



**BERKELEY CITY COUNCIL HEALTH, LIFE ENRICHMENT, EQUITY &
COMMUNITY COMMITTEE
REGULAR MEETING**

**Monday, February 10, 2020
10:00 AM**

2180 Milvia Street, 6th Floor - Redwood Room

Committee Members:

Councilmembers Rashi Kesarwani, Ben Bartlett, and Sophie Hahn
Alternate: Councilmember Rigel Robinson

AGENDA

Roll Call

Public Comment on Non-Agenda Matters

Minutes for Approval

Draft minutes for the Committee's consideration and approval.

1. Minutes - January 27, 2020

Committee Action Items

The public may comment on each item listed on the agenda for action as the item is taken up. The Chair will determine the number of persons interested in speaking on each item. Up to ten (10) speakers may speak for two minutes. If there are more than ten persons interested in speaking, the Chair may limit the public comment for all speakers to one minute per speaker. Speakers are permitted to yield their time to one other speaker, however no one speaker shall have more than four minutes.

Following review and discussion of the items listed below, the Committee may continue an item to a future committee meeting, or refer the item to the City Council.

2. Election of a Chair

Committee Action Items

3. **Listening Session on Homelessness (15 minutes)**
4. **Healthy Checkout Ordinance**
From: Councilmembers Harrison and Hahn
Referred: October 28, 2019
Due: April 26, 2019
Recommendation: 1. Adopt an ordinance requiring stores over 2,500 square feet in size to sell more nutritious food and beverage options in their checkout areas.
2. Refer to the City Manager to determine funding and staffing needs to implement and enforce the ordinance and sources of funding to support this program.
Financial Implications: See report
Contact: Kate Harrison, Councilmember, District 4, (510) 981-7140
- 5a. **Recommendation that the City Council Pass a Resolution Regarding Procurement, Sales and Serving of Sugar-Sweetened Beverages.**
From: Sugar Sweetened Beverage Product Panel of Experts
Referred: January 21, 2020
Due: June 9, 2020
Recommendation: The Sugar Sweetened Beverage Product Panel of Experts recommends that the Berkeley City Council adopt a Resolution that City of Berkeley departments and City food services contractors shall not: 1. Serve sugar-sweetened beverages at City meetings and events on City property; 2. Procure sugar-sweetened beverages with City funds; or, 3. Sell sugar-sweetened beverages on City property, including in vending machines.
Financial Implications: See report
Contact: Dechen Tsering, Commission Secretary, (510) 981-5300
- 5b. **Companion Report: Recommendation that the City Council Pass a Resolution Regarding Procurement, Sales, and Serving Sugar-Sweetened Beverages**
From: City Manager
Referred: January 21, 2020
Due: June 9, 2020
Recommendation: Recommend that the City Council adopt an amended resolution that recognizes the important principles in the Commission recommendation, clarifies the intent of the measure and provides some flexibility for City programs and staff while still emphasizing availability of healthy options. This amended resolution would require that the majority of all beverages provided or sold at any City event or on any City property (including vending machines) be non-sugar sweetened beverages (as defined in chapter 7.72 of the Berkeley Municipal Code) and education materials be provided to all COB staff to actively discourage the consumption of sugar-sweetened beverages and encourage the consumption of water.
Financial Implications: See report
Contact: Kelly Wallace, Housing and Community Services, (510) 981-5400

Unscheduled Items

These items are not scheduled for discussion or action at this meeting. The Committee may schedule these items to the Action Calendar of a future Committee meeting.

- 6a. Recommendation to Modify Policies Related to the Enforcement of the Berkeley Smoke-Free Multi-Unit Housing Ordinance**
From: Housing Advisory Commission
Referred: October 29, 2019
Due: April 27, 2020
Recommendation: Approve modifications to policies related to the enforcement of the Smoke-Free Multi-Unit Housing Ordinance, as follows:
1. Increase staffing to implement enforcement of the ordinance as part of the next budget;
 2. Improve signage related to the ordinance in residential buildings;
 3. Make the complaint process less onerous and more user-friendly, including enabling complainants to submit complaints electronically, providing complaint forms in different languages, and removing language requiring the statements to be “sworn,” and considering other, less threatening language that still expects a complaint be provided under the best of appellant’s knowledge;
 4. Relax the current requirements around how the Ordinance-based complaint form must be completed in order to be processed (e.g., removing the requirement of providing two separate complaints from different individuals within a six-month period, if the building contains two or fewer units, removing the requirement of providing a sworn statement under penalty of perjury); and
 5. Refer to the Community Health and Cannabis Commissions the question of whether the use of recreational (non-medical) cannabis should be incorporated into the Smoke-Free Housing Ordinance.
- Financial Implications:** See report
Contact: Mike Uberti, Commission Secretary, (510) 981-7400
- 6b. Companion Report: Recommendation to Modify Policies Related to the Enforcement of the Berkeley Smoke-Free Multi-Unit Housing Ordinance**
From: City Manager
Referred: October 29, 2019
Due: April 27, 2020
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.
Financial Implications: See report
Contact: Kelly Wallace, Housing and Community Services, (510) 981-5400

Items for Future Agendas

- Discussion of items to be added to future agendas
- Discussion of future hearings and open forums

Adjournment

Written communications addressed to the Health, Life Enrichment, Equity & Community Committee and submitted to the City Clerk Department will be distributed to the Committee prior to the meeting.

This meeting will be conducted in accordance with the Brown Act, Government Code Section 54953. Members of the City Council who are not members of the standing committee may attend a standing committee meeting even if it results in a quorum being present, provided that the non-members only act as observers and do not participate in the meeting. If only one member of the Council who is not a member of the committee is present for the meeting, the member may participate in the meeting because less than a quorum of the full Council is present. Any member of the public may attend this meeting. Questions regarding this matter may be addressed to Mark Numainville, City Clerk, (510) 981-6900.



COMMUNICATION ACCESS INFORMATION:

This meeting is being held in a wheelchair accessible location. To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at (510) 981-6418 (V) or (510) 981-6347 (TDD) at least three business days before the meeting date. Attendees at public meetings are reminded that other attendees may be sensitive to various scents, whether natural or manufactured, in products and materials. Please help the City respect these needs.

I hereby certify that the agenda for this meeting of the Standing Committee of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City's website, on February 6, 2020.

A handwritten signature in black ink that reads "Mark Numainville".

Mark Numainville, City Clerk

Communications

Communications submitted to City Council Policy Committees are on file in the City Clerk Department at 2180 Milvia Street, 1st Floor, Berkeley, CA.

**BERKELEY CITY COUNCIL HEALTH, LIFE ENRICHMENT, EQUITY &
COMMUNITY COMMITTEE
REGULAR MEETING MINUTES**

**Monday, January 27, 2020
10:00 AM**

2180 Milvia Street, 6th Floor - Redwood Room

Committee Members:

Councilmembers Rashi Kesarwani, Cheryl Davila, and Sophie Hahn

Roll Call: 10:01 a.m. Councilmember Hahn absent.

Public Comment on Non-Agenda Matters – 2 speakers.

Minutes for Approval

Draft minutes for the Committee's consideration and approval.

1. Minutes - December 9, 2019

Action: M/S/C (Kesarwani/Davila) to approve the minutes of December 9, 2019.

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

Committee Action Items

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Following review and discussion of the items listed below, the Committee may continue an item to a future committee meeting, or refer the item to the City Council.

2. Listening Session on Homelessness (15 minutes) – 1 speaker

Committee Action Items

3. **Healthy Checkout Ordinance**

From: Councilmembers Harrison and Hahn

Referred: October 28, 2019

Due: April 26, 2019

Recommendation: 1. Adopt an ordinance requiring stores over 2,500 square feet in size to sell more nutritious food and beverage options in their checkout areas.

2. Refer to the City Manager to determine funding and staffing needs to implement and enforce the ordinance and sources of funding to support this program.

Financial Implications: See report

Contact: Kate Harrison, Councilmember, District 4, (510) 981-7140

Action: 1 speaker. Discussion held.

Item continued to next meeting on February 10, 2020.

4a. **Recommendation that the City Council Pass a Resolution Regarding Procurement, Sales and Serving of Sugar-Sweetened Beverages**

From: Sugar Sweetened Beverage Product Panel of Experts

Referred: January 21, 2020

Due: June 9, 2020

Recommendation: The Sugar Sweetened Beverage Product Panel of Experts recommends that the Berkeley City Council adopt a Resolution that City of Berkeley departments and City food services contractors shall not: 1. Serve sugar-sweetened beverages at City meetings and events on City property; 2. Procure sugar-sweetened beverages with City funds; or, 3. Sell sugar-sweetened beverages on City property, including in vending machines.

Financial Implications: See report

Contact: Dechen Tsering, Commission Secretary, (510) 981-5300

4b. **Companion Report: Recommendation that the City Council Pass a Resolution Regarding Procurement, Sales, and Serving Sugar-Sweetened Beverages**

From: City Manager

Referred: January 21, 2020

Due: June 9, 2020

Recommendation: Recommend that the City Council adopt an amended resolution that recognizes the important principles in the Commission recommendation, clarifies the intent of the measure and provides some flexibility for City programs and staff while still emphasizing availability of healthy options. This amended resolution would require that the majority of all beverages provided or sold at any City event or on any City property (including vending machines) be non-sugar sweetened beverages (as defined in chapter 7.72 of the Berkeley Municipal Code) and education materials be provided to all COB staff to actively discourage the consumption of sugar-sweetened beverages and encourage the consumption of water.

Financial Implications: See report

Contact: Kelly Wallace, Housing and Community Services, (510) 981-5400

Committee Action Items

Action: 3 speakers. Discussion held.

Item continued to next meeting on February 10, 2020.

Unscheduled Items

These items are not scheduled for discussion or action at this meeting. The Committee may schedule these items to the Action Calendar of a future Committee meeting.

5a. **Recommendation to Modify Policies Related to the Enforcement of the Berkeley Smoke-Free Multi-Unit Housing Ordinance**

From: Housing Advisory Commission

Referred: October 29, 2019

Due: April 27, 2020

Recommendation: Approve modifications to policies related to the enforcement of the Smoke-Free Multi-Unit Housing Ordinance, as follows:

1. Increase staffing to implement enforcement of the ordinance as part of the next budget;
2. Improve signage related to the ordinance in residential buildings;
3. Make the complaint process less onerous and more user-friendly, including enabling complainants to submit complaints electronically, providing complaint forms in different languages, and removing language requiring the statements to be “sworn,” and considering other, less threatening language that still expects a complaint be provided under the best of appellant’s knowledge;
4. Relax the current requirements around how the Ordinance-based complaint form must be completed in order to be processed (e.g., removing the requirement of providing two separate complaints from different individuals within a six-month period, if the building contains two or fewer units, removing the requirement of providing a sworn statement under penalty of perjury); and
5. Refer to the Community Health and Cannabis Commissions the question of whether the use of recreational (non-medical) cannabis should be incorporated into the Smoke-Free Housing Ordinance.

Financial Implications: See report

Contact: Mike Uberti, Commission Secretary, (510) 981-7400

5b. **Companion Report: Recommendation to Modify Policies Related to the Enforcement of the Berkeley Smoke-Free Multi-Unit Housing Ordinance**

From: City Manager

Referred: October 29, 2019

Due: April 27, 2020

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.

Financial Implications: See report

Contact: Kelly Wallace, Housing and Community Services, (510) 981-5400

Items for Future Agendas

- Discussion of items to be added to future agendas
- Discussion of future hearings and open forum

Adjournment


Adjourned at 10:35 a.m.

I hereby certify that this is a true and correct record of the Health, Life Enrichment, Equity & Community Committee meeting held on January 27, 2020.

April Richardson, Assistant City Clerk

Communications

Communications submitted to City Council Policy Committees are on file in the City Clerk Department at 2180 Milvia Street, 1st Floor, Berkeley, CA.



No Material
Available for
this Item

There is no material for this item.

City Clerk Department
2180 Milvia Street
Berkeley, CA 94704
(510) 981-6900

The City of Berkeley, Health, Life Enrichment, Equity & Community Policy Committee
Webpage:

https://www.cityofberkeley.info/Clerk/Home/Policy_Committee_Health,_Life_Enrichment,_Equity_Community.aspx



Kate Harrison
Councilmember District 4

ACTION CALENDAR
November 12, 2019

To: Honorable Mayor and Members of the City Council
From: Councilmembers Kate Harrison and Sophie Hahn
Subject: Healthy Checkout Ordinance

RECOMMENDATION

1. Adopt an ordinance requiring stores over 2,500 square feet in size to sell more nutritious food and beverage options in their checkout areas.
2. Refer to the City Manager to determine funding and staffing needs to implement and enforce the ordinance and sources of funding to support this program.

POLICY COMMITTEE TRACK

Health, Life Enrichment, Equity and Community

FINANCIAL IMPLICATIONS

1. Implementation of the ordinance would require staff time to educate the approximately 25 stores about what is required of them to comply with the ordinance. The Center for Science in the Public Interest could provide technical assistance including a suggested list of products that meet the criteria of the ordinance. Healthy Berkeley funded programs could also assist with store education and monitoring. Community partners could assist with implementation.
2. Enforcement of the ordinance may be incorporated into the regular inspections of food retailers conducted by the City. Spot checks of items sold in each aisle could monitor compliance.
3. The City-held public meetings for retailers and community residents to share their input will require time from the ~~Committee~~ ~~mission~~ ~~secretaries~~.

BACKGROUND

Today's food landscape plays a large role in determining what people purchase and consume. Unhealthy food and beverages are promoted and placed repeatedly throughout retail stores. Cheap, ready-to-eat foods high in salt, saturated fat, and added sugars dominate checkout aisles, where shoppers are more likely to make impulse purchases and where parents struggle with their children over demands to buy treats at the end of a shopping trip.

This ordinance would require all stores over 2,500 square feet in size that sell at least 25 linear feet of food to follow the requirements for Healthy Checkout, as written in the

2180 Milvia Street, Berkeley, CA 94704 • Tel: (510) 981-7140 • TDD: (510) 981-6903 • Fax: (510) 981-6903 E-Mail: KHarrison@cityofberkeley.info

ordinance, the specifics of which are to be determined in the policy committee process. This would impact approximately 25 stores in Berkeley, including Safeway, Whole Foods, CVS, Walgreens, Berkeley Bowl, and Monterey Market.

Health Impacts of Sugar and Sodium Consumption and Related Disease Disparities

Impulse buying at checkout contributes to the high levels of sugar consumption in American diets. There has been much research and media attention¹ about the health impacts of excessive added sugar intake, including elevated risk of tooth decay, heart disease, and Type 2 diabetes.² The adverse health effects of added sugar consumption further entrench health disparities, burdening people of color more than white populations. Currently, Type 2 diabetes is on the rise across the country; one in three children and one of two children of color will be diagnosed in their lifetime.³

Diets that are high in sodium are linked to high blood pressure, heart disease, and stroke,⁴ all of which disproportionately affect African Americans and communities of color.⁵

Health Equity and Inequity

Berkeley also has health disparities in diet-related disease. In 2014, African American residents were four times more likely than White residents to be diagnosed with diabetes and 14 times more likely to be hospitalized due to its effects.⁶ This gap has decreased since 2014, but the disparity continues to exist.⁷ Rates of hospitalization for heart disease and high blood pressure are also significantly higher among African-American residents than White and Latino residents.⁵

On a national scale, racial and ethnic minorities experience diet-related disparities – diets high in fat and salt and low in fruits, vegetables, and whole grains.⁸ These diet-related disparities lead to additional health disparities including heart disease and diabetes, as discussed above. Providing more nutritious options will benefit people of all backgrounds, but it will disproportionately benefit low-income communities and communities of color who are most affected by nutrition-related health issues.

Checkout Areas of Grocery Stores Contribute to the Problem

Consumers are trying to make healthier purchases. A 2019 report found that 73 percent of shoppers are concerned about the nutritional content of their food.^{9,10}

Despite consumer desire to select healthier foods, unhealthy foods are prevalent in checkout areas in a wide variety of retail stores. A national study of 8,600 stores – including supermarkets, convenience stores, drug stores, and dollar stores – found that 88 percent display candy at checkout and one-third (34 percent) sell sugar-sweetened beverages.¹¹ Only 24 percent of stores sell water at checkout, and only 13 percent sell fresh fruits or vegetables at checkout.⁸ Almost all supermarkets (91 percent) display candy and 85 percent sell soda and other sugary drinks at checkout.⁸

In 2018, a Berkeley-based youth group assessed a sample of 35 Berkeley stores including Walgreens, Safeway, Trader Joes, Target, Berkeley Bowl, Dollar Tree and

others. Data was collected from 16,404 facings, which are the display of a single product on the shelf (not including the items stacked behind it). They found that 69 percent of beverages and 81 percent of foods sold in the checkout area of surveyed stores were considered unhealthy using the [National Alliance for Nutrition and Activity Model Nutrition Standards for Checkout](#).¹²

Research shows that food choices are strongly affected by the environments in which they are made. The aim of placing food and beverages at checkout is to induce unplanned purchases; thus, unhealthy checkout options undermine consumers' efforts to purchase healthier foods.¹³ The placement of snacks near the register increases the likelihood that people purchase those foods.¹⁴ In addition, most of the candy, soda, and chips in checkout aisles are placed at eye-level and within reach of children, undermining parents' efforts to feed their children well.¹⁵

Three-quarters of parents report that it is hard to shop at grocery stores because unhealthy food is so prevalent.¹⁶ Healthy checkout aisles provide all families more opportunities to say yes to their kids.

Grocery Stores are a Prime Place for Policy Change

Grocery stores are Americans' top source for food and beverages, providing more than 60 percent of calories.¹⁷ Ninety percent of Supplemental Nutritional Assistance Program (SNAP) dollars are redeemed at supermarkets and grocery stores.¹⁸ Though grocery stores sell a wide range of healthy products, they are also the largest contributor of unhealthy food and beverages to the diet. Seventy percent of the sugary beverages children consume come from food retail.¹⁹

Sugary drinks are promoted repeatedly throughout stores; appearing in as many as 25 different places in a single grocery store.²⁰ At checkout, these drinks make up 60% of beverage offerings.²¹

Healthy Checkout also provides an opportunity for grocery stores. When United Kingdom grocery stores provided healthier options at checkout, consumers responded positively and provided a "responsible" branding opportunity for those stores.²² Consumers want healthier options, and stores can use this fact to their advantage.

For all these reasons, grocery store checkout lanes are an ideal place to begin changing norms around healthy snacks and drinks.

Strategies to Reduce Sugar Consumption in Berkeley

In 2014, Berkeley became the first city in the country to tax the distribution of sugar sweetened beverages. In the last five years, the City created the Healthy Berkeley program which supports the Berkeley Unified School District garden education program as well as community programs that educate residents about nutrition and are changing norms around beverage choice.

This ordinance is another effort to create a healthy food environment that would support families by providing them the ability to avoid high-calorie, low-nutrient food and

beverages when they do their grocery and other shopping. Individuals and families who want to purchase sugary drinks, candy, chips, and other sweet and salty snacks will be able to find them in their respective aisles in the center of stores. By changing checkout norms, shoppers and their children face less temptation to consume sugary foods and there is less reinforcement of these unhealthy choices.

Berkeley Residents are Demanding Checkout Changes

In 2018, Berkeley-based youth advocates conducted four focus groups where adults and adolescents unanimously supported removing unhealthy food and beverages from grocery store checkout lanes and requiring stores to have healthy checkout aisles. Participants suggested retailers stock checkout with water, fruit juice, coffee, and tea. They also requested that gum, mints and healthy snacks be available. Using the National Alliance for Nutrition and Activity standards as a guide, this ordinance aims to create checkout aisles where beverages with no added sugars or artificial sweeteners, such as 100% juice and water are considered healthy beverages, and where healthy snacks are predominantly fruits, nuts, and vegetables.

In order to streamline implementation and enforcement, the proposed Healthy Checkout Ordinance restricts added sugars and sodium for food products sold at checkout.

Outreach and Focus Groups

The Center for Science in the Public Interest performed four focus group studies in 2019 regarding the proposed Healthy Checkout Ordinance. The focus groups were intentionally diverse but focused on youth and health advocates. The four focus groups were 1) Berkeley High School students 2) Latinx women in South Berkeley, conducted in Spanish 3) African-American women, hosted by Healthy Black Families and 4) North and Northwest Berkeley residents, hosted by Urban Adamah. From the focus groups, advocates learned that half reported feeling stress at checkout, there was unanimous support for healthy checkout options in grocery stores, and parents and children are susceptible to impulse purchases.

There were also nine interviews conducted with a dentist, a Community Health Commissioner, two non-profit leaders, four local retail managers, and one store owner. 100% of the retailers were interested in making healthier changes and 50% of the managers were interested in supporting the ordinance directly. All retailers also stated that straightforward guidelines would help with implementation.

The City has also begun some outreach, with positive results. Healthy Checkout was recently polled in the Berkeley Considers engagement portal, where over 95% of respondents were in favor. Over 100 people responded to the question.

Healthy Checkout Reduces Impulse Buying of Sugary Snacks and Drinks

A recent study by the University of Cambridge analyzed purchasing data for common unhealthy checkout foods from 2013-2017 in nine U.K. supermarket chains. They found

that consumers purchased 17 percent fewer sweets, chocolate and potato chips. One year later the decline in unhealthy purchases remained steady at 16 percent.¹

The Healthy Checkout Ordinance will create a level playing field for customers and retailers and support consistent, healthy snacking norms for shoppers and families.

Reducing Unhealthy Food and Beverages Sold Providing Alternatives at Checkout in Berkeley: Ordinance Elements

The attached ordinance (Attachment 1):

- limits food and beverage products sold at the checkout area;
- applies to approximately 25 stores in Berkeley that are over 2,500 square feet (see attached) and have more than 25 linear feet of food for sale; and
- allows only beverages with no added sugars and no artificial sweeteners and food items with limited calories, added sugars, and sodium to be sold in the checkout area.

These limitations allow for healthy alternatives to proliferate in checkout areas. Stores will continue to sell food items in their checkout areas, and limiting the salt and added sugars will lead to stores selling fruits, vegetables, seeds, nuts, water, milk, and other healthier options.

The attached ordinance still has some unanswered questions that will require input from public health advocates, City staff, food retailers, and the policy committee. Those questions are:

- how to define healthy food, and what parameters are most appropriate;
- date of implementation;
- appropriate definition of “checkout area”. The attached draft ordinance includes the definition of “checkout area” as defined in AB 765, but that definition may not appropriately reflect the needs of all large retail stores in Berkeley.

RATIONALE FOR RECOMMENDATION

Requiring the approximately 25 stores to follow the requirements for Healthy Checkout would eliminate the encouragement of unplanned purchases of unhealthy foods and beverages. Such a change would thus contribute to healthy norms and reduce the consumption of sugary drinks and unhealthy foods in the City of Berkeley.

ALTERNATIVES CONSIDERED

In February 2019, Assemblymember Buffy Wicks introduced AB 765, a bill which would implement Healthy Checkout statewide. However, as the bill has not advanced from committee since April, progress at the state level is not guaranteed.

In the United Kingdom, many grocery stores have voluntarily undertaken a healthy checkout initiative.²² However, without clear standards for what constitutes “healthy” or enforcement, the voluntary model is too modest to draw conclusions about long-term

health impacts. In addition, the interviews with retailers indicated that voluntary compliance without straightforward guidelines would be more difficult to follow.

CONTACT PERSON

Kate Harrison, District 4

ATTACHMENTS:

1: Draft Ordinance #1 -- regulatory

2: Draft Ordinance #2 -- prescriptive

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- ¹ Brody, JE. The Downside of Having a Sweet Tooth. *The New York Times*. July 22, 2019. <https://www.nytimes.com/2019/07/22/well/eat/the-downside-of-having-a-sweet-tooth.html>.
- ² U.S. Department of Health and Human Services and U.S. Department of Agriculture. *2015–2020 Dietary Guidelines for Americans 8th Edition*. Washington, DC; HHS and USDA, 2015.
- ³ *Lancet Diabetes Endocrinol*. 2014 Nov;2(11):867-74. doi: 10.1016/S2213-8587(14)70161-5. Epub 2014 Aug 12.
- ⁴ <https://www.hsph.harvard.edu/nutritionsource/salt-and-sodium/>
- ⁵ <https://www.cdc.gov/mmwr/volumes/67/ss/ss6705a1.htm>
- ⁶ City of Berkeley. *Health Status Report 2014*. Berkeley, CA; 2014.
- ⁷ City of Berkeley. *Health Status Report 2018*. Berkeley, CA; 2018.
- ⁸ *Satia, Jessie A. Diet-Related Disparities: Understanding the Problem and Accelerating Solutions. J. Am Diet Assoc. 2009 April.*
- ⁹ Food Marketing Institute. *The Power of Health and Well-Being in Food Retail*. Arlington, VA: FMI; 2019.
- ¹⁰ International Food Information Council Foundation. *2019 Food & Health Survey*. Washington, D.C.: IFIC; 2019.
- ¹¹ Barker D, Quinn C, Rimkus L, Zenk S, Chaloupka F. *Availability of Healthy Food Products at Check-out Nationwide, 2010-2012*. Chicago, IL: Bridging the Gap Program, Health Policy Center, Institute for Health Research and Policy, University of Illinois at Chicago; 2015.
- ¹² The Center for Science in the Public Interest. *Model Nutrition Standards for Checkout*. <https://cspinet.org/protecting-our-health/nutrition/model-nutrition-standards-checkout>.
- ¹³ Center for Science in the Public Interest. *Temptation at Checkout: The Power of Point-of-Sale Retail Food Marketing*. Washington, D.C.: CSPI; 2015.
- ¹⁴ Kerr J, Sallis JF, Bromby E, Glanz K. Assessing Reliability and Validity of the GroPromo Audit Tool for Evaluation of Grocery Store Marketing and Promotional Environments. *J Nutr Educ Behav*. 2012;44(6):597-603. doi:10.1016/j.jneb.2012.04.017.
- ¹⁵ Horsley JA, Absalom KA, Akiens EM, Dunk RJ, Ferguson AM. The Proportion of Unhealthy Foodstuffs Children Are Exposed to at the Checkout of Convenience Supermarkets. *Public Health Nutr*. 2014;17(11):2453-2458.
- ¹⁶ Caravan ORC International. *Checkout Polling: Online Survey of 1,024 adults*. Princeton, NJ; 2016.
- ¹⁷ Mancino L, Guthrie J. *Supermarkets, Schools, and Social Gatherings: Where Supplemental Nutrition Assistance Program and Other U.S. Households Acquire their Foods Correlates with Nutritional Quality*. Washington, DC: U.S. Department of Agriculture Economic Research Center; 2018.
- ¹⁸ U.S. Department of Agriculture Food and Nutrition Service. *2015 SNAP Retailer Management Year-End Summary*. Washington, D.C.: USDA; 2015.
- ¹⁹ Poti JM, Slining MM, Popkin BM, Kenan WR. Where are kids getting their empty calories? Stores, schools, and fast food restaurants each play an important role in empty calorie intake among US children in 2009-2010. *J Acad Nutr Diet*. 2014;114(6):908-917. doi: 10.1016/j.jand.2013.08.012.
- ²⁰ Cohen DA, Bogart L, Castro G, Rossi AD, Williamson S, Han B. Beverage marketing in retail outlets and The Balance Calories Initiative. *Prev Med*. 2018;115:1-7.
- ²¹ Fielding-Singh P, Almy J, Wootan MG. *Sugar Overload: Retail Checkout Promotes Obesity*. Washington, DC: Center for Science in the Public Interest, 2014.
- ²² *Winkler, Lise L, et al. Substituting Sugar Confectionary with Fruit and Healthy Snacks at Checkout – A Win-Win Strategy for Consumers and Food Stores? BMC Public Health. 2016*

ORDINANCE NO. -N.S.

ADDING CHAPTER 9.82 TO THE BERKELEY MUNICIPAL CODE "HEALTHY CHECKOUT"

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That the Berkeley Municipal Code is amended to read as follows:

9.82.010. Findings and Purpose.

The City of Berkeley hereby finds and declares as follows:

- A. Diets with an excess of added sugars and sodium are correlated to chronic health issues including diabetes, high blood pressure, and stroke.
- B. Grocery stores are Americans' top source for food and beverages, contributing an average of 60% of caloric intake.
- C. Food choices are strongly affected by the environments in which they are made. The placement of unhealthy snacks near a register increases the likelihood that consumers will purchase those foods and drinks, thus undermining consumer health choices and public health initiatives.
- D. It is in the interest of the health, safety, and welfare of all who live, work, and do business in the City that large stores offer healthy options and do not actively encourage the purchase of unhealthy foods.
- E. This Chapter is consistent with the General Provisions of Environmental Health of the City (Berkeley Municipal Code 11.04).

9.82.020. Definitions.

- A. Added Sugars shall mean sugars added during the processing of food and beverages, or are packaged as such, and include sugars (free, mono and disaccharides), sugars from syrups and honey, and sugars from concentrated fruit or vegetable juices that are in excess of what would be expected from the same volume of 100 percent fruit or vegetable juice of the same type, as defined in Section [101.9](#) of Title 21 of the Code of Federal Regulations.
- B. Artificial Sweetener shall mean sweeteners with few to no calories that have a higher intensity of sweetness per gram than sucrose.
- C. Category List shall mean the list of foods and beverages which meet the standards of BMC 9.82.030.
- D. Checkout Area shall mean any area that is accessible to a customer of the Large Retail Store that is
 - i. within **XX** feet of any Register; or
 - ii. in an area in the Large Retail Store which is designated only for

customers to wait in line to make a purchase.

- E. "Register" shall mean a device used for monetary transactions that calculates the sales of goods and displays the amount of sales for the customer.
- F. "Large Retail Store" shall mean a commercial establishment selling goods to the public with a total floor area of 2,500 square feet or more and selling 25 linear feet or more of food.

9.82.030. Healthy Checkout Areas.

Each Large Retail Store shall, at all hours during which the Large Retail Store is open to the public, ensure that the only foods and beverages available in all checkout areas meet the standards in Sec 9.82.030 A-B:

- A. Beverages with no added sugars and no artificial sweeteners.
- B. Food items with no more than XX calories, XX grams of added sugars, and XX grams of sodium.

9.82.040. Enforcement.

- A. The City is hereby authorized to issue all rules and regulations consistent with this ordinance, including, but not limited to, fees for re-inspection.
- B. Compliance with this Chapter shall be administered by the City during regular inspections of qualifying Large Retail Stores. The City may require a Large Retail Store to provide such information as may be necessary to determine the Large Retail Store's compliance with this Chapter.

9.82.050. Violation--Penalty.

- A. A Large Retail Store that violates any provision of this chapter may be subject to administrative citations pursuant to Chapter [1.28](#) of this Code.
- B. This section shall not limit the City from recovering all costs associated with implementing this chapter or investigating complaints pursuant to fee resolution.
- C. Remedies and penalties under this chapter are cumulative and not exclusive.

9.82.060. Effective Date.

This ordinance and the legal requirements set forth herein shall take effect and be in force XX.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

ORDINANCE NO. -N.S.

ADDING CHAPTER 9.82 TO THE BERKELEY MUNICIPAL CODE "HEALTHY CHECKOUT"

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That the Berkeley Municipal Code is amended to read as follows:

9.82.010. Findings and Purpose.

The City of Berkeley hereby finds and declares as follows:

- A. Diets with an excess of added sugars and sodium are correlated to chronic health issues including diabetes, high blood pressure, and stroke.
- B. Grocery stores are Americans' top source for food and beverages, contributing an average of 60% of caloric intake.
- C. Food choices are strongly affected by the environments in which they are made. The placement of unhealthy snacks near a register increases the likelihood that consumers will purchase those foods and drinks, thus undermining consumer health choices and public health initiatives.
- D. It is in the interest of the health, safety, and welfare of all who live, work, and do business in the City that large stores offer healthy options and do not actively encourage the purchase of unhealthy foods.
- E. This Chapter is consistent with the General Provisions of Environmental Health of the City (Berkeley Municipal Code 11.04).

9.82.020. Definitions.

- A. "Added sugars" means sugars added during the processing of food and beverages, or are packaged as such, and include sugars (free, mono and disaccharides), sugars from syrups and honey, and sugars from concentrated fruit or vegetable juices that are in excess of what would be expected from the same volume of 100 percent fruit or vegetable juice of the same type, as defined in Section [101.9](#) of Title 21 of the Code of Federal Regulations.
- B. "Checkout area" means any area that is accessible to a customer of the Retail Store that is
 - 1. within **XX** feet of any Register; or
 - 2. in an area where the Retail Store directs customers to wait in line to make a purchase.
- C. "Hermetically sealed" means a container that is designed and intended to be

secure against the entry of micro-organisms and, in the case of low-acid canned foods, to maintain the commercial sterility of its contents after processing, as defined in Section [113805](#) of the California Health and Safety Code.

- D. "Juice" means the aqueous liquid expressed or extracted from one or more fruits or vegetables, purees of the edible portions of one or more fruits or vegetables, or any concentrates of such liquid or puree, as defined in Section [120.1](#) of Title 21 of the Code of Federal Regulations. "Juice" includes juice as a beverage, an ingredient of a beverage, and a puree as an ingredient of a beverage.
- E. "Milk substitute" means a non-dairy plant-based drink served in place of Milk, including but not limited to soy milk, almond milk, or rice milk, as defined in Chapter [12.72.010](#) of this Code.
- F. "Register" means a device used for monetary transactions that calculates the sales of goods and displays the amount of sales for the customer.
- G. "Retail store" means a commercial establishment selling goods to the public with a total floor area of 2,500 square feet or more and selling 25 linear feet or more of food and beverage products.

9.82.030. Healthy Checkout Areas.

Each retail store shall at all hours during which the retail store is open to the public permit only the following foods and beverages in all checkout areas:

- A. Beverages consisting of:
 - 1. Water, including carbonated water with no added sugars;
 - 2. Coffee or tea with no added sugars;
 - 3. One hundred percent fruit juice or juice combined with water or carbonated water, with no added sugars;
 - 4. One hundred percent vegetable juice with no added sugars, with no more than 200 milligrams of sodium per serving;
 - 5. Dairy milk or calcium- and vitamin-D fortified milk substitute with no added sugars.
- B. Chewing gum and mints with no added sugars;
- C. Bars with fruit, nuts, or seeds listed as the first two ingredients and no more than 5 grams added sugars per labeled serving;

- D. Fresh, canned or otherwise hermetically sealed, and dried fruits or vegetables with no more than 5 grams added sugars and 200 milligrams of sodium per labeled serving;
- E. Packages that contain one hundred percent nuts or seeds, nut butters, and snack mixes with fruit, nuts, or seeds listed as the first two ingredients, and with no more than 5 grams added sugars and 200 milligrams of sodium per labeled serving;
- F. Popcorn with no more than 5 grams added sugars and 200 milligrams of sodium per labeled serving; and
- G. Yogurt with no more than 5 grams added sugars per serving.

9.82.040. Enforcement.

- A. The City is hereby authorized to issue all rules and regulations consistent with this ordinance, including, but not limited to, fees for re-inspection.
- B. Compliance with this Chapter shall be administered by the City during regular inspections of qualifying Large Retail Stores. The City may require a Large Retail Store to provide such information as may be necessary to determine the Large Retail Store's compliance with this Chapter.

9.82.050. Violation--Penalty.

- A. A Large Retail Store that violates any provision of this chapter may be subject to administrative citations pursuant to Chapter [1.28](#) of this Code.
- B. This section shall not limit the City from recovering all costs associated with implementing this chapter or investigating complaints pursuant to fee resolution.
- C. Remedies and penalties under this chapter are cumulative and not exclusive.

9.82.060. Effective Date.

This ordinance and the legal requirements set forth herein shall take effect and be in force **XX**.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.



Kate Harrison
Councilmember District 4

ACTION CALENDAR
November 12, 2019

To: Honorable Mayor and Members of the City Council
From: Councilmembers Kate Harrison and Sophie Hahn
Subject: Healthy Checkout Ordinance

RECOMMENDATION

1. Adopt an ordinance requiring stores over 2,500 square feet in size to sell more nutritious food and beverage options in their checkout areas.
2. Refer to the City Manager to determine funding and staffing needs to implement and enforce the ordinance and sources of funding to support this program.

POLICY COMMITTEE TRACK

Health, Life Enrichment, Equity and Community

FINANCIAL IMPLICATIONS

1. Implementation of the ordinance would require staff time to educate the approximately 25 stores about what is required of them to comply with the ordinance. The Center for Science in the Public Interest could provide technical assistance including a suggested list of products that meet the criteria of the ordinance. Healthy Berkeley funded programs could also assist with store education and monitoring. Community partners could assist with implementation.
2. Enforcement of the ordinance may be incorporated into the regular inspections of food retailers conducted by the City. Spot checks of items sold in each aisle could monitor compliance.
3. The City-held public meetings for retailers and community residents to share their input will require time from the Commission secretaries.

BACKGROUND

Today's food landscape plays a large role in determining what people purchase and consume. Unhealthy food and beverages are promoted and placed repeatedly throughout retail stores. Cheap, ready-to-eat foods high in salt, saturated fat, and added sugars dominate checkout aisles, where shoppers are more likely to make impulse purchases and where parents struggle with their children over demands to buy treats at the end of a shopping trip.

This ordinance would require all stores over 2,500 square feet in size that sell at least 25 linear feet of food to follow the requirements for Healthy Checkout, as written in the

2180 Milvia Street, Berkeley, CA 94704 • Tel: (510) 981-7140 • TDD: (510) 981-6903 • Fax: (510) 981-6903 E-Mail: KHarrison@cityofberkeley.info

ordinance, the specifics of which are to be determined in the policy committee process. This would impact approximately 25 stores in Berkeley, including Safeway, Whole Foods, CVS, Walgreens, Berkeley Bowl, and Monterey Market.

Health Impacts of Sugar and Sodium Consumption and Related Disease Disparities

Impulse buying at checkout contributes to the high levels of sugar consumption in American diets. There has been much research and media attention¹ about the health impacts of excessive added sugar intake, including elevated risk of tooth decay, heart disease, and Type 2 diabetes.² The adverse health effects of added sugar consumption further entrench health disparities, burdening people of color more than white populations. Currently, Type 2 diabetes is on the rise across the country; one in three children and one of two children of color will be diagnosed in their lifetime.³

Diets that are high in sodium are linked to high blood pressure, heart disease, and stroke,⁴ all of which disproportionately affect African Americans and communities of color.⁵

Berkeley also has health disparities in diet-related disease. In 2014, African American residents were four times more likely than White residents to be diagnosed with diabetes and 14 times more likely to be hospitalized due to its effects.⁶ This gap has decreased since 2014, but the disparity continues to exist.⁷ Rates of hospitalization for heart disease and high blood pressure are also significantly higher among African-American residents than White and Latino residents.⁵

Checkout Areas of Grocery Stores Contribute to the Problem

Consumers are trying to make healthier purchases. A 2019 report found that 73 percent of shoppers are concerned about the nutritional content of their food.⁸⁹

Despite consumer desire to select healthier foods, unhealthy foods are prevalent in checkout areas in a wide variety of retail stores. A national study of 8,600 stores – including supermarkets, convenience stores, drug stores, and dollar stores – found that 88 percent display candy at checkout and one-third (34 percent) sell sugar-sweetened beverages.¹⁰ Only 24 percent of stores sell water at checkout, and only 13 percent sell fresh fruits or vegetables at checkout.⁸ Almost all supermarkets (91 percent) display candy and 85 percent sell soda and other sugary drinks at checkout.⁸

In 2018, a Berkeley-based youth group assessed a sample of 35 Berkeley stores including Walgreens, Safeway, Trader Joes, Target, Berkeley Bowl, Dollar Tree and others. Data was collected from 16,404 facings, which are the display of a single product on the shelf (not including the items stacked behind it). They found that 69 percent of beverages and 81 percent of foods sold in the checkout area of surveyed stores were considered unhealthy using the [National Alliance for Nutrition and Activity Model Nutrition Standards for Checkout](#).¹¹

Research shows that food choices are strongly affected by the environments in which they are made. The aim of placing food and beverages at checkout is to induce

unplanned purchases; thus, unhealthy checkout options undermine consumers' efforts to purchase healthier foods.¹² The placement of snacks near the register increases the likelihood that people purchase those foods.¹³ In addition, most of the candy, soda, and chips in checkout aisles are placed at eye-level and within reach of children, undermining parents' efforts to feed their children well.¹⁴

Three-quarters of parents report that it is hard to shop at grocery stores because unhealthy food is so prevalent.¹⁵ Healthy checkout aisles provide all families more opportunities to say yes to their kids.

Grocery Stores are a Prime Place for Policy Change

Grocery stores are Americans' top source for food and beverages, providing more than 60 percent of calories.¹⁶ Ninety percent of Supplemental Nutritional Assistance Program (SNAP) dollars are redeemed at supermarkets and grocery stores.¹⁷ Though grocery stores sell a wide range of healthy products, they are also the largest contributor of unhealthy food and beverages to the diet. Seventy percent of the sugary beverages children consume come from food retail.¹⁸

Sugary drinks are promoted repeatedly throughout stores; appearing in as many as 25 different places in a single grocery store.¹⁹ At checkout, these drinks make up 60% of beverage offerings.²⁰

For all these reasons, grocery store checkout lanes are an ideal place to begin changing norms around healthy snacks and drinks.

Strategies to Reduce Sugar Consumption in Berkeley

In 2014, Berkeley became the first city in the country to tax the distribution of sugar sweetened beverages. In the last five years, the City created the Healthy Berkeley program which supports the Berkeley Unified School District garden education program as well as community programs that educate residents about nutrition and are changing norms around beverage choice.

This ordinance is another effort to create a healthy food environment that would support families by providing them the ability to avoid high-calorie, low-nutrient food and beverages when they do their grocery and other shopping. Individuals and families who want to purchase sugary drinks, candy, chips, and other sweet and salty snacks will be able to find them in their respective aisles in the center of stores. By changing checkout norms, shoppers and their children face less temptation to consume sugary foods and there is less reinforcement of these unhealthy choices.

Berkeley Residents are Demanding Checkout Changes

In 2018, Berkeley-based youth advocates conducted four focus groups where adults and adolescents unanimously supported removing unhealthy food and beverages from grocery store checkout lanes and requiring stores to have healthy checkout aisles. Participants suggested retailers stock checkout with water, fruit juice, coffee, and tea. They also requested that gum, mints and healthy snacks be available. Using the National Alliance for Nutrition and Activity standards as a guide, this ordinance aims to

create checkout aisles where beverages with no added sugars or artificial sweeteners, such as 100% juice and water are considered healthy beverages, and where healthy snacks are predominantly fruits, nuts, and vegetables.

In order to streamline implementation and enforcement, the proposed Healthy Checkout Ordinance restricts added sugars and sodium for food products sold at checkout.

Healthy Checkout Reduces Impulse Buying of Sugary Snacks and Drinks

A recent study by the University of Cambridge analyzed purchasing data for common unhealthy checkout foods from 2013-2017 in nine U.K. supermarket chains. They found that consumers purchased 17 percent fewer sweets, chocolate and potato chips. One year later the decline in unhealthy purchases remained steady at 16 percent.¹

The Healthy Checkout Ordinance will create a level playing field for customers and retailers and support consistent, healthy snacking norms for shoppers and families.

Reducing Unhealthy Food and Beverages Sold at Checkout in Berkeley: Ordinance Elements

The attached ordinance (Attachment 1):

- limits food and beverage products sold at the checkout area;
- applies to approximately 25 stores in Berkeley that are over 2,500 square feet (see attached) and have more than 25 linear feet of food for sale; and
- allows only beverages with no added sugars and no artificial sweeteners and food items with limited calories, added sugars, and sodium to be sold in the checkout area.

The attached ordinance still has some unanswered questions that will require input from public health advocates, City staff, food retailers, and the policy committee. Those questions are:

- how to define healthy food, and what parameters are most appropriate;
- date of implementation;
- appropriate definition of “checkout area”. The attached draft ordinance includes the definition of “checkout area” as defined in AB 765, but that definition may not appropriately reflect the needs of all large retail stores in Berkeley.

RATIONALE FOR RECOMMENDATION

Requiring the approximately 25 stores to follow the requirements for Healthy Checkout would eliminate the encouragement of unplanned purchases of unhealthy foods and beverages. Such a change would thus contribute to healthy norms and reduce the consumption of sugary drinks and unhealthy foods in the City of Berkeley.

ALTERNATIVES CONSIDERED

In February 2019, Assemblymember Buffy Wicks introduced AB 765, a bill which would implement Healthy Checkout statewide. However, as the bill has not advanced from committee since April, progress at the state level is not guaranteed.

CONTACT PERSON

Kate Harrison, District 4

ATTACHMENTS:

1: Draft Ordinance

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- ¹ Brody, JE. The Downside of Having a Sweet Tooth. *The New York Times*. July 22, 2019. <https://www.nytimes.com/2019/07/22/well/eat/the-downside-of-having-a-sweet-tooth.html>.
- ² U.S. Department of Health and Human Services and U.S. Department of Agriculture. *2015–2020 Dietary Guidelines for Americans 8th Edition*. Washington, DC; HHS and USDA, 2015.
- ³ *Lancet Diabetes Endocrinol*. 2014 Nov;2(11):867-74. doi: 10.1016/S2213-8587(14)70161-5. Epub 2014 Aug 12.
- ⁴ <https://www.hsph.harvard.edu/nutritionsource/salt-and-sodium/>
- ⁵ <https://www.cdc.gov/mmwr/volumes/67/ss/ss6705a1.htm>
- ⁶ City of Berkeley. *Health Status Report 2014*. Berkeley, CA; 2014.
- ⁷ City of Berkeley. *Health Status Report 2018*. Berkeley, CA; 2018.
- ⁸ Food Marketing Institute. *The Power of Health and Well-Being in Food Retail*. Arlington, VA: FMI; 2019.
- ⁹ International Food Information Council Foundation. *2019 Food & Health Survey*. Washington, D.C.: IFIC; 2019.
- ¹⁰ Barker D, Quinn C, Rimkus L, Zenk S, Chaloupka F. *Availability of Healthy Food Products at Check-out Nationwide, 2010-2012*. Chicago, IL: Bridging the Gap Program, Health Policy Center, Institute for Health Research and Policy, University of Illinois at Chicago; 2015.
- ¹¹ The Center for Science in the Public Interest. *Model Nutrition Standards for Checkout*. <https://cspinet.org/protecting-our-health/nutrition/model-nutrition-standards-checkout>.
- ¹² Center for Science in the Public Interest. *Temptation at Checkout: The Power of Point-of-Sale Retail Food Marketing*. Washington, D.C.: CSPI; 2015.
- ¹³ Kerr J, Sallis JF, Bromby E, Glanz K. Assessing Reliability and Validity of the GroPromo Audit Tool for Evaluation of Grocery Store Marketing and Promotional Environments. *J Nutr Educ Behav*. 2012;44(6):597-603. doi:10.1016/j.jneb.2012.04.017.
- ¹⁴ Horsley JA, Absalom KA, Akiens EM, Dunk RJ, Ferguson AM. The Proportion of Unhealthy Foodstuffs Children Are Exposed to at the Checkout of Convenience Supermarkets. *Public Health Nutr*. 2014;17(11):2453-2458.
- ¹⁵ Caravan ORC International. *Checkout Polling: Online Survey of 1,024 adults*. Princeton, NJ; 2016.
- ¹⁶ Mancino L, Guthrie J. *Supermarkets, Schools, and Social Gatherings: Where Supplemental Nutrition Assistance Program and Other U.S. Households Acquire their Foods Correlates with Nutritional Quality*. Washington, DC: U.S. Department of Agriculture Economic Research Center; 2018.
- ¹⁷ U.S. Department of Agriculture Food and Nutrition Service. *2015 SNAP Retailer Management Year-End Summary*. Washington, D.C.: USDA; 2015.
- ¹⁸ Poti JM, Slining MM, Popkin BM, Kenan WR. Where are kids getting their empty calories? Stores, schools, and fast food restaurants each play an important role in empty calorie intake among US children in 2009-2010. *J Acad Nutr Diet*. 2014;114(6):908-917. doi: 10.1016/j.jand.2013.08.012.
- ¹⁹ Cohen DA, Bogart L, Castro G, Rossi AD, Williamson S, Han B. Beverage marketing in retail outlets and The Balance Calories Initiative. *Prev Med*. 2018;115:1-7.
- ²⁰ Fielding-Singh P, Almy J, Wootan MG. *Sugar Overload: Retail Checkout Promotes Obesity*. Washington, DC: Center for Science in the Public Interest, 2014.

ORDINANCE NO. -N.S.

ADDING CHAPTER 9.82 TO THE BERKELEY MUNICIPAL CODE "HEALTHY CHECKOUT"

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That the Berkeley Municipal Code is amended to read as follows:

9.82.010. Findings and Purpose.

The City of Berkeley hereby finds and declares as follows:

- A. Diets with an excess of added sugars and sodium are correlated to chronic health issues including diabetes, high blood pressure, and stroke.
- B. Grocery stores are Americans' top source for food and beverages, contributing an average of 60% of caloric intake.
- C. Food choices are strongly affected by the environments in which they are made. The placement of unhealthy snacks near a register increases the likelihood that consumers will purchase those foods and drinks, thus undermining consumer health choices and public health initiatives.
- D. It is in the interest of the health, safety, and welfare of all who live, work, and do business in the City that large stores offer healthy options and do not actively encourage the purchase of unhealthy foods.
- E. This Chapter is consistent with the General Provisions of Environmental Health of the City (Berkeley Municipal Code 11.04).

9.82.020. Definitions.

- A. Added Sugars shall mean sugars added during the processing of food and beverages, or are packaged as such, and include sugars (free, mono and disaccharides), sugars from syrups and honey, and sugars from concentrated fruit or vegetable juices that are in excess of what would be expected from the same volume of 100 percent fruit or vegetable juice of the same type, as defined in Section [101.9](#) of Title 21 of the Code of Federal Regulations.
- B. Artificial Sweetener shall mean sweeteners with few to no calories that have a higher intensity of sweetness per gram than sucrose.
- C. Category List shall mean the list of foods and beverages which meet the standards of BMC 9.82.030.
- D. Checkout Area shall mean any area that is accessible to a customer of the Large Retail Store that is
 - i. within **XX** feet of any Register; or
 - ii. in an area in the Large Retail Store which is designated only for

customers to wait in line to make a purchase.

- E. "Register" shall mean a device used for monetary transactions that calculates the sales of goods and displays the amount of sales for the customer.
- F. "Large Retail Store" shall mean a commercial establishment selling goods to the public with a total floor area of 2,500 square feet or more and selling 25 linear feet or more of food.

9.82.030. Healthy Checkout Areas.

Each Large Retail Store shall, at all hours during which the Large Retail Store is open to the public, ensure that the only foods and beverages available in all checkout areas meet the standards in Sec 9.82.030 A-B:

- A. Beverages with no added sugars and no artificial sweeteners.
- B. Food items with no more than XX calories, XX grams of added sugars, and XX grams of sodium.

9.82.040. Enforcement.

- A. The City is hereby authorized to issue all rules and regulations consistent with this ordinance, including, but not limited to, fees for re-inspection.
- B. Compliance with this Chapter shall be administered by the City during regular inspections of qualifying Large Retail Stores. The City may require a Large Retail Store to provide such information as may be necessary to determine the Large Retail Store's compliance with this Chapter.

9.82.050. Violation--Penalty.

- A. A Large Retail Store that violates any provision of this chapter may be subject to an administrative citations pursuant to Chapter 1.28 of this Code.
- B. This section shall not limit the City from recovering all costs associated with implementing this chapter or investigating complaints pursuant to fee resolution.
- C. Remedies and penalties under this chapter are cumulative and not exclusive.

Commented [JCD1]: I'm not sure what the intent is here. We would need to evaluate whether there is a mechanism to recover administrative enforcement costs.

9.82.060. Effective Date.

This ordinance and the legal requirements set forth herein shall take effect and be in force XX.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.



Office of the City Manager

ACTION CALENDAR

January 21, 2020

To: Honorable Mayor and Members of the City Council

From: Sugar Sweetened Beverage Product Panel of Experts (SSBPPE)

Submitted by: Poki Namkung, Chairperson, SSBPPE Commission

Subject: Recommendation that the City Council Pass a Resolution Regarding Procurement, Sales and Serving of Sugar-Sweetened Beverages.

RECOMMENDATION

The Sugar Sweetened Beverage Product Panel of Experts recommends that the Berkeley City Council adopt a Resolution that City of Berkeley departments and City food services contractors shall not:

- 1) Serve sugar-sweetened beverages at City meetings and events on City property;
- 2) Procure sugar-sweetened beverages with City funds; or,
- 3) Sell sugar-sweetened beverages on City property, including in vending machines.

FISCAL IMPACTS OF RECOMMENDATION

Cost of promulgating information, notifying City Departments and revising clauses in City contracts.

CURRENT SITUATION AND ITS EFFECTS

Currently, the City of Berkeley has no policy regarding either the procurement of sugar-sweetened beverages with City funds or the sales or distribution of sugar-sweetened beverages at City meetings and events or on City property.

On September 19, 2019, the SSBPPE Commission voted as follows:

Moved to approve and adopt the SSB Resolution (version #13) and the accompanying Council Report and forward to the City Council.

M/S/C: Commissioners Scheider/Rose

Ayes: Commissioners Browne, Crawford, Moore, Rose, Ishii, and Scheider

Noes: None

Abstain: None

Absent from vote: None

Recused: None

Excused: Commissioners Morales and Namkung

Definitions: Sugar-sweetened beverages or SSBs refer to all beverages with added caloric sweeteners with a minimum of 2 calories per fluid ounce, as defined in Chapter 7.72 of the City of Berkeley Municipal Code.i SSBs include juices with added sweetener, sodas, energy drinks, sweetened teas and coffee drinks, and sport drinks. These drinks offer little or no nutritional value, but include massive quantities of added sugar. For instance, a single 20-ounce bottle of soda typically contains the equivalent of approximately 16 teaspoons of sugar.

In BMC Chapter 7.72, SSBs exclude 100% juice, diet drinks, waters, and milk drinks as well as medical drinks and baby formula.

BACKGROUND

In November of 2014, the Berkeley voters passed Measure D with 76% of the vote, which requires both the collection of a 1 cent-per-ounce tax on the distribution of SSBs in the City of Berkeley and the convening of the Sugar Sweetened Beverage Products Panel of Experts (SSBPPE) to recommend investments to both reduce the consumption of SSBs as well as to address the health consequences of the consumption of SSBs including diabetes, dental caries, heart disease and obesity.ii

To accomplish these goals, the SSBPPE recommended that the City create the Healthy Berkeley program to reduce the consumption of sugar-sweetened beverages (“SSB”) in Berkeley and to address the effects of SSB consumption. The City Council unanimously adopted this recommendation on November 29, 2016 and awarded a \$1.5 million per year investment to be granted to community agencies and the Berkeley Unified School District garden and nutrition program. \$225,000, or 15%, of this funding is allocated to the City Public Health Division to administer and evaluate the Healthy Berkeley Program. See November 29, 2016, Council agenda items 33a and 33b.iii

The City of Berkeley requires that all Healthy Berkeley funded programs (including the school district) adopt an organizational policy curtailing the service, procurement and sale of SSBs. The purpose of these organizational policies is to change norms in our community about consuming sugary drinks and support the educational work of these programs.

We know from the public health campaigns to reduce tobacco use, that institutional policies that change norms have a powerful impact on behavior and are a vital tool to improving health in our communities. Education and media campaigns are not enough to change behaviors, especially when pervasive and persuasive marketing by corporations influence choices that people make, and when there is an addictive aspect to the behavior as is the case with both tobacco and sugar.iv

ENVIRONMENTAL SUSTAINABILITY

None

RATIONALE FOR RECOMMENDATION

In 2014, Berkeley voters overwhelmingly passed Measure D and since then the City of Berkeley has led the effort to reduce the consumption of sugary drinks and resulting health impacts and disparities, not only in Berkeley but also in the Bay Area and nationwide. Sales of sugary beverages have decreased and school and community groups have been funded to continue the effort to reduce sugary drink consumption and improve health. Now is an opportune time for the City to once again provide leadership for City employees and the community by enacting a healthy beverage policy for the City that restricts procurement of sugary drinks as well as the serving and sales of sugary drinks at City events. This policy would be responsive to the will of the voters, supportive of school and community efforts to improve Berkeley residents' health, and a model to other cities. This policy will align the City with Healthy Berkeley grantees who have already adopted similar policies. The SSBPPE encourages the City to take this step to set an example and demonstrate its own commitment to the further reducing sugary drink consumption and improvement in community health.

ALTERNATIVE ACTIONS CONSIDERED

In January 2018, the SSSBPPE voted to recommend that the Berkeley City Council adopt an Ordinance amending the Administrative Code to direct the City of Berkeley departments and City food services contractors to refrain from: 1) Procuring sugar-sweetened beverages with City funds; 2) Selling sugar-sweetened beverages on City property, including in vending machines; and, 3) Serving sugar-sweetened beverages at City meetings and events on City property. On March 27, 2018, the City Council voted to refer the recommendation to the City Manager and request that the City Manager draft an ordinance for consideration by the City Council. In June 2018, the City Council ranked this ordinance around 32 among items to develop for the City. No further action was taken until May of 2019, when Council Member Harrison reached out to Holly Scheider, her appointee on the SSBPPE Commission, and suggested that the Commission put forward a Resolution in place of an Ordinance with the same content.

CITY MANAGER

See the City Manager companion report.

CONTACT PERSON

Dechen Tsering, SSBPPE Commission Secretary (510) 981-5394

Attachments:

1: Resolution

RESOLUTION NO. ##,###-N.S.

RESOLUTION ESTABLISHING CITY POLICY / AMENDING THE ADMINISTRATIVE CODE TO DIRECT CITY OF BERKELEY DEPARTMENTS AND CONTRACTORS TO REFRAIN FROM PROCURING, SERVING OR SELLING SUGARY DRINKS

WHEREAS, the City of Berkeley is known for its commitment to reducing inequities in diet and disease and in promoting access to healthy food and beverages.

WHEREAS, drinking just **one** serving of sugar-sweetened beverage per day poses a **30 percent or higher risk** of becoming diabetic.

WHEREAS, drinking just **one** serving of sugar-sweetened beverage per day poses a **30 percent or higher risk** of early death from cardiovascular disease.

WHEREAS, city employees deserve a healthy work environment, with an increased variety of healthier low-sugar alternative beverages such as flavored waters, plain or carbonated water, 100% juice, milk drinks, diet drinks, unsweetened or artificially sweetened iced teas and coffee drinks.

WHEREAS, it is recognized that city staff are free to bring and consume their own sugary beverages at work.

WHEREAS, other public institutions that have completely eliminated the sales of sugar sweetened beverages on their premises and have demonstrated that as a result, positive changes have been documented in the staff's metabolic disease indicators associated with lower risk of diabetes and heart disease

WHEREAS, giving City employees access to healthier beverages in the workplace will increase healthy beverage consumption and reduce the impact of diet-related disease, thus reducing the City's health care expenses.

WHEREAS, the City of Berkeley requires that *all* organizations receiving funding from Healthy Berkeley not serve or sell sugar sweetened beverages on their premises.

WHEREAS, the Berkeley Unified School District does not serve or sell soda to students of all ages and students on their premises and this contributes to positive adult role modeling regarding healthy beverage consumption.

WHEREAS, Chapter 7.72 of the City of Berkeley Municipal Code^v has already defined sugar-sweetened beverages as all beverages with added caloric sweeteners with a minimum of 2 calories per fluid ounce, including juices with added sweetener, sodas, energy drinks, sweetened teas and coffee drinks, and sport drinks which offer little or no nutritional value, but include massive quantities of added sugar and in addition, Berkeley Municipal Code Chapter 7.72 also defines exemptions and thus excludes waters, 100% juice, milk drinks, diet drinks, as well as medical drinks and baby formula.

THEREFORE BE IT RESOLVED that the City of Berkeley and City food services contractors **shall not**:

- 1) Serve sugar-sweetened beverages at City meetings and events on City property,
- 2) Procure sugar-sweetened beverages with City funds; and,
- 3) Sell sugar-sweetened beverages on City property, including in vending machines.

i B.M.C. 7388-NS § 7.72, 2014, City of Berkeley

ii B.M.C. 7388-NS § 7.72, 2014, City of Berkeley

iii Berkeley Nov. 29, 2016 agenda:

https://www.cityofberkeley.info/Clerk/City_Council/2016/11_Nov/City_Council_11-29-2016_-_Regular_Meeting_Agenda.aspx Language in the Nov. 29, 2016

Resolution, Agenda item 33a, pages 9 and 11, follows:

“BUSD will not sell or serve sugar-sweetened beverages (as defined by the SSB tax) at any BUSD schools or campuses.”

“Funded organizations must have in place or agree to adopt prior to being funded an organizational policy prohibiting serving SSBs at organization sponsored events or meetings.”

iv <https://www.theatlantic.com/health/archive/2014/01/the-sugar-addiction-taboo/282699/>

v B.M.C. 7388-NS § 7.72, 2014, City of Berkeley



Office of the City Manager

5b

ACTION CALENDAR
January 21, 2020

To: Honorable Mayor and Members of the City Council
From: Dee Williams-Ridley, City Manager
Submitted by: Kelly Wallace, Director, HHCS
Subject: Companion Report: Recommendation that the City Council Pass a Resolution Regarding Procurement, Sales, and Serving Sugar-Sweetened Beverages

RECOMMENDATION

Recommend that the City Council adopt an amended resolution that recognizes the important principles in the Commission recommendation, clarifies the intent of the measure and provides some flexibility for City programs and staff while still emphasizing availability of healthy options. This amended resolution would require that the majority of all beverages provided or sold at any City event or on any City property (including vending machines) be non-sugar sweetened beverages (as defined in chapter 7.72 of the Berkeley Municipal Code) and education materials be provided to all COB staff to actively discourage the consumption of sugar-sweetened beverages and encourage the consumption of water.

FISCAL IMPACTS OF RECOMMENDATION

Potential impacts on programs could include increased staffing capacity across Departments to monitor or enforce the recommended resolution and/or impacts on participation in certain events and programs.

CURRENT SITUATION AND ITS EFFECTS

The Sugar Sweetened Beverage Product Panel of Experts has recommended that the Berkeley City Council adopt a resolution to prohibit City of Berkeley departments and City food services contractors, from:

- 1) Procuring sugar-sweetened beverages with City funds;
- 2) Selling sugar-sweetened beverages on City property, including in vending machines; and,
- 3) Serving sugar-sweetened beverages at City meetings and events on City property.

The City of Berkeley has steadily reduced the purchase of sugar sweetened beverages throughout its Departments and has promoted healthy options at functions and program activities. The City Manager supports the goals of this effort and agrees to continue working to reduce the consumption of SSBs on City properties and at City sponsored

events. An initial survey of City Departments indicates that adoption of the resolution as presented would have potential negative impacts on some programs and staff, most particularly those that work in jobs where they are unable to leave the worksite during their shifts, such as police dispatchers. Additionally,

- 1) The prohibition of procuring sugar sweetened beverages cannot be tracked through the City's procurement process, as many of these purchases are not listed item by item in the electronic system for requisitions. This would require staff to review all food and beverage purchases both on the program level as well as the fiscal level. As many food purchases are made via a blanket purchase order process, there is no internal mechanism in place to monitor the purchasing process for any specific item.
- 2) The prohibition of selling of sugar-sweetened beverages on City property, including vending machines may impact staff in some Departments, such as the Police Department, who provide 24-hour, 7-day of week operations. Although offering a majority of healthy options would promote and encourage the choice of healthy beverage options, eliminating sugar-sweetened beverages entirely, may not offer a choice to staff who cannot leave their worksites and did not bring the desired beverage with them to work.
- 3) The prohibition of "serving sugar-sweetened beverages at City meetings and events on City property" is not well defined and does not have clear guidelines regarding who is providing the beverages or the manner in which it is provided (i.e. a staff member at a City hosted holiday potluck). This language, as it is written, cannot be reasonably monitored and would be unenforceable.
- 4) Additionally, some City programs, such as family camps, serve lemonade and other such drinks which are a part of the fabric of the experience. Banning such drinks could limit people choosing these programs and presumes that people cannot make informed choices.

Finally, the City of Berkeley Public Health Division is piloting a program of locating Refillable Hydration Stations in some of our public facilities to encourage the consumption of water and use of refillable bottles. These environmental changes will make it easier for people to choose water over other beverages.

BACKGROUND

In November of 2014, Berkeley voters passed Measure D, requiring both the collection of a 1 cent per ounce tax on the distribution of sugary drinks in the City of Berkeley and the convening of a Panel of Experts (the Sugar Sweetened Beverage Products Panel of Experts--SSBPPE) to recommend general fund investments to both reduce the consumption of sugary drinks as well as to address the health consequences of the consumption of sugary drinks.

Since FY 2019, the City Council has passed resolutions allocating over \$9 million in budget code 010-9703-410.35-10 between FY2015 through FY2021 for minigrants,

branding and education campaigns, and funding of community agencies as per SSBPPE Commission's recommendations. The resolutions included allocation of overhead funding to pay for staff support and evaluation and education campaigns from the public health division.

A previous recommendation submitted on March 27, 2018 that included language for City departments and City food service contractors "to refrain" from these activities was referred to the Health, Housing and Community Services Department via the Re-Weighted Rank Voting list and is in the queue to be addressed by priority. The Commission's proposed resolution strengthens this further by prohibiting such actions.

ENVIRONMENTAL SUSTAINABILITY

This recommendation has no direct environmental sustainability effects.

RATIONALE FOR RECOMMENDATION

The prohibitive language of "shall not" places a burden on internal systems to monitor and enforce activities that may not be possible. It also impacts choice options for staff as well as community members who engage in services provided by City run programs.

ALTERNATIVE ACTIONS CONSIDERED

The City could replace the "shall not" to language to "promote healthy beverage options and refrain from." The City could also remove the "serving sugar-sweetened beverages at City meetings and events on City property" language from the proposed resolution.

The City could adopt the resolution language as recommended by the Commission, with the understanding that it is cost prohibitive to monitor, track, or enforce any violations of this resolution based on the constraints stated above.

CONTACT PERSON

Janice Chin, Division Manager, Public Health Division, HHCS, (510) 981-5121
Dechen Tsering, Secretary, SSBPPE Commission, (510) 981-5394

RESOLUTION NO. ##,###-N.S.

RESOLUTION ESTABLISHING CITY POLICY / AMENDING THE ADMINISTRATIVE CODE TO DIRECT CITY OF BERKELEY DEPARTMENTS AND CONTRACTORS TO REFRAIN FROM PROCURING, SERVING OR SELLING SUGARY DRINKS

WHEREAS, the City of Berkeley is known for its commitment to reducing inequities in diet and disease and in promoting access to healthy food and beverages.

WHEREAS, drinking just **one** serving of sugar-sweetened beverage per day poses a **30 percent or higher risk** of becoming diabetic.

WHEREAS, drinking just **one** serving of sugar-sweetened beverage per day poses a **30 percent or higher risk** of early death from cardiovascular disease.

WHEREAS, city employees deserve a healthy work environment, with an increased variety of healthier low-sugar alternative beverages such as flavored waters, plain or carbonated water, 100% juice, milk drinks, diet drinks, unsweetened or artificially sweetened iced teas and coffee drinks.

WHEREAS, it is recognized that city staff are free to bring and consume their own sugary beverages at work.

WHEREAS, other public institutions that have made efforts to decrease or eliminated the sales of sugar sweetened beverages on their premises and have demonstrated that as a result, positive changes have been documented in the staff's metabolic disease indicators associated with lower risk of diabetes and heart disease

WHEREAS, giving City employees access to healthier beverages in the workplace will increase healthy beverage consumption and reduce the impact of diet-related disease, thus reducing the City's health care expenses.

WHEREAS, the City of Berkeley strongly encourages *all* organizations receiving funding from Healthy Berkeley not serve or sell sugar sweetened beverages on their premises.

WHEREAS, the Berkeley Unified School District does not serve or sell soda to students of all ages and students on their premises and this contributes to positive adult role modeling regarding healthy beverage consumption.

WHEREAS, Chapter 7.72 of the City of Berkeley Municipal Codeⁱ has already defined sugar-sweetened beverages as all beverages with added caloric sweeteners with a minimum of 2 calories per fluid ounce, including juices with added sweetener, sodas, energy drinks, sweetened teas and coffee drinks, and sport drinks which offer little or no nutritional value, but include massive quantities of added sugar and in addition, Berkeley Municipal Code Chapter 7.72 also defines exemptions and thus excludes waters, 100% juice, milk drinks, diet drinks, as well as medical drinks and baby formula.

THEREFORE BE IT RESOLVED that the City of Berkeley and City food services contractors promote healthy beverage options by:

- 1) Promoting that the majority of beverages offered are always non-sugar sweetened beverages
- 2) Providing educational materials to City of Berkeley staff to encourage consumption of water and reduction of consumption of sugar sweetened beverages, and;
- 3) Provide as much as possible an environment that makes consumption of water an easier choice, such as through the placement of Refillable Hydration Stations.

ⁱ B.M.C. 7388-NS § 7.72, 2014, City of Berkeley



Housing Advisory Commission

6a

ACTION CALENDAR
October 29, 2019

To: Honorable Mayor and Members of the City Council
From: Housing Advisory Commission
Submitted by: Xavier Johnson, Chairperson, Housing Advisory Commission
Subject: Recommendation to Modify Policies Related to the Enforcement of the Berkeley Smoke-Free Multi-Unit Housing Ordinance

RECOMMENDATION

Approve modifications to policies related to the enforcement of the Smoke-Free Multi-Unit Housing Ordinance, as follows:

- 1) Increase staffing to implement enforcement of the ordinance as part of the next budget;
- 2) Improve signage related to the ordinance in residential buildings;
- 3) Make the complaint process less onerous and more user-friendly, including enabling complainants to submit complaints electronically, providing complaint forms in different languages, and removing language requiring the statements to be "sworn," and considering other, less threatening language that still expects a complaint be provided under the best of appellant's knowledge;
- 4) Relax the current requirements around how the Ordinance-based complaint form must be completed in order to be processed (e.g., removing the requirement of providing two separate complaints from different individuals within a six-month period, if the building contains two or fewer units, removing the requirement of providing a sworn statement under penalty of perjury); and
- 5) Refer to the Community Health and Cannabis Commissions the question of whether the use of recreational (non-medical) cannabis should be incorporated into the Smoke-Free Housing Ordinance.

SUMMARY

At its July 11, 2019 meeting, the HAC took the following actions:

Action: M/S/C (Tregub/Sharenko) to recommend that City Council modify certain policies related to the enforcement of the Smoke-Free Multi-Unit Housing Ordinance, as follows:

- 1) Increase staffing to implement enforcement of the ordinance as part of the next budget;
- 2) Improve signage related to the ordinance in residential buildings;

- 3) Make the complaint process less onerous and more user-friendly, including enabling complainants to submit complaints electronically, providing complaint forms in different languages, and removing language requiring the statements to be “sworn,” and considering other, less threatening language that still expects a complaint be provided under the best of appellant’s knowledge; and
- 4) Relax the current requirements around how the Ordinance-based complaint form must be completed in order to be processed (e.g., removing the requirement of providing two separate complaints from different individuals within a six-month period, if the building contains two or fewer units, removing the requirement of providing a sworn statement under penalty of perjury).

Vote: Ayes: Johnson, Lewis, Sargent, Tregub, and Wright. Noes: Lord and Sharenko. Abstain: None. Absent: Mendonca (excused), Owens (unexcused), Simon-Weisberg (excused), and Wolfe (excused).

Action: M/S/C (Tregub/Sharenko) to recommend that City Council modify certain policies related to the enforcement of the Smoke-Free Multi-Unit Housing Ordinance, as follows:

- 5) Refer to the Community Health and Cannabis Commissions the question of whether the use of recreational (non-medical) cannabis should be incorporated into the Smoke-Free Housing Ordinance.

Vote: Ayes: Johnson, Sargent, Sharenko, Tregub, and Wright. Noes: Lewis and Lord. Abstain: None. Absent: Mendonca (excused), Owens (unexcused), Simon-Weisberg (excused), and Wolfe (excused).

FISCAL IMPACTS OF RECOMMENDATION

Unknown direct costs. Staff time would be needed to implement these recommendations and to administer a possibly increased volume of complaints should the process of filing a complaint become less onerous. However, savings in staff time would potentially be realized as a result of implementing the efficiencies being proposed.

CURRENT SITUATION AND ITS EFFECTS

The HAC’s recommendation to modify certain policies related to the enforcement of the Berkeley Smoke-Free Multi-Unit Housing Ordinance is a Strategic Plan Priority Project, advancing our goal to create affordable housing and housing support service for our most vulnerable community members.

Ordinance No. 7,321-N.S., The Berkeley Smoke-Free Multi-Unit Housing Ordinance was adopted in early 2014 and, as of May 1, 2014, prohibits smoking in 100% of multi-unit housing with two or more units. This also includes common areas such as private

decks, balconies, and porches of units.¹ Enforcement of the ordinance is complaint-based and modeled after the “Events” section of the Community Noise Ordinance² and Barking Dog Ordinance, in that the standard for enforcement is “two non-anonymous citizen noise complaints.” In the case of the Smoke-Free Housing Ordinance, the City must “[receive] at least two complaints from residents of at least two separate units of the same multi-unit residence, or in the case of a two-unit multi-unit residence, from a resident of the other unit of a violation of [the Ordinance] by the same person provided notice...” in order for the complaints to be sustained. Further, both of these notices must be received within “a six month period following issuance of a [first] notice” to the resident allegedly in violation of the Ordinance.³ The existing complaint form appears to only be available in English on the City website⁴ and includes the following information that a complainant is required to acknowledge:

1. I am a resident in a multi-unit residence within the City of Berkeley;
2. This Complaint is not confidential and may be shared with the person responsible for the violation;
3. If this is the 3rd complaint, City of Berkeley Code Enforcement staff will review the complaint and if they find the complaint contains enough information to move forward, they will consider the matter for further action;
4. If an administrative citation is issued, and the recipient(s) appeals, I will be called to testify at an administrative appeal hearing. I agree to make myself available to testify, and understand that if I fail to testify, the citation may be dismissed.”⁵

As part of the declaration, the complainant must also attest to the following statement: “I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.”⁶

BACKGROUND

Over the prior twenty months, the Berkeley Housing Advisory Commission (HAC) received and heard several concerns from members of the public about the difficulty they encountered in an attempt to bring the City of Berkeley to enforce its Smoke-Free Multi-Unit Housing Ordinance. The HAC recommended to the City Council that a Berkeley Considers survey be conducted, an action that was adopted and completed.

¹ https://www.cityofberkeley.info/Health_Human_Services/Public_Health/Smoke_Free_MUH.aspx

² https://www.cityofberkeley.info/uploadedFiles/Clerk/Level_3_-_City_Council/2009/1n2Dec/2009-12-08_Item_01_Ordinance_7122.pdf

³ https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Level_3_-_Public_Health/TobaccoFreeMultiUnitOrdinance.pdf

⁴ https://www.cityofberkeley.info/Health_Human_Services/Public_Health/Smoke_Free_MUH.aspx

⁵ https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Level_3_-_Public_Health/SFMUH-ComplaintForm-02-28-18.pdf

⁶ *Ibid.*

The survey results point to similar challenges, primarily associated with:

- 1) The real or perceived difficulty of having a complaint sustained due to the standard applied to the complaint in order for the City to process it;
- 2) The real or perceived onerous nature of filling out and submitting the present complaint form in the manner required by the City;
- 3) The undesirable nature of pursuing action under the Ordinance against a neighboring property owner or tenant, particularly since the complaint is required to be non-anonymous; and
- 4) The perception that, even if the complaint process is followed as required, the City will not enforce it due to the high standard associated with enforcement and complaint-based nature of the enforcement mechanism.

At its March 2019 meeting, the HAC convened a Smoke-Free Housing Ordinance Subcommittee which met in April 2019. Members of the subcommittee reached consensus on several recommendations to the HAC, which were discussed at the April 2019 HAC meeting. Additional feedback was solicited from HAC members as well as members of the public at that meeting. Although the subcommittee did not meet a second time to finalize these recommendations, one of the members of the subcommittee discussed these recommendations with the Eviction Defense Center and the East Bay Community Law Center and modified the draft recommendations so that the idea of empowering inspectors to integrate proactive inspections at the same time that they are conducting other city-mandated inspections (e.g., the Rental Housing Safety Program), exploring the legality of allowing anonymous complaints to be processed, and relaxing the requirement of having to provide two separate complaints within a six-month period in buildings of *all* unit counts were removed from the proposed recommendations that were discussed and approved at the July meeting.

ENVIRONMENTAL SUSTAINABILITY

Insofar as the ability of every occupant of multi-family housing to reside in a smoke-free environment has a nexus to environmental sustainability and environmental justice, these recommendations support the City of Berkeley's environmental sustainability goals.

RATIONALE FOR RECOMMENDATIONS

The recommendations above address the primary challenges associated with enforcement that have been previously described. A brief rationale for each recommendation is presented below.

- 1) Increase staffing to implement enforcement of the ordinance as part of the next budget;

- 2) Improve signage related to the ordinance in residential buildings;

The recommendations above were made at the request of several members of the public who credibly claimed that the current staffing level to enforce the ordinance and required signage are inadequate to meet the goals of this ordinance.

- 3) Make the complaint process less onerous and more user-friendly, including enabling complainants to submit complaints electronically, providing complaint forms in different languages, and removing language requiring the statements to be “sworn,” and considering other, less threatening language that still expects a complaint be provided under the best of appellant’s knowledge; and
- 4) Relax the current requirements around how the Ordinance-based complaint form must be completed in order to be processed (e.g., removing the requirement of providing two separate complaints from different individuals within a six-month period, if the building contains two or fewer units, removing the requirement of providing a sworn statement under penalty of perjury).

These four recommendations would address the following concerns that the HAC noted from members of the public as well as from survey responses:

- 1) The real or perceived difficulty of having a complaint sustained due to the standard applied to the complaint in order for the City to process it;
- 2) The real or perceived onerous nature of filling out and submitting the present complaint form in the manner required by the City;
- 3) The undesirable nature of pursuing action under the Ordinance against a neighboring property owner or tenant, particularly since the complaint is required to be non-anonymous; and
- 4) The perception that, even if the complaint process is followed as required, the City will not enforce it due to the high standard associated with enforcement and complaint-based nature of the enforcement mechanism.

The current process requires an extremely high bar of evidence and effort for a complainant, and in a situation in which the complainant resides in close quarters with the allegedly offending party, may expose the complainant to possible retaliation (due to the lack of anonymity of the complaint). In addition, while the correctness of a complaint is fundamental to its ability to be processed, using the same language in the complaint form that is seen in a sworn affidavit is likely to intimidate some would-be complainants from undergoing the process of completing and submitting the form.

Furthermore, while the Smoke-Free Multi-Unit Housing Ordinance page on the City of Berkeley website currently includes several forms in Spanish as well as English, the complaint form itself is only available in English. No other languages besides English and Spanish were found anywhere on the site.⁷ The requirement that only a hard copy can be submitted and that electronic submission mechanisms are not accepted is overly burdensome, in an age where even police reports can be filed online. The provision that three separate complaints (two of them from separate individuals) must be received within the span of six months shifts the burden of policing onto the complainants rather than City, which is charged with enforcing this ordinance. Each of these recommendations addresses these and related concerns mentioned above.

The final recommendation approved by a separate vote by the HAC is as follows:

- 5) Refer to the Community Health and Cannabis Commissions the question of whether the use of recreational (non-medical) cannabis should be incorporated into the Smoke-Free Housing Ordinance.”

The Smoke-Free Housing Subcommittee and several additional members of the HAC and public felt that, with the recent relaxation of state law around the use of recreational (non-medical) cannabis, it would be worthwhile for these two commissions, both comprised of subject matter experts in their respective fields, to study this question. Only further study rather than any concrete actions is recommended at this time.

ALTERNATIVE ACTIONS CONSIDERED

Members of the HAC Smoke-Free Housing Subcommittee briefly discussed but dismissed the notion of making changes to the underlying Berkeley Smoke-Free Multi-Unit Housing Ordinance itself. Based on discussions with the eviction defense community, several elements were removed from the initial recommendations. These recommendations that are no longer proposed included the following:

- 1) Empowering inspectors to integrate proactive inspections regarding the smoke-free Ordinance enforcement at the same time that the inspectors are conducting other city-mandated inspections (e.g., the Rental Housing Safety Program);
- 2) Exploring the legality of allowing anonymous complaints to be processed;
- 3) Relaxing the requirement of having to demonstrate two separate complaints within a six-month period in buildings of *all unit sizes*.

Therefore, though some of the recommended actions, if approved, may trigger the need to provide subtle adjustments to the enforcement of the Ordinance, none of the actions above alter the fundamental architecture of the Ordinance.

⁷ https://www.cityofberkeley.info/Health_Human_Services/Public_Health/Smoke_Free_MUH.aspx

Recommendation to Modify Policies Related to the Enforcement
of the Smoke-Free Multi-Unit Housing Ordinance

ACTION CALENDAR
October 29, 2019

CITY MANAGER

See companion report.

CONTACT PERSON

Mike Uberti, Commission Secretary, HHCS, (510) 981-5114



Office of the City Manager

6b

ACTION CALENDAR
October 29, 2019

To: Honorable Mayor and Members of the City Council
From: Dee Williams-Ridley, City Manager
Submitted by: Kelly Wallace, Interim Director, Health, Housing, & Community Services
Subject: Companion Report: Recommendation to Modify Policies Related to the Enforcement of the Berkeley Smoke-Free Multi-Unit Housing Ordinance

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.

FISCAL IMPACTS OF RECOMMENDATION

The modifications proposed by the Housing Advisory Commission could require 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 adopted a multi-pronged recommendation to modify the SFMUH ordinance. The proposed modifications vary in their scope and will require additional analysis prior to adoption, which fits with the Strategic Plan Priority goal to provide an efficient and financially-healthy City government.

The commission's recommendations are outlined below with proposed analysis by staff. The proposed analysis would include:

Commission Recommendation 1: Increase staffing to implement enforcement of the ordinance as part of the next budget.

Staff should analyze how the proposed modifications, if adopted, will impact current demands on staff time and determine how many Full Time Equivalent (FTE) employees would be needed. The Public Health Division's Tobacco Prevention Program manages the administration of the ordinance, including processing and monitoring complaints and correspondence with potential violators and landlords. Enforcement of this ordinance is

managed by the City Manager's Code Enforcement Division in coordination with the PH Tobacco Prevention Program.

This request for analysis aligns with a recommendation of the June 2018 City Audit of the Neighborhood Services' Code Enforcement Unit. The audit states any proposed legislation that creates additional workload for the Neighborhood Services Code Enforcement Unit should undergo a resource analysis by City Council to evaluate the proposed fiscal and workload impacts and determine the opportunity cost and implementation approach. The Audit also notes that new code enforcement areas may require significant staff time and resources, which may take away from the unit's ability to meet its other enforcement obligations. Additions to the unit's workload could result in loss of revenue generated from fines and enforcement fees, as well as an increased risk to lawsuits brought on by those who claim the City failed to meet its enforcement obligations.

Commission Recommendation 2: Improve signage related to the ordinance in residential buildings.

The City's Tobacco Prevention Program provides property owners/managers with "No Smoking" signage for common areas consistent with the signposting requirements of Berkeley Municipal Code Section 12.70.060. Staff could consult with the Community Health Commission to seek information and determine any potential improvements.

Commission Recommendation 3: Make the complaint process less onerous and more user-friendly, including enabling complainants to submit complaints electronically, providing complaint forms in different languages, and removing language requiring the statements to be "sworn," and considering other, less threatening language that still expects a complaint be provided under the best of appellant's knowledge.

Staff appreciates the Commission's efforts to make the complaint process more user-friendly. An electronic complaint submission system would considerably ease the complaint process (which requires signature authentication) as well as administrative tasks. At the same time, some of the Commission's suggestions could raise potential unintended consequences that would need to be considered and thought through. For instance, several departments—including the City Attorney's office—would need to provide an opinion on the City's ability to accept signatures electronically and the implications of removing requirements for sworn statements. Additionally, electronic forms and signatures should be considered as a part of the City's ongoing website redesign.

Staff currently has a limited capacity for language translation. A feasibility analysis would have to determine criteria for what languages should be included and funding needed to provide these services, as well as changes to the language in the ordinance to simply the process.

Commission Recommendation 4: Relax the current requirements around how the Ordinance-based complaint form must be completed in order to be processed (e.g., removing the requirement of providing two separate complaints from different individuals within a six-month period, if the building contains two or fewer units, removing the requirement of providing a sworn statement under penalty of perjury).

Again, we support efforts to ease the process for complainants, and would work with the City Attorney on any liabilities or legal implications associated with the proposed modifications.

Commission Recommendation 5: Refer to the Community Health and Cannabis Commissions the question of whether the use of recreational (non-medical) cannabis should be incorporated into the Smoke-Free Housing Ordinance.

Staff are currently working on amendments to the current SFMUH ordinance (and other parts of the Berkeley Municipal Code) to clarify that it includes cannabis. Proposition 64 legalized adult-use of cannabis in California by creating limited exceptions to the state Uniform Controlled Substances Act. But Proposition 64 specifically provided that it did not permit smoking of “cannabis or cannabis products in a location where smoking tobacco is prohibited.” (Health & Safety Code, § 11362.3.) Thus, cannabis smoking is still unlawful in places where tobacco smoking is prohibited, including under local laws like the SFMUH ordinance.

BACKGROUND

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 their recommendations, staff are recommending a feasibility analysis is first considered to better understand the potential impacts and needs associated with the proposed ordinance modifications.

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

Mike Uberti, Commission Secretary, HHCS, (510) 981-5114