



Office of the City Manager

CONSENT CALENDAR  
October 27, 2020

To: Honorable Mayor and Members of the City Council  
 From: Dee Williams-Ridley, City Manager  
 Submitted by: Lisa Warhuus, Director, Health, Housing, & Community Services  
 Subject: Companion Report: Smoke-Free Multi-Unit Housing Ordinance Policy and Enforcement Modifications

RECOMMENDATION

The City Manager appreciates the Housing Advisory Commission's efforts to strengthen the implementation of the Smoke-free Multi-Unit Housing ordinance and recommends that the proposed modifications be referred to the City Manager Office for an analysis of the financial and legal feasibility of the proposed changes.

POLICY COMMITTEE RECOMMENDATION

On September 29, 2020, the Health, Life Enrichment, Equity & Community Committee adopted the following action: M/S/C (Hahn/Bartlett) to send to Council a qualified positive recommendation including the following referrals: 1. Refer to staff to explore expanding the Ordinance to buildings with one unit; 2. Refer to staff to explore and consider improvements in the interface between the residential and commercial non-smoking Ordinances in mixed-use buildings; 3. Refer to staff to create a web-based complaint filing mechanism/service; 4. Refer to staff to create special protocols for chronic situations and to consider including requirements for better air filtration and purification as well as other measures to effectively manage chronic cases; 5. Refer to staff to study the infraction and enforcement mechanisms and determine if they have any benefits and to consider other potential enforcement end points; 6. Refer to staff to look for opportunities for bias in enforcement and mechanisms to better guard against bias while still allowing for maximum action to resolve legitimate complaints; 7. Refer to staff to propose funding sources for enforcement; 8. Refer to staff to collect demographic data around complaints and targets of complaints (as much as possible); and 9. To return to Council with Ordinance amendments to accomplish the following: (a) amend or remove the 10-day language element (b) modify or remove the 2-complainant rule if warranted (c) adjust for the medical cannabis state law changes, (d) propose any and all other improvements beneficial to the Ordinance.

Vote: Ayes – Bartlett, Hahn; Noes – None; Absent – Kesarwani; Abstain – None.

FISCAL IMPACTS OF RECOMMENDATION

The modifications proposed by the Housing Advisory Commission could require an increase in staffing and resources for Public Health's Tobacco Prevention Program and

the City Manager's Code Enforcement Division. A feasibility analysis will provide more insight to the costs of revised program administration as proposed.

#### CURRENT SITUATION AND ITS EFFECTS

On July 11, 2019, the Housing Advisory Commission (HAC) adopted a multi-pronged recommendation to modify the Smoke-free Multi-Unit Housing (SFMUH) ordinance. These recommendations were focused on improving the administration and enforcement of the SFMUH ordinance. On October 29, 2019, Council referred these recommendations and a staff companion report to the Health, Life Enrichment, Equity and Community Policy Committee.

On October 3, 2019, the HAC adopted additional recommendations related to improving the ordinance's administration and enforcement. These recommendations are meant to supplement the initial recommendations made on July 11, 2019 and should be considered by Council together. Staff's current recommendation is consistent with analysis provided in the October 29, 2019 companion report. These proposed modifications vary in their scope and will require additional analysis prior to adoption. The staff recommendation aligns with the Strategic Plan Priority goal to provide an efficient and financially-healthy City government.

Staff support the HAC's intent to improve the City's ability to enforce the SFMUH ordinance. However, as stated in the June 26, 2018 Audit performed by the City Auditor's Office, the Code Enforcement Unit is chronically understaffed for the increasing workload. The Audit recommends that, prior to adoption, ordinances should be "evaluated to determine the impact on current City resources and the feasibility of making the intended impact." The analysis should take place before the policy is presented to Council for adoption and include considerations of:

- Staff time and other City resource needs, including the fiscal impact of those resource needs;
- Opportunity cost, i.e. consideration of other activities that may be deprioritized in order to meet new demands; and
- Feasibility impact to determine how best to implement the new legislation.

A feasibility analysis will assist in determining how to prioritize the Unit's heavy caseload. This analysis is imperative to determine how to use limited staffing and resources effectively, especially in context of life and safety issues. It will also assist understanding of supplemental resources for the Tobacco Prevention Program, which currently operates with funding from the State and Alameda County.

Staff provided some more detailed feedback on specific recommendations outlined in HAC's report in addition to the general assessment above. This analysis is intended to guide the feasibility analysis and Council's understanding of implementation and enforcement.

**HAC Recommendation #1: Make a short term referral directing the City Manager to correct current City Policies for enforcing BMC 12.70.035 so that these policies do not contradict the ordinance and BMC 12.70.035 requires that second and third complaints must refer to a violation or violations that occur after the 12.70.035(C) notice has been made.**

This recommendation is targeted at the City's policies related to code enforcement and administration standards.

The City's approach to enforcing SFMUH ordinance is consistent with how staff manage all code enforcement activities. Rationale for the City's approach to code enforcement and use of its discretionary powers are outlined below.

#### *Code Enforcement Practices*

The HAC's recommendations related to enforcement are inconsistent with the City's progressive approach to code enforcement. The City's approach emphasizes voluntary compliance in the first instance, followed by progressively more punitive enforcement measures when a property owner refuses to voluntarily comply. In addition, the recommendations outlined in the report would lead to inconsistencies in the process of enforcing Municipal Code and could improperly delegate the City's police power to private third parties.

#### *Discretionary Enforcement*

The HAC recommends Code Enforcement must notify reporting parties when enforcement does not take place. This practice would be inconsistent with the Unit's approach in all other enforcement categories, and would add significant time to the workload of the division (which at the time of this writing has one staff person and two vacancies). Decisions made by Code Enforcement staff to pursue enforcement measures, based on their investigations, are not appealable. Further, the City currently has no process in place to appeal a non-action.

Code Enforcement throughout the City is given discretion to determine whether sufficient violations exist. If violations do exist, Staff's initial approach is to educate the violator in pursuit of voluntary compliance. Enforcement as a method to compel compliance is used only after efforts to elicit voluntary compliance have failed. The HAC recommendation would compel staff to pursue enforcement as a primary method, and would empower the reporting party to determine whether enforcement is appropriate, rather than the Code Enforcement Team.

The second part of the recommendation calls to modify BMC 12.70.035 to require that second and third complaints must refer to a violation or violations that occur after the 12.70.035.C notice has been made. This recommendation is related to how the ordinance is implemented via a 10-day administrative period. Staff established this period for processing multiple complaints at one property. This period provides a

reasonable amount of time once the City receives a complaint to 1) process the complaint; 2) notify and educate the alleged violator of the ordinance; and 3) provide the alleged violator the opportunity to come into compliance before a seconded complaint is filed.

Staff agree the second and third complaints must refer to a violation or violations that occur after Section C notice has been made to the person(s) responsible. Second and third complaints can be made after 10 days of the City officially receiving (time stamped) the initial complaint since it takes approximately 10 business days after the City receives the complaint to send out notices and inform to the alleged violators. The fact sheet can be amended to reflect this change. This is consistent with the City's voluntary compliance approach prior to issuing punitive measures.

As an ancillary recommendation to improve this process, the HAC recommended modifying BMC 12.70.035.D to use the date of delivery of a notice, and for the City to send notices using the USPS confirmed delivery service. This recommendation should also encompass BMC 12.70.035.C, which is the process for an initial reported violation at a property. Subsection D addresses additional reported violations.

The Tobacco Prevention Program currently timestamps every complaint received and logs the complaints. Using a USPS mail tracking service to verify delivery of violation notifications and other mailing requirements required by the ordinance should be considered in terms of capacity and administrative costs for increased mailing costs.

The information sheet can be edited to remove the following statement, "Please note that the issuance of a citation is an absolutely discretionary process based on the City's resources, competing time constraints, and whether it is clear that the complaints are being filed in good faith." A policy to communicate the reasons for not issuing an infraction to complaint filers and provide an option to appeal (if appropriate) could be included in the proposed feasibility analysis although Code Enforcement has reported that this would differ from the process for all other complaints.

**HAC Recommendation #3: Modify BMC 12.70.035 so that the requirement that signs be posted is enforced as part of the Residential Safety ordinance. Failure to post signage may result in fines, accordingly.**

There is currently no outlined infractions in the SFMUH ordinance around signage. This would potentially increase Code Enforcement's duties and should be included as part of a feasibility analysis.

**HAC Recommendation #4: Modify BMC 12.70.035 so that repeated failure to provide new tenants with the City's brochure shall be guilty of an infraction. It shall also be an infraction for landlords to tell new tenants, in contradiction to the law, that tobacco smoking by some tenants is permitted.**

Staff understand the importance and responsibility to increase awareness of the ordinance with Berkeley residents. The Tobacco Prevention Program incorporates building awareness of the SFMUH through regularly conducted outreach and education activities. The Tobacco Prevention Program maintains a copy of the brochure on the City website and consistently has copies at their office (1947 Center Street) for any requests from residents and landlords alike. These activities can continue and, in the future, the Tobacco Prevention Program can also provide copies of the brochure on an ongoing basis to the public-facing zoning and permitting counters and any other applicable City Departments. Staff support increasing accessibility to property owners and managers and all Berkeley residents.

The Tobacco Prevention staff's scope of work is contingent on grant funding from the State and Alameda County. This scope of work does not include enforcement or education activities related to the SFMUH ordinance. Additional resources would be needed to expand outreach and provide more targeted and sustained education initiatives.

**HAC Recommendation #5: Obtain an analysis of the financial impacts of the recommended modifications to the BMC.**

This is consistent with staff's recommendation for a feasibility analysis.

**BACKGROUND**

On December 3, 2013, the Berkeley City Council adopted Ordinance No. 7,321-N.S. regulating second hand smoke in all multi-unit residences common areas. As of May 1, 2014, smoking tobacco products is prohibited in 100% of multi-unit housing with two or more units (i.e. apartments, co-ops, condominiums, common interest developments, etc.). This also includes common areas such as private decks, balconies, and porches of units.

**ENVIRONMENTAL SUSTAINABILITY**

Providing smoke-free housing improves the local air quality of Berkeley's housing stock.

**RATIONALE FOR RECOMMENDATION**

Staff appreciate the commission's efforts to respond to community concerns and ensure the City has the most effective and accessible ordinance possible to serve our residents. Due to the varied, multi-pronged nature of the HAC recommendations, staff recommend that a feasibility analysis be done first to better understand the potential impacts and needs associated with effectively administering the proposed ordinance modifications so that the goals it engenders can be actualized.

Certain recommendations may have unanticipated impacts on City practices. The City uses a proactive approach to Code Enforcement. Modifications to enforcement practices as prescribed by the HAC's recommendations may create inconsistencies in

the process of enforcing Municipal Code and could improperly delegate the City's police power to private third parties. These impacts should be considered as part of a feasibility study.

ALTERNATIVE ACTIONS CONSIDERED

The City Council may consider to maintain the current enforcement mechanisms that fall within the City's established legal and administrative protocol.

CONTACT PERSON

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