the Board of Supervisors is to Approve Any Aspect of the Project.

Supervisor Wiener's legislation would eliminate the right to appeal EIRs, negative declarations and exemption determinations made by staff or any non-elected official or body to the Board of Supervisors if one or more proposed "approval actions" for the project is pending before the Board. Significantly, this would eliminate the existing right to appeal the Planning Commission's certifications of EIRs to the Board, which could in and of itself result in significant impacts on the environment.

Examples of pending project "approval actions" that would preclude the public's right to appeal a project's CEQA document or determination to the Board include changes in the height and bulk of a site, amendments to the General Plan, adopting a Special Use District, considering a recommendation to designate a landmark or district, appropriating funds, entering into contracts where board approval is required, and any amendments to City ordinances or codes.

In each of these cases, the public would not be allowed to appeal an EIR, negative declaration or exemption determination to the Board. Instead, CEQA issues could only be raised at a public hearing held on the project before a committee of the Board (unless the Board's approval action otherwise required a hearing at the full Board).

This represents a significant elimination of the public's right to appeal to its elected body, as in many cases the Board of Supervisors' review would be either too early or too late to affect earlier decisions on the project, and the momentum for project approval would make the Board of Supervisors review a post hoc rationalization.

Examples of recent EIRs that would not have been appealable to the Board under Supervisor Wiener's proposal include those on the following projects:

CPMC
Treasure Island
8 Washington
Eastern Neighborhood Plan
Western SOMA Plan
America's Cup
555 Washington
Central Subway
Park Merced
110 The Embarcadero (mitigated negative declaration)

3. No Clear and Uniform Public Notice to Start the Appeals Clock for Exemption Determinations.

Supervisor Wiener's Amendments create a complex and confusing multifaceted scheme for determining when his proposed 20-day clock is triggered for filing an appeal of an exemption determination.

Under Supervisor Wiener's proposal (See Section 31.04(h)), the 20-day time limit for filing an appeal of an exemption determination would be triggered by the "first approval" of the project. "First approval" would in turn depend on whether the project is a "private" or "public" project, whether there is or is not some other appeal process for a project entitlement, whether there is or is not a notice of any public hearing on the project, whether or not there was a discretionary review of the project, whether a building permit was issued in reliance on an exemption without being preceded by a public hearing, along with a confusing new definition of what might be an "Entitlement of Use for the Whole of the Project."

Clearly written by attorneys for attorneys, Supervisor Wiener's proposed legislation is unnecessarily legalistic and incomprehensible to project sponsors and members of the public. Clearly, the Clerk of the Board will have to ask the City Attorney for an opinion as to the timeliness of every appeal of an exemption determination (assuming an appeal is even allowed).

Due process and fairness require clear and uniform public notice requirements are necessary to start the appeals clock running for exemption determinations.

4. Limiting Appeals of Exemption Determinations to 20 days following the "First Approval" Violates CEQA as well as General Principles of Due Process and Fairness.

Under Supervisor Wiener's legislation, the only time an appeal of an exemption determination may occur is after the "first approval," even though many projects have multiple discretionary approvals: a certificate of appropriateness, a conditional use permit, a rezoning, a building permit, etc. Under his proposal, once any discretionary approval is made based on an exemption from CEQA a 20-day time limit to file an appeal to the Board of Supervisors begins to run and no subsequent approvals for the same or a revised project may be appealed to the Board.

This violates CEQA as well as general principles of due process and fairness. Projects often require multiple approvals from different advisory commissions and staff. The first approval may be innocuous and may not trigger environmental concerns. If a subsequent approval arguably raises new environmental concerns, there has to be some process by which to challenge the sufficiency of the claimed exemption. It cannot be left as an unappealable staff determination.

An appeal as to the adequacy of an exemption must be allowed as late as the final required approval. There must also be provision for appeal related to a revised project. The exemption must be adequate as to all discretionary decisions, and each one may generate relevant new information about the scope of the environmental impacts and adequacy of review.

5. Fails to Include the "Fair Argument Standard" to Review of Adequacy of Negative Declarations.

Supervisor Wiener's legislation uses a "substantial evidence" standard for reviewing the adequacy of negative declarations.

State law requires the use of the "fair argument" standard to determine whether an EIR must be prepared for a project. In the case of an appeal of a negative declaration to the Planning Commission or Board of Supervisors, the negative declaration must be overturned if a "fair argument" is presented that a project may have a significant effect on the environment. Thereafter, either enforceable mitigation measures must be incorporated to eliminate the significant effect or an EIR must be prepared.

6. Inadequate Public Notice for Exemption Determinations Affecting Buildings 50 Years and Older.

In sharp contrast to Supervisor Alioto-Pier's proposed 2010 CEQA legislation, Supervisor Wiener's legislation does not require adequate public notice of exemption determinations made on projects affecting buildings 50 years and older in order to trigger the appeals clock. Instead, he insists in his "Fact Sheet on Supervisor Kim's Alternative CEQA Legislation" that a "CEQA Categorical Exemption Stamp" obtained "over the counter in a matter of hours" is somehow adequate. Supervisor Wiener shows his bias against public notice in these instances by claiming that public notice of these exemptions is much too expensive and time consuming -- a claim based on a complete misunderstanding of the intent and purpose of the provision, which is to provide uniform notice standards.

Including buildings 50 years and older within the list of exemption determinations that require public notice in order to trigger appeals is critically important to maintaining the character of our City and neighborhoods. This is where many CEQA issues arise. Particularly when a project sponsor requests an over the counter exemption stamp, buildings are very often assumed to be "not historic" and stamped exempt because so few buildings are designated or surveyed. However, whether there is evidence to support a "fair argument" that a building may be a historic resource or that a project may impact a potentially significant building or historic district are important CEQA issues that must be appealable to the Board as the City's elected decision-making body.

If time limits on the public's right to appeal these exemption determinations are to be established, adequate notice is critical. A "stamp" on a plan or a letter is not adequate public notice of the exemption determination.

7. Adds Significant New Obstacles and Burdens on Filing Appeals.

Supervisor Wiener's legislation adds new obstacles and burdens on the public for filing an appeal. Wiener's legislation requires appellants to submit "all written materials" in support of the appeal with its letter of appeal (now only a letter of appeal is required) plus the Planning Commission's certification motion and the approval action taken for the project (even before the appellant knows if the appeal is accepted) and requires appellants to provide "written authorization" before their attorney or other representative is allowed to file an appeal on its behalf. These obstacles are not in existing Chapter 31 for appeals of EIRs. These types of provisions are not required for any other appeals to the Board of Supervisors.

8. Eliminates Existing Provision that Suspends Project Approvals While an Appeal is Pending.

Supervisor Wiener's legislation would eliminate the provision contained in existing law that requires all project approvals be suspended while an appeal is pending. This would mean that a project can be approved by all decision makers before a determination is made that all

environmental impacts of the project have been fully evaluated, which conflicts with the very intent and purpose of CEQA. In all other instances, such as appeals to the Board of Appeals, a project is stayed while an appeal is pending.

9. Eliminates Existing Public Notice Requirements.

• The Weiner Amendments completely eliminate the requirement for mailed public notice in the case of City-sponsored projects that involve rezonings, area plans or General Plan amendments if the area of land that is part of the project is 20 acres or more.

• The Weiner Amendments automatically eliminate mailed notice of CEQA determinations to all individuals and organizations that the Department has an email address for, even if mailed notice has been requested by such parties and they have not opted for electronic notification.

10. No Procedures for the Charter-Mandated Role of the Historic Preservation Commission to Review and Comment on all CEQA and NEPA Documents.

Again, in contrast to Supervisor Alioto-Pier's proposed 2010 CEQA legislation, Supervisor Wiener's proposal contains no procedures for implementing the Charter-mandated authority of the Historic Preservation Commission (HPC) to review and comment on all environmental documents under CEQA and NEPA and on all regulations, laws and ordinances that may impact those historic resources.

The informal process currently followed by the ERO to implements this authority is inadequate and inconsistent with the SF Charter. As an example, the ERO schedules a hearing at the HPC on a draft EIR on the day before the scheduled Planning Commission hearing on the draft EIR, which renders meaningless any comments the HPC may have on the adequacy of the EIR to consider impacts to historic resources since the deadline for submitting comments on the draft EIR is the end of the Planning Commission hearing. There is no time for the comments of the HPC to be committee to writing. At most, a member of the HPC may appear, just like any member of the public, and within the 2 or 3 minutes allowed for each public comment, attempt to provide the HPC's comments for the record. This shows why procedures to implement the HPC's Charter-mandated authority must be included in the CEQA procedures.

Supervisor Kim's Alternative CEQA Legislation.

A broad coalition of those interested in sensible and fair CEQA implementation procedures asked that Supervisor Kim introduce alternative CEQA reform legislation. Supervisor Kim is in the process of crafting this legislation to create fair and clear procedures for appeals of negative declarations and exemptions determinations without fundamentally undermining San Francisco's CEQA process.