



**BERKELEY CITY COUNCIL PUBLIC SAFETY COMMITTEE  
REGULAR MEETING**

**Monday, December 7, 2020  
10:30 AM**

Committee Members:

Councilmembers Rashi Kesarwani, Rigel Robinson, and Susan Wengraf  
Alternate: Councilmember Lori Droste

**PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED EXCLUSIVELY THROUGH  
VIDEOCONFERENCE AND TELECONFERENCE**

Pursuant to Section 3 of Executive Order N-29-20, issued by Governor Newsom on March 17, 2020, this meeting of the City Council Public Safety Policy Committee will be conducted exclusively through teleconference and Zoom videoconference. Please be advised that pursuant to the Executive Order, and to ensure the health and safety of the public by limiting human contact that could spread the COVID-19 virus, there will not be a physical meeting location available.

To access the meeting remotely using the internet: Join from a PC, Mac, iPad, iPhone, or Android device: Use URL - <https://us02web.zoom.us/j/83621975390>. If you do not wish for your name to appear on the screen, then use the drop down menu and click on "rename" to rename yourself to be anonymous. To request to speak, use the "raise hand" icon on the screen.

To join by phone: Dial **1-669-900-9128** or **1-877-853-5257 (Toll Free)** and Enter Meeting ID: **836 2197 5390**. If you wish to comment during the public comment portion of the agenda, press \*9 and wait to be recognized by the Chair.

Written communications submitted by mail or e-mail to the Public Safety Policy Committee by 5:00 p.m. the Friday before the Committee meeting will be distributed to the members of the Committee in advance of the meeting and retained as part of the official record. City offices are currently closed and cannot accept written communications in person.

# AGENDA

## Roll Call

## Public Comment on Non-Agenda Matters

## Minutes for Approval

*Draft minutes for the Committee's consideration and approval.*

### 1. Minutes - November 2, 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.*

## Committee Action Items

**2. Safety for All: The George Floyd Community Safety Act - Development of a Progressive Police Academy**

**From: Councilmember Bartlett (Author), Mayor Arreguin (Co-Sponsor) and Councilmember Davila (Co-Sponsor)**

**Referred: June 16, 2020**

**Due: January 17, 2021**

**Recommendation:** That the City Council refers to the Public Safety Committee to develop a progressive police academy and curriculum. That this progressive academy is hosted by the City of Berkeley and offered for use by the regional. The City should hire consultants and convene stakeholders including the Police Review Commission, a community task-force, and the Berkeley Police Department to create the academy's programmatic design. Once established, Berkeley Police Department recruits will attend this academy for basic training. The training program is intended to become revenue neutral. The program will be offered on a paid subscription basis to interested jurisdictions. Berkeley's progressive police academy envisions a curriculum that teaches recruits de-escalation, empathy, and the Critical Decision-Making Model (CDM). CDM encourages officers to challenge their biases, refrain from using force when possible, and build police-community trust. By reshaping police ideology through education, the City of Berkeley can tackle police brutality and police misconduct at their roots.

**Financial Implications:** This recommendation would reallocate some funding from the department's Training and Standards division to the development of a new regional police academy. Once established, Berkeley's police academy would serve as a training institution for recruits from other progressive minded jurisdictions throughout the region. Attracting recruits from other cities and counties would potentially make this a revenue generating measure.

Contact: Ben Bartlett, Councilmember, District 3, (510) 981-7130

**3. Adopt an Ordinance Adding Chapter 2.64.170 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment** *(Supplemental Material Received)*

**From: Councilmember Harrison (Author) and Councilmember Bartlett (Co-Sponsor)**

**Referred: July 13, 2020**

**Due: February 13, 2021**

**Recommendation:** 1. Refer draft Ordinance to the Police Review Commission for further consideration and policy development and submit recommendations to the Public Safety Committee and author within 60 days; and  
2. Adopt an Ordinance Adding Chapter 2.64.170 to the Berkeley Municipal Code to Regulate Police Acquisition and Use of Controlled Equipment.

**Financial Implications:** Staff time

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

## 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.*

- 4. Introduce an Ordinance permanently banning the use of less lethal weaponry, chemical irritants, smoke projectiles, acoustic weapons, directed energy weapons, water cannons, disorientation devices and ultrasonic cannons used by the police on civilians**

**From: Councilmember Davila (Author)**

**Referred: September 30, 2020**

**Due: January 27, 2020**

**Recommendation:** Direct the City Manager and City Attorney to prepare the attached ordinance: "Prohibition On The Use Of Certain Munitions Ordinance" for first reading for the October 27, 2020 Regular City Council Meeting.

**Financial Implications:** See report

Contact: Cheryl Davila, Councilmember, District 2, (510) 981-7120

- 5. Providing our Unhoused Community with Fire Extinguishers**

**From: Councilmember Davila (Author)**

**Referred: October 13, 2020**

**Due: February 10, 2021**

**Recommendation:** Direct the City Manager to use existing homeless services funding to develop a program to provide fire extinguishers, fire prevention tools and deploy them through the community based homeless services providers to distribute to our unhoused community.

**Financial Implications:** See report

Contact: Cheryl Davila, Councilmember, District 2, (510) 981-7120

## Items for Future Agendas

- **Discussion of items to be added to future agendas**

## Adjournment

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*Written communications addressed to the Public Safety 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:

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.

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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 December 3, 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 PUBLIC SAFETY COMMITTEE  
REGULAR MEETING MINUTES**

**Monday, November 2, 2020  
10:30 AM**

Committee Members:

Councilmembers Rashi Kesarwani, Rigel Robinson, and Susan Wengraf  
Alternate: Councilmember Lori Droste

**PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED EXCLUSIVELY THROUGH  
VIDEOCONFERENCE AND TELECONFERENCE**

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Written communications submitted by mail or e-mail to the Public Safety Policy Committee by 5:00 p.m. the Friday before the Committee meeting will be distributed to the members of the Committee in advance of the meeting and retained as part of the official record. City offices are currently closed and cannot accept written communications in person.

## MINUTES

**Roll Call:** 10:35 am. All present.

**Public Comment on Non-Agenda Matters:** 1 Speaker

### Minutes for Approval

*Draft minutes for the Committee's consideration and approval.*

#### 1. Minutes - October 5, 2020

**Action:** M/S/C (Robinson/Kesarwani) to approve the 10/5/20 minutes as presented.

**Vote:** All Ayes.

### 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. **Adopt an Ordinance Adding Chapter 2.64.170 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment** (*Supplemental Material Received*)

**From:** Councilmember Harrison (Author) and Councilmember Bartlett (Co-Sponsor)

**Referred:** July 13, 2020

**Due:** February 13, 2021

**Recommendation:** 1. Refer draft Ordinance to the Police Review Commission for further consideration and policy development and submit recommendations to the Public Safety Committee and author within 60 days; and

2. Adopt an Ordinance Adding Chapter 2.64.170 to the Berkeley Municipal Code to Regulate Police Acquisition and Use of Controlled Equipment.

**Financial Implications:** Staff time

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

**Action:** 12 speakers. Discussion held. Supplemental material was received from the Author and the Police Review Commission. The item was continued to the next meeting to allow for City Attorney review.



## Committee Action Items

- 3. Introduce an Ordinance permanently banning the use of less lethal weaponry, chemical irritants, smoke projectiles, acoustic weapons, directed energy weapons, water cannons, disorientation devices and ultrasonic cannons used by the police on civilians**  
**From: Councilmember Davila (Author)**  
**Referred: September 30, 2020**  
**Due: January 27, 2021**  
**Recommendation:** Direct the City Manager and City Attorney to prepare the attached ordinance: "Prohibition On The Use Of Certain Munitions Ordinance" for first reading for the October 27, 2020 Regular City Council Meeting.  
**Financial Implications:** See report  
Contact: Cheryl Davila, Councilmember, District 2, (510) 981-7120  
**Action:** The item was continued to the next meeting.
  
- 4. Safety for All: The George Floyd Community Safety Act - Development of a Progressive Police Academy**  
**From: Councilmember Bartlett**  
**Referred: June 16, 2020**  
**Due: January 17, 2021**  
**Recommendation:** That the City Council refers to the Public Safety Committee to develop a progressive police academy and curriculum. That this progressive academy is hosted by the City of Berkeley and offered for use by the regional. The City should hire consultants and convene stakeholders including the Police Review Commission, a community task-force, and the Berkeley Police Department to create the academy's programmatic design. Once established, Berkeley Police Department recruits will attend this academy for basic training. The training program is intended to become revenue neutral. The program will be offered on a paid subscription basis to interested jurisdictions. Berkeley's progressive police academy envisions a curriculum that teaches recruits de-escalation, empathy, and the Critical Decision-Making Model (CDM). CDM encourages officers to challenge their biases, refrain from using force when possible, and build police-community trust. By reshaping police ideology through education, the City of Berkeley can tackle police brutality and police misconduct at their roots.  
**Financial Implications:** This recommendation would reallocate some funding from the department's Training and Standards division to the development of a new regional police academy. Once established, Berkeley's police academy would serve as a training institution for recruits from other progressive minded jurisdictions throughout the region. Attracting recruits from other cities and counties would potentially make this a revenue generating measure.  
Contact: Ben Bartlett, Councilmember, District 3, (510) 981-7130  
**Action:** The item was continued to the next meeting.

## Committee Action Items

### 5. Improving Hate Crimes Reporting and Response

**From: Mayor Arreguin (Author), Councilmember Bartlett (Co-Sponsor), Councilmember Wengraf (Co-Sponsor) and Councilmember Hahn (Co-Sponsor)**

**Referred: July 13, 2020**

**February 13, 2021**

**Recommendation:** Refer to the City Manager to review the following proposals and implement new systems for reporting and response to hate incidents and crimes: - Develop easy, transparent reporting systems for victims and/or their support networks, including a hate crimes reporting hotline (SF implemented) and/or an online reporting tool; -Privacy policies and procedures that will provide support for victims and encourage reporting; -Culturally appropriate personnel structures to respond to incidents that will encourage reporting, reduce fear and provide support; - Establishing supportive community based networks that provide clear, decisive response to hate crimes and hate incidents  
-The creation of accessible and multilingual reporting procedures and resources that deliver the clear message that hate has no place in Berkeley; -Engaging youth and BUSD to make it clear that bullying, racial slurs and vandalism are hate-fueled incidents; -Develop a public facing mapping tool that indicates patterns of hate incidents and crimes to help with outreach and prevention; -Other emerging policies and activities that support an inclusive and safe community.

**Financial Implications:** See report

Contact: Jesse Arreguin, Mayor, (510) 981-7100

**Action:** 5 speakers. Discussion held. M/S/C (Wengraf/Kesarwani) to send the item with a positive recommendation to the City Council, as submitted in the revised material received on 11/2/20 and further revised to include: Consider existing internal and external resources including the City's 311 Customer Service line and the County's Hate Crimes Reporting Hotline; and to coordinate with educational institutions (e.g. UC Berkeley and BUSD) to achieve goals.

**Vote:** All Ayes.

### 6. Providing our Unhoused Community with Fire Extinguishers

**From: Councilmember Davila (Author)**

**Referred: October 13, 2020**

**Due: February 10, 2021**

**Recommendation:** Direct the City Manager to use existing homeless services funding to develop a program to provide fire extinguishers, fire prevention tools and deploy them through the community based home-less services providers to distribute to our unhoused community.

**Financial Implications:** See report

Contact: Cheryl Davila, Councilmember, District 2, (510) 981-7120

**Action:** The item was continued to the next meeting.

## 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.*

- None

## Items for Future Agendas

- None

**Adjournment:** 12:51 pm.

**Action:** M/S/C (Robinson/Kesarwani) to adjourn the meeting.

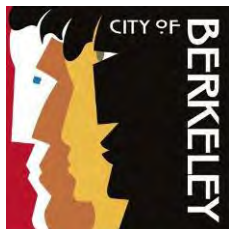
**Vote:** All Ayes.

I hereby certify that this is a true and correct record of Public Safety Policy Committee meeting held on November 2, 2020.

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Michael MacDonald, Assistant City Clerk





Councilmember Ben Bartlett  
City of Berkeley, District 3

**02**

## EMERGENCY ITEM AGENDA MATERIAL

**Meeting date:** June 16, 2020  
**Item Description:** Safety for All: The George Floyd Community Safety Act - Development of a Progressive Police Academy  
**Submitted by:** Councilmember Ben Bartlett (Author), Mayor Jesse Arreguin (Co-Sponsor) and Councilmember Cheryl Davila (Co-Sponsor)

**Rationale:**

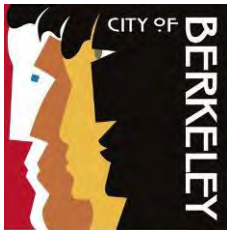
Pursuant to California Government Code Section 54954.2(b) (2), Councilmember Ben Bartlett submits the attached item to the City Council for placement on the June 16, 2020 meeting agenda. Gov. Code Section 54954.2(b) (2) states that *“Upon a determination by a two-thirds vote of the members of a legislative body presents at the meeting, or, if less than two-thirds of the members are present, a unanimous vote of those members present, that there is a need to take immediate action and that the need for action came to the attention of the local agency subsequent to the agenda being posted as specified in subdivision (a).”*

This item meets the criteria for “immediate action” as follows:

- 1) The budget is being considered and there is public outcry for the Council to take action.
- 2) Racism Is a Public Health Emergency.
- 3) Council is considering numerous police items right now.

In all 50 states and more than 145 cities, Americans are calling for an end to police brutality, legitimate police accountability, and the transformation of the police system itself. The killing of George Floyd, a 46-year-old Black man, at the hands of police officers in Minneapolis, Minnesota followed a long series of constitutional abuses of Black men and women. Mr. Floyd’s death has proved to be the tipping point, giving rise to these waves of demonstrations, including many in the City of Berkeley. It is imperative that the City takes urgent action to end racial injustice and police brutality by considering all options.

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Councilmember Ben Bartlett  
City of Berkeley, District 3

## CONSENT CALENDAR

June 16, 2020

To: Honorable Mayor and Members of the City Council  
From: Councilmember Ben Bartlett (Author) and Mayor Jesse Arreguin (Co-Sponsor)  
Subject: Safety for All: The George Floyd Community Safety Act - Development of a Progressive Police Academy

### RECOMMENDATION:

That the City Council refers to the Public Safety Committee to develop a progressive police academy and curriculum. That this progressive academy is hosted by the City of Berkeley and offered for use by the regional. The City should hire consultants and convene stakeholders including the Police Review Commission, a community task-force, and the Berkeley Police Department to create the academy's programmatic design. Once established, Berkeley Police Department recruits will attend this academy for basic training. The training program is intended to become revenue neutral. The program will be offered on a paid subscription basis to interested jurisdictions. Berkeley's progressive police academy envisions a curriculum that teaches recruits de-escalation, empathy, and the Critical Decision-Making Model (CDM). CDM encourages officers to challenge their biases, refrain from using force when possible, and build police-community trust. By reshaping police ideology through education, the City of Berkeley can tackle police brutality and police misconduct at their roots.

### CURRENT SITUATION

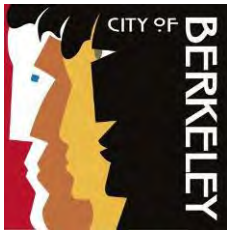
It is imperative that the City of Berkeley develops, implements, and enforces a clear and effective roadmap towards making real change, ending anti-Black state racism, stopping police violence, and holding police accountable for their actions.

As a component of the **REDUCE, IMPROVE, RE-INVEST** framework, this item works towards the IMPROVE goal: *the City should reform current aspects of the police department to better hold its officers accountable for their actions.* Specifically, this item will develop a progressive police academy that is not paramilitary in nature and embraces non-violent approaches to curb police brutality.

### **The Current State of Berkeley Police Department Training**

The department's adopted 2019 fiscal year budget allocated \$3,433,573 for Personnel and Training<sup>1</sup>. Berkeley Police Department recruits currently train at the Contra Costa County Sheriff's Office Academy Training Center, Sacramento Police Academy, Santa

<sup>1</sup> <https://www.cityofberkeley.info/uploadedFiles/Manager/Budget/FY-2020-2021-Adopted-Budget-Book.pdf> (p.295)



Councilmember Ben Bartlett  
City of Berkeley, District 3

Clara County Sheriff's Office Justice Training Center, and Alameda County Sheriff's Office Academy Training Center.

Unfortunately, these facilities are paramilitary in structure, potentially instilling the warrior mentality that forces a divide between law enforcement and the public and promotes fear. Additionally, the Alameda County Sheriff's Office's history of using military technology, deploying armored vehicles, equipping deputies with automatic rifles, and support for Urban Shield casts doubt on the ability of the Alameda County Sheriff's Office Regional Training Center in Dublin to train cadets in a progressive, non-paramilitary manner.

## BACKGROUND

### **Peace Officer Basic Training**

The Berkeley Police Department requires officers to attend a basic training academy that is approved by the Commission on Peace Officer Standards and Training.

The guidelines for police officer training are outlined by the Commission on Peace Officer Standards and Training (POST). The POST-certified Regular Basic Course (basic academy) is the training standard for police officers, deputy sheriffs, school district police officers, district attorney investigators, as well as a few other classifications of peace officers. The basic academy is both physically and mentally challenging. It includes a minimum of 664 hours of POST-developed training and testing in 42 separate areas of instruction called Learning Domains. Most POST-certified basic training academies exceed the 664 hour minimum by 200 or more hours with some academies presenting over 1000 hours of training and testing.

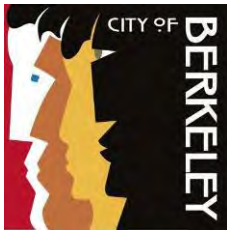
Academy students are subject to various written, skill, exercise, and scenario-based tests. Students must also participate in a rigorous physical conditioning program which culminates in a Work Sample Test Battery (physical ability test) at the end of the academy. Students must pass all tests in order to graduate from the basic academy.<sup>2</sup>

### **Progressive Police Academy Models in the United States**

Those condemning the paramilitary aspect of policing have concentrated their attention on federal military equipment transfers, and for good reason. But the police system's paramilitary nature extends beyond the equipment used on the streets. It takes on a fundamental role, weaving itself into police ideology from the very beginning.

Many police academies in the United States are paramilitary in nature and instill cadets with a warrior mentality from the start. Police training must be reformed if we are to close the divide between police and the civilians they serve.

<sup>2</sup> <https://post.ca.gov/peace-officer-basic-training>



Councilmember Ben Bartlett  
City of Berkeley, District 3

Georgetown University law professor Rosa Brooks discusses several police academies that have reformed their training processes. In Washington State, the “Listen and Explain with Equity and Dignity” method trains recruits to listen, show empathy, explain their actions, and de-escalate tense situations. In Washington, D.C., the Metropolitan Police Department has brought civilian teachers and adult-learning specialists into many senior police-academy positions instead of staffing the academy solely with sworn officers. D.C. police recruits are encouraged to question and debate policies instead of just memorizing them. The department has also partnered with several local universities to develop programs designed to push both recruits and more experienced officers to critically engage with the history and practices of their profession. All officers now visit the Holocaust Memorial Museum and the National Museum of African American History and Culture, and spend a day discussing the role of police officers in perpetuating—or ending—atrocities and injustice. A select group of officers take part in the Georgetown program’s Police for Tomorrow Fellowship, where the fellows participate in intensive workshops on many of the toughest and most controversial issues in policing, including race and the legacy of racial discrimination, over-criminalization, alternatives to arrest, poverty, addiction, and homelessness. Officers visit prisons and homeless shelters and meet with local teens, and each fellow undertakes a capstone community project.

Such programs can be transformative. In D.C., many of the young officers who go through these programs credit them with changing how the officers think about their role—and their thoughtful feedback has helped fuel internal changes within the department, including some recent changes at the police academy itself.<sup>3</sup>

A new regional progressive police academy should adopt these policies or look to them as inspiration for innovation.

### **Fair and Impartial Policing (FIP)**

Fair and Impartial Policing is a philosophy and methodology of reflecting on bias, based on an understanding that all of us have biases. The old way of addressing this was to point out bad behavior and tell cops to stop the behavior. This caused some to feel police departments are full of racist, biased officers, which is not the case.<sup>4</sup>

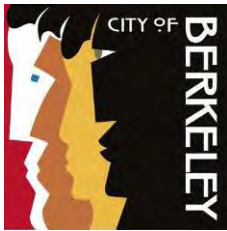
### **The Critical Decision-Making Model**

The Critical Decision-Making Model is a five-step critical thinking process developed by the Police Executive Research Forum (PERF). All five steps are built around the core values of the department and the policing profession.

<sup>3</sup> <https://www.theatlantic.com/ideas/archive/2020/06/police-academies-paramilitary/612859/>

<sup>4</sup> <https://www.iaclea.org/assets/uploads/pdfs/CLEJ-2017-03-ProgressivePolicing.pdf>





Councilmember Ben Bartlett  
City of Berkeley, District 3

The thought processes embedded in the CDM are not very different from what many police officers already do on a daily basis. The CDM is certainly in line with how specialized tactical units are trained to approach their assignments. And it likely reflects the activities of many patrol officers, whether consciously or by instinct, when responding to calls for service or engaging in proactive policing. What is new and different about the CDM is that it offers a structure for working through a series of steps that officers may already be following and questions they are probably asking already. This structure helps to ensure that each critical step is followed and that all key questions are asked along the way.

At the center of the CDM is an ethical core that provides grounding and guidance for the entire process. The four elements of the CDM core are:

- Police ethics
- Agency values
- Concept of proportionality
- Sanctity of all human life

Every step of the process is connected to this core, and the core informs and guides officers throughout the five steps. Everything an officer does within the CDM must support the ideals in the center, and no action can go against those standards.

#### Step 1: Collect Information

The logical first step in the process is for officers to gather information and intelligence, a process that begins as officers are heading toward the incident. During this step, officers ask themselves and others, including Dispatch personnel, a series of key questions.

#### Step 2: Assess Situation, Threat and Risks

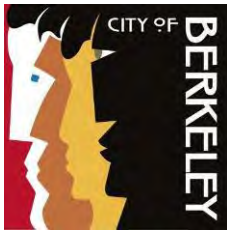
This step typically begins as officers are responding to the incident and are evaluating what they are being told by dispatchers or others. That is the time when officers begin considering “what if?” scenarios in their minds. The assessment step shifts into high gear as officers arrive on scene and can visually begin to gauge threats and risks.

#### Step 3: Consider Police Powers and Agency Policy

This step represents an important self-check of officers’ authority to take action. In addition to considering their legal authority to act, officers must think about what their agencies’ policies say about the situation.

#### Step 4: Identify Options and Determine the Best Course of Action

Using the information and assessment from earlier steps, officers now begin to narrow their options and determine the best course of action. Again, part of this step is to



Councilmember Ben Bartlett  
City of Berkeley, District 3

determine if the officers have enough information and resources, and a compelling interest, to act right away. Or should they hold off, possibly to get even more information and resources?

#### Step 5: Act, Review and Reassess

In this step, officers execute the plan, evaluate the impact, and determine what more, if anything, they need to do.

If the incident is not resolved, then officers should begin the Critical Decision-Making Model again, starting with the collection of additional information and intelligence.<sup>5</sup>

#### REVIEW OF EXISTING PLANS, PROGRAMS, POLICIES, AND LAWS

Before starting their career as a Police Officer for the City of Berkeley, Berkeley Police Officers must attend a Basic Training Academy that has been approved by the Commission on Peace Officer Standards and Training (POST).<sup>6</sup>

#### ACTIONS/ALTERNATIVES CONSIDERED

Alternatives considered include:

1. Instituting police reform without altering existing academies
2. Reforming existing police academies

Unfortunately, the paramilitary aspect of police culture may be planted in the beginning as officers undergo training. It is clear that police academy training must be transformed to effectively reduce police brutality.

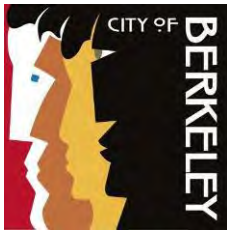
While the City of Berkeley may advocate for the reform of existing police academies, it would have little ability to enforce necessary changes and oversee the transformation process. By starting an academy from the ground-up, the City has input at every step of the development process, and can ensure that officers of the Berkeley Police Department are properly trained.

#### OUTREACH OVERVIEW AND RESULTS

The District 3 Office has consulted with David Muhammad, who is the Executive Director of the National Institute for Criminal Justice Reform; the former Chief Probation Officer in Alameda County; and the former Deputy Commissioner of Probation in New York City. David Muhammad is a leading expert on criminal justice who has helped inform our response to the current situation.

<sup>5</sup> [https://www.policeforum.org/assets/ICAT/module%202\\_cdm\\_dec16.pdf](https://www.policeforum.org/assets/ICAT/module%202_cdm_dec16.pdf)

<sup>6</sup> [https://www.cityofberkeley.info/BPD\\_General\\_Orders.aspx](https://www.cityofberkeley.info/BPD_General_Orders.aspx)



Councilmember Ben Bartlett  
City of Berkeley, District 3

The District 3 Office has also consulted with Marcus McKinney, the Senior Director of Government Affairs & Public Policy at the Center for Policing Equity.

The District 3 Office has also consulted with Professor Tracey L. Meares, Walton Hale Hamilton Professor and Faculty Director of the Justice Collaboratory at Yale Law School.

### RATIONALE FOR RECOMMENDATION

The paramilitary aspect of policing and police academies creates a rift between law enforcement officers and the public. Many civilians cease to view the police as members of the community tasked with upholding the law, seeing instead an unpredictable occupying force with a license for violence and the armaments to do so. Their paramilitary training instills far too many officers with a warrior mentality, deepening the divide between civilians and police.

Rooting out the paramilitary aspect of policing begins with transforming police training. It necessitates equipping officers with practical and effective decision making methods that prioritize de-escalation and reserve use of force as a last resort. It necessitates teaching police officers that they have the power and the choice to perpetuate or defeat injustice. It necessitates engaging officers with the history of their profession and challenging their socioeconomic and racial biases.

### FISCAL IMPACTS OF RECOMMENDATION

This recommendation would reallocate some funding from the department's Training and Standards division to the development of a new regional police academy. Once established, Berkeley's police academy would serve as a training institution for recruits from other progressiveminded jurisdictions throughout the region. Attracting recruits from other cities and counties would potentially make this a revenue generating measure.

### ENVIRONMENTAL SUSTAINABILITY

No expected negative environmental impact.

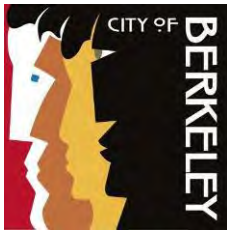
### OUTCOMES AND EVALUATION

It is expected that a new progressive police academy will be created to help recruits build a foundation of empathy and de-escalation.

### CONTACT PERSON

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Kyle Tang  
Kimberly Woo

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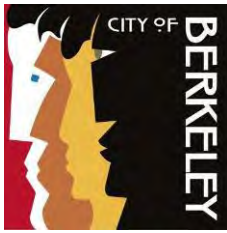
Councilmember Ben Bartlett  
City of Berkeley, District 3

Matthew Gallati

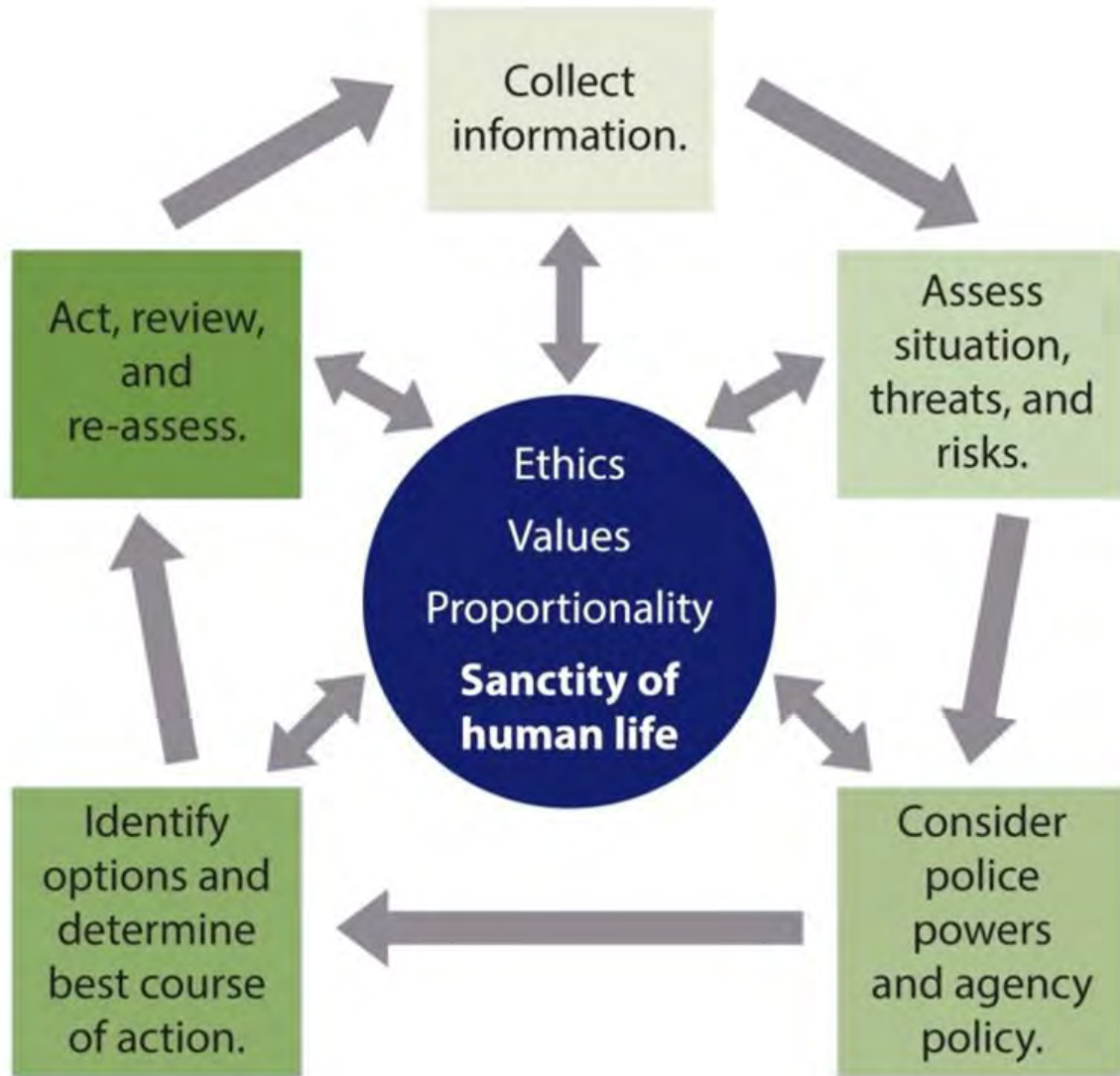
[matthewgallati@gmail.com](mailto:matthewgallati@gmail.com)

#### ATTACHMENTS

1. Critical Decision-Making Model Chart
2. Cover Letter - Safety for All: George Floyd Community Safety Act
  - <https://drive.google.com/file/d/16pqqd9J6NPRzh6298Bgazo7jw1qxTK6Y/view?usp=sharing>



Councilmember Ben Bartlett  
City of Berkeley, District 3







Kate Harrison  
Councilmember District 4

**03**

## **REVISED AGENDA MATERIAL**

**Meeting Date:** November 2, 2020

**Item Number:** 2

**Item Description:** **Adopt an Ordinance Adding Chapter 2.64.170 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment**

**Submitted by:** Councilmember Harrison

### **Revisions**

1. Accepted Police Review Commission edits;
2. Clarified that the LRAD is controlled equipment to the extent that it is used as an crowd dispersal tool;
3. Moved definition of Exigent Circumstances to the definitions section;
4. Clarified that the ordinance applies to the Police Review Commission or successive agency;
5. Clarified that BPD shall report on controlled equipment annually.

ORDINANCE NO. -N.S.

ADDING A NEW CHAPTER 2.100 TO THE BERKELEY MUNICIPAL CODE  
REGULATING POLICE ACQUISITION AND USE OF CONTROLLED  
EQUIPMENT

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

Section 1. The Berkeley Municipal Code Chapter 2.100 is amended to read as follows:

**Chapter 2.100**  
**POLICE EQUIPMENT AND COMMUNITY SAFETY ORDINANCE**

**Sections:**

**2.100.010 Name of Ordinance**

**2.100.020 Definitions**

**2.100.030 Controlled Equipment Use Policy Requirement**

**2.100.040 Acquisition and Use of Controlled Equipment**

**2.100.050 Reports on the Use of Controlled Equipment**

**2.100.060 Enforcement**

**2.100.070 Transparency**

**2.100.080 Whistleblower Protections**

**2.100.090 Severability**

**2.100.010 Name of Ordinance**

(A) This Ordinance shall be known as the Police Equipment and Community Safety Ordinance.

**2.100.020 Definitions**

(A) "Controlled Equipment" includes, but is not limited to, all of the following:

(1) Vehicles that are built or modified to provide ballistic protection to their occupants, such as mine-resistant ambush protected (MRAP) vehicles or armored personnel carriers.

(a) Police versions of standard passenger vehicles are specifically excluded from this section.

(2) Multi-purpose wheeled vehicles that are: built to operate both on-road and off- road, such as a high mobility multipurpose wheeled vehicle (HMMWV), commonly referred to as a Humvee, a two and one-half-ton truck, or a five-ton truck; or built or modified to use a breaching or entry apparatus as an attachment.

(a) Unarmored all-terrain vehicles (ATVs) and motorized dirt bikes are specifically excluded from this section.

(3) Tracked vehicles that are built or modified to provide ballistic protection to their



occupants and utilize a tracked system instead of wheels for forward motion.

(4) Aircraft, vessels, or vehicles of any kind, whether manned or unmanned, with attached or mounted weapons.

(5) Breaching apparatus designed to provide rapid entry into a building or through a secured doorway, including equipment that is mechanical, such as a battering ram, and equipment that is ballistic, such as a slug, or equipment that is explosive in nature. Items designed to remove a lock, such as bolt cutters, small gauge frangible rounds, or a handheld ram, are excluded from this policy.

(6) Firearms of .50 caliber or greater.

(7) Ammunition of .50 caliber or greater.

(8) Specialized firearms, including the Colt M4, and associated ammunition of less than .50 caliber, as defined in Sections 30510 and 30515 of the California Penal Code.

(9) Projectile launch platforms and their associated munitions, such as 40mm projectile launchers, "bean bag," rubber bullet, or specialty impact munition (SIM) weapons, and equipment used to disperse chemical agents.

(10) Any knife designed to be attached to the muzzle of a rifle, shotgun, or long gun for purposes of hand-to-hand combat.

(11) Explosives, pyrotechnics, such as "flashbang" grenades, and chemical weapons such as "teargas," CS gas, pepper spray, and "pepper balls".

(12) Batons 30 inches or longer in length.

(13) Active area denial weapons, such as the Taser Shockwave, microwave weapons, and water cannons and the Long Range Acoustic Device (LRAD).

(a) Only LRAD as an area denial tool shall trigger the reporting requirements of this ordinance.

(14) Any other equipment as determined by a majority of the City Council to require additional oversight.

(B) "City" means any department, agency, bureau, and/or subordinate division of the City of Berkeley.

(C) "Controlled Equipment Impact Statement" means a publicly released, written document that includes, at a minimum, all of the following:

(1) Description: A description of each type of Controlled Equipment, the quantity sought, its capabilities, expected lifespan, intended uses and effects, and how it works, including product descriptions from the manufacturer of the Controlled Equipment.

(2) Purpose: The specific purpose or purposes that each type of Controlled Equipment is intended to achieve-

(3) Fiscal Cost: The fiscal cost of each type of Controlled Equipment, including the initial costs of obtaining the equipment, the costs of each proposed use, the costs of potential adverse impacts, and the annual, ongoing costs of the equipment, including operating, training, transportation, storage, maintenance, and upgrade costs.

(4) Impact: An assessment specifically identifying any potential impacts that the use of Controlled Equipment might have on the welfare, safety, civil rights, and civil liberties of the public.

(5) Mitigations: Specific, affirmative technical and procedural measures that will be implemented to safeguard the public from such impacts.

(6) Alternatives: Alternative method or methods by which the Police Department can accomplish the purposes for which the Controlled Equipment is proposed to be used, and rationale for selection over alternative methods.

(7) Third Party Dependence: Whether use or maintenance of the Controlled Equipment will require the engagement of third party service providers.

(D) "Exigent Circumstances" means a law enforcement agency's good faith belief that an emergency involving the danger of, or imminent threat of death or serious physical injury to any person requires the use of unapproved Controlled Equipment.

### **2.100.030 Controlled Equipment Use Policy Requirement**

Controlled Equipment requires a publicly available use policy that identifies the purpose, any prohibited uses, training requirements, and any process required prior to use.

### **2.100.040 Acquisition and Use of Controlled Equipment.**

#### **(A) Restrictions Prior to Submission and Approval**

(1) The Police Department shall not engage in any of the following activities regarding a piece of Controlled Equipment before the Berkeley Police Review Commission ("Police Review Commission"), or any successive agency, -reviews and recommends, and the City Council approves, a Controlled Equipment Impact Report and a Controlled Equipment Use Policy for that equipment in compliance with this section.

(a) Requesting the transfer of Controlled Equipment pursuant to Section 2576a of Title 10 of the United States Code.

(b) Seeking funds for Controlled Equipment, including, but not limited to, applying for a grant, soliciting or accepting private, local, state, or federal funds, in-kind donations, or other donations or transfers.

(c) Acquiring Controlled Equipment either permanently or temporarily, including by borrowing or leasing.

(d) Using any new Controlled Equipment for a purpose, in a manner, or by a person not previously approved by the City Council pursuant to this Ordinance.

(e) Soliciting or responding to a proposal for, or entering into an agreement with, any other person or entity to seek funds for, apply to receive, acquire, use, or collaborate in the use of, Controlled Equipment.

#### **(B) Submission to Police Review Commission**

(1) At least 15 days prior to any public meeting to consider the adoption of any Controlled Equipment Use Policy or Controlled Equipment Impact Report, the Use Policy and Impact

report shall be published for public review.

(2) The final Controlled Equipment Impact Report and Controlled Equipment Use Policy shall be made publicly available on the Department's website for as long as the Controlled Equipment is available for use.

(3) The Police Review Commission shall consider Controlled Equipment Impact Reports and Controlled Equipment Use Policies as an agenda item for review at an open session of a meeting.

(C) Criteria for Police Review Commission Recommendations

(1) The Police Review Commission shall recommend approval of a request to fund, acquire, or use Controlled Equipment pursuant to this chapter only if it determines all of the following:

(a) The Controlled Equipment is needed despite available alternatives.

(b) The proposed Controlled Equipment Use Policy will safeguard the public's welfare, safety, civil rights, and civil liberties.

(c) The use of Controlled Equipment will not be used based on race, national origin, religion, sexual orientation, gender, gender identity, political viewpoint, or disability, or disproportionately impact any community or group.

(2) If the submitted Controlled Equipment Impact Report identifies a risk of potential adverse effects on the public's welfare, safety, civil rights, or civil liberties, the Police Review Commission's recommendation for approval for the funding, acquisition, or use of the Controlled Equipment shall not be deemed an acquiescence to those effects, but instead an acknowledgment of the risk of those effects and the need to avoid them proactively.

(D) Temporary Use in Exigent Circumstances

(1) Notwithstanding the provisions of this Chapter, the Police Department may borrow and/or temporarily use Controlled Equipment in Exigent Circumstances without following the requirements in Section 2.100.040. However, if the Department does so, it must take all of the following actions:

(a) Provide written notice of that acquisition or use to the City Council within 30 days following the commencement of such Exigent Circumstance, unless such information is confidential or privileged;

(b) If it is anticipated that the use will continue beyond the Exigent Circumstance, submit a proposed Controlled Equipment Impact Report and Controlled Equipment Use Policy, as applicable, to the City Council within 90 days following the borrowing, acquisition or temporary use, and receive approval, as applicable, from the City Council pursuant to Section 2.100.040; and

(c) Include the Controlled Equipment in the Department's next annual Controlled Equipment Report.

~~(2) "Exigent Circumstances" means a law enforcement agency's good faith belief that~~

~~an emergency involving the danger of, or imminent threat of death or serious physical injury to any person requires the use of unapproved Controlled Equipment.~~

(E) Police Review Commission Review Required Before City Council Consideration of Approval.

(1) The Police Review Commission shall recommend that the City Council adopt, modify, or reject the proposed Controlled Equipment Use Policy, and notify the Police Department of its recommendations.

(2) The Police Review Commission shall present its recommendations to City Council.

(3) Failure by the Police Review Commission to make its recommendation on a proposal within ninety (90) days of submission shall enable City Staff to proceed to the City Council for approval of the proposal.

(F) Police Review Commission Review of Prior Recommendations

(1) The Police Review Commission shall determine, as part of its annual Work Plan, whether to include the review of any Controlled Equipment use policy in the coming year.

(2) A Police Review Commission recommendation to City Council that a prior approval be revoked shall be presented to Council. If City Council does not act on such a recommendation within four (4) City Council meetings from when the item is first scheduled, the Police Department shall cease its use of the Controlled Equipment.

(G) Review Process for Previously-Acquired Equipment

(1) The Police Department shall have one year from the date of passage of this Ordinance to submit Controlled Equipment Use Policies and Controlled Equipment Impact Statements for approval if the Department wishes to continue the use of Controlled Equipment acquired prior to the passage of this Ordinance. If the Department fails to do so, it must cease use of such equipment.

(2) To ensure that the review of previously-acquired Controlled Equipment is appropriately prioritized, the Police Department shall provide a prioritized ranking of such Controlled Equipment, and the Police Review Commission shall consider this ranking in determining the order in which to perform its review. .

(H) City Council Approval Process

(1) After the Police Review Commission review requirements have been met, the Police Department shall schedule for City Council consideration the proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy, and include Police Review Commission recommendations, at least fifteen (15) days prior to a public meeting.

(2) If the City Council does not approve such item within four (4) regular City Council meetings from when the item is first scheduled, the Police Department shall cease its use of the Controlled Equipment until such review and approval occurs.

## 2.100.050 Reports on the Use of Controlled Equipment.

### (A) Annual Report on Controlled Equipment

(1) The Police Department shall submit a report on Controlled Equipment to the Police Review Commission within one year of approval, and annually thereafter for as long as the Controlled Equipment is available for use, ~~for any Controlled Equipment not included in a Use of Force report~~. The report shall be provided no later than March 15<sup>th</sup> of each year, unless the Police Review Commission advises the Department that an alternate date is preferred. The Department shall also make each annual report publicly available on its website for as long as the Controlled Equipment is available for use. The annual report shall, at a minimum, include the following information for the immediately preceding calendar year:

(a) Production descriptions for Controlled Equipment and inventory numbers of each product in the Police Department's possession.

(b) A summary of how Controlled Equipment was used. For the purposes of annual reports, "use" of equipment shall refer to deployments in which equipment is publicly displayed or visible, or is deployed in an operation or critical response, not to transfers of location or placement of equipment inside Department vehicles.

(c) If applicable, a breakdown of where Controlled Equipment was used geographically by individual police area. For each police area, the Police Department shall report the number of days Controlled Equipment was used and what percentage of those daily reported uses were authorized by warrant and by non-warrant forms of court authorization.

(d) A summary of any complaints or concerns received concerning Controlled Equipment.

(e) The results of any internal audits, any information about violations of Controlled Equipment Use Policies, and any actions taken in response.

### (B) Compliance or Revocation of Approval

(1) Within 60 days of the Police Department submitting an annual report, the Police Review Commission shall place the report as an agenda item for an open session of a regular meeting. The Police Review Commission shall determine, based on the report, whether each piece of Controlled Equipment reported on has complied with the standards for approval set forth in Section 2.100.040.

(2) If the Police Review Commission determines that any Controlled Equipment has not complied with those standards, it shall either recommend revocation of the authorization for that piece of Controlled Equipment or modify the Controlled Equipment Use Policy in a manner that will resolve the lack of compliance. Recommendations for revocations shall be forwarded to City Council in accordance with the approval process in Section 2.100.040.

(3) After review by the Police Review Commission, the Police Department shall submit

the annual report to City Council, indicating its approval or lack of compliance for each piece of Controlled Equipment.

**2.100.060 Enforcement.**

(A) Remedies for Violations of this Ordinance

This Chapter does not provide a private right of action upon any person or entity to seek injunctive relief against the City or any employee unless that person or entity has first provided written notice to the City Manager by serving the City Clerk, regarding the specific alleged violations of this Chapter. If a specific alleged violation is not remedied within 90 days of that written notice, a person or entity may seek injunctive relief in a court of competent jurisdiction. If the alleged violation is substantiated and subsequently cured, a notice shall be posted in a conspicuous manner on the City's website that describes, to the extent permissible by law, the corrective measures taken to address the violation. If it is shown that the violation is the result of arbitrary or capricious action by the City or an employee or agent thereof in his or her official capacity, the prevailing complainant in an action for relief may collect from the City reasonable attorney's fees in an amount not to exceed \$15,000 if they are personally obligated to pay such fees.

**2.100.070 Transparency**

(A) Disclosure Requirements

(1) It shall be unlawful for the City to enter into any Controlled Equipment-related contract or other agreement that conflicts with the provisions of this Ordinance, and any conflicting provisions in such future contracts or agreements, including but not limited to non-disclosure agreements, shall be deemed void and legally unenforceable.

(2) To the extent permitted by law, the City shall publicly disclose all of its Controlled Equipment-related contracts, including any and all related non-disclosure agreements, if any, regardless of any contract terms to the contrary.

**2.100.080 Whistleblower Protections.**

All provisions of Berkeley's Protection of Whistleblowers Workplace Policy, as promulgated by the City Manager on November 2, 2016, and including any updates or replacements thereto, shall apply.

**2.100.090 Severability**

If any section, subsection, sentence, clause, phrase, or word of this Chapter, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of this Chapter. The Council of the City of Berkeley hereby declares that it would have passed this Chapter and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this Chapter or application

thereof would be subsequently declared invalid or unconstitutional.

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 A NEW CHAPTER 2.100 TO THE BERKELEY MUNICIPAL CODE  
REGULATING POLICE ACQUISITION AND USE OF CONTROLLED EQUIPMENT

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

Section 1. The Berkeley Municipal Code Chapter 2.100 is amended to read as follows:

**Chapter 2.100**  
**POLICE EQUIPMENT AND COMMUNITY SAFETY ORDINANCE**

**Sections:**

**2.100.010 Name of Ordinance**

**2.100.020 Definitions**

**2.100.030 Controlled Equipment Use Policy Requirement**

**2.100.040 Acquisition and Use of Controlled Equipment**

**2.100.045 Reports on the Use of Controlled Equipment**

**2.100.056 Enforcement**

**2.100.067 Transparency**

**2.100.078 Whistleblower Protections**

**2.100.089 Severability**

**2.100.010 Name of Ordinance**

(A) This Ordinance shall be known as the Police Equipment and Community Safety Ordinance.

**2.100.020 Definitions**

(A) "Controlled Equipment" ~~means equipment that is military or militaristic in nature and~~ includes, but is not limited to, all of the following:

(1) ~~Special-purpose wheeled vehicles~~ Vehicles that are ~~either~~ built or modified to provide ballistic protection to their occupants, such as mine-resistant ambush protected (MRAP) vehicles or armored personnel carriers.

(a) Police versions of standard passenger vehicles are specifically excluded from this section.

(2) Multi-purpose wheeled vehicles that are: ~~either~~ built to operate both on-road and off-road, such as a high mobility multipurpose wheeled vehicle (HMMWV), commonly referred to as a Humvee, a two and one-half-ton truck, or a five-ton truck; ~~;~~ or ~~vehicles~~ built or modified to use a breaching or entry apparatus as an attachment.

(a) Unarmored all-terrain vehicles (ATVs) and motorized dirt bikes are specifically excluded from this section.

(3) Tracked vehicles that are built or modified to provide ballistic protection to their



occupants and utilize a tracked system instead of wheels for forward motion.

(4) ~~Weapon-bearing aircraft~~Aircraft, vessels, or vehicles of any kind, whether manned or unmanned, with attached or mounted weapons.

(5) Breaching apparatus designed to provide rapid entry into a building or through a secured doorway, including equipment that is mechanical, such as a battering ram, and equipment that is ballistic, such as a slug, or equipment that is explosive in nature. Items designed to remove a lock, such as bolt cutters, small gauge frangible rounds, or a handheld ram, are excluded from this policy.

(6) Firearms of .50 caliber or greater.

(7) Ammunition of .50 caliber or greater.

(8) Specialized firearms, including the Colt M4, and associated ammunition of less than .50 caliber, as defined in Sections 30510 and 30515 of the California Penal Code.

(9) Projectile launch platforms and their associated munitions, such as 40mm projectile launchers, "bean bag," rubber bullet, or specialty impact munition (SIM) weapons, and "riot guns" equipment used to disperse chemical agents.

(10) Any knife designed to be attached to the muzzle of a rifle, shotgun, or long gun for purposes of hand-to-hand combat.

(11) Explosives, pyrotechnics, such as "flashbang" grenades ~~explosive breaching tools~~, and chemical weapons such as "teargas," CS gas, pepper spray, and "pepper balls".

(12) ~~Crowd control equipment, such as riot batons 30 inches or longer in length, riot helmets, and riot shields, but excluding service-issued telescopic or fixed length batons.~~

(13) Active area denial weapons, such as the Taser Shockwave, microwave weapons, water cannons, and the Long Range Acoustic Device (LRAD).

(a) Only LRAD as an area denial tool shall trigger the reporting requirements of this ordinance.

(14) Any other equipment as determined by a majority of the City Council to require additional oversight.

(B) "City" means any department, agency, bureau, and/or subordinate division of the City of Berkeley.

~~(C) "City Staff" means City personnel authorized by the City Administrator or designee to seek City Council approval of the acquisition of Controlled Equipment in conformance with this Ordinance.~~

~~(D)~~(C) "Controlled Equipment Impact Statement" means a publicly released, written document that includes, at a minimum, all of the following:

(1) Description: A description of each type of Controlled Equipment, the quantity sought, its capabilities, expected lifespan, intended uses and effects, and how it works, including product descriptions from the manufacturer of the Controlled Equipment.

(2) Purpose: ~~The specific purpose or purposes that each type of Controlled Equipment is intended to achieve. The purposes and reasons for which the Berkeley Police Department (hereinafter, "Police Department") proposes to use each type of Controlled Equipment.~~

(3) Fiscal Cost: The fiscal cost of each type of Controlled Equipment, including the initial costs of obtaining the equipment, the costs of each proposed use, the costs of potential adverse impacts, and the annual, ongoing costs of the equipment, including operating, training, transportation, storage, maintenance, and upgrade costs.

(4) Impact: An assessment specifically identifying any potential impacts that the use of Controlled Equipment might have on the welfare, safety, civil rights, and civil liberties of the public, ~~and what specific affirmative measures will be implemented to safeguard the public from potential adverse impacts.~~

(5) Mitigations: Specific, affirmative technical and procedural measures that will be implemented to safeguard the public from such impacts.

(6) Alternatives: Alternative method or methods by which the Police Department can accomplish the purposes for which the Controlled Equipment is proposed to be used, ~~the annual costs of alternative method or methods, and rationale for selection over alternative methods. the potential impacts of alternative method or methods on the welfare, safety, civil rights, and civil liberties of the public.~~

~~(7) Location: The location(s) it may be used, using general descriptive terms.~~

~~(8)~~(7) Third Party Dependence: Whether use or maintenance of the Controlled Equipment will require the engagement of third party service providers.

~~(9)~~(8) Track Record: The relevant experiences of other jurisdictions with the proposed controlled equipment, including its effectiveness at achieving its stated purpose and any know adverse impacts on the public of the experience (if any) other entities, especially government entities have had with the proposed Controlled Equipment, including, if available, quantitative information about the effectiveness of the Controlled Equipment in achieving its stated purpose in other jurisdictions, and any known adverse information about the Controlled Equipment (such as unanticipated costs, failures, or civil rights and civil liberties abuses).

(D) "Exigent Circumstances" means a law enforcement agency's good faith belief that an emergency involving the danger of, or imminent threat of death or serious physical injury to any person requires the use of unapproved Controlled Equipment.

### **2.100.030 Controlled Equipment Use Policy Requirement**

Controlled Equipment requires a publicly available use policy that identifies the purpose, any prohibited uses, training requirements, and any process required prior to use. ~~"Controlled Equipment Use Policy" means a publicly released, legally enforceable written document governing the use of Controlled Equipment by the Berkeley Police Department that addresses, at a minimum, all of the following:~~

~~(10) Purpose: The specific purpose or purposes that each type of Controlled Equipment is intended to achieve.~~

~~(11) — Authorized Use: The specific uses of Controlled Equipment that are authorized, and rules and processes required prior to such use.~~

~~(12) — Prohibited uses: A non-exclusive list of uses that are not authorized.~~

~~— Training: The course of training that must be completed before any officer, agent, or employee of the Police Department is allowed to use each specific type of Controlled Equipment or a reference to applicable BPD training policy.~~

~~(3) Auditing and Oversight: The mechanisms to ensure compliance with the Controlled Equipment Use Policy, including which independent persons or entities have oversight authority, and what legally enforceable sanctions are put in place for violations of the policy. City Attorney likely to reject codified sanctions.~~

~~(3) Transparency: The procedures by which members of the public may register complaints or concerns or submit questions about the use of each specific type of Controlled Equipment, and how the Police Department will ensure that each complaint, concern, or question receives a response in a timely manner.~~

~~"Police Area" refers to each of the geographic districts assigned to a police commander and as such districts are amended from time to time.~~

~~"Exigent Circumstances" means a law enforcement agency's good faith belief that an emergency involving the danger of, or imminent threat of death or serious physical injury to any person requires the use of unapproved Controlled Equipment.~~

## **2.100.0430 Acquisition and Use of Controlled Equipment.**

(A) Restrictions Prior to Submission and Approval

(1) The ~~Berkeley~~ Police Department shall not engage in any of the following activities regarding a piece of Controlled Equipment before submit to the Berkeley Police Review Commission (hereinafter "Police Review Commission"), or any successive agency, reviews and recommends, and the City Council approves, a Controlled Equipment Impact Report and a Controlled Equipment Use Policy for that equipment in compliance with this section, prior to engaging in any of the following:

(a) Requesting the transfer of Controlled Equipment pursuant to Section 2576a of Title 10 of the United States Code.

(b) Seeking funds for Controlled Equipment, including, but not limited to, applying for a grant, soliciting or accepting private, local, state, or federal funds, in-kind donations, or other donations or transfers.

(c) Acquiring Controlled Equipment either permanently or temporarily, including by borrowing or leasing.

~~(d) Collaborating with another law enforcement agency, such as commanding, controlling, or otherwise directing that agency or its personnel, in the deployment or other use of Controlled Equipment within Berkeley.~~

~~(e)~~(d) Using any new ~~or existing~~ Controlled Equipment for a purpose, in a manner, or by a person not previously approved by the ~~governing body~~City Council pursuant to this Ordinance.

~~(f)(e)~~ Soliciting or responding to a proposal for, or entering into an agreement with, any other person or entity to seek funds for, apply to receive, acquire, use, or collaborate in the use of, Controlled Equipment.

~~(1) The funding, acquisition, or use of Controlled Equipment by the Police Department shall not be permitted without the review and recommendation, by the Police Review Commission, and approval, by City Council, of a Controlled Equipment Impact Report and a Controlled Equipment Use Policy submitted pursuant to this Ordinance.~~

~~(f) Notwithstanding the above, The Chair of the Police Review Commission, in consultation with the Vice Chair, may provide limited approval, in writing, for the Department to solicit funding for Controlled Equipment prior to the submission of before submitting a Controlled Equipment Impact Report and a Controlled Equipment Use Policy.~~

~~(f) If funding is received, the Controlled Equipment funded under the exception provided by this subsection shall not be used unless a Controlled Equipment Impact Report and Controlled Equipment Use Policy is subsequently submitted to the Police Review Commission for review and subsequently approved by City Council, pursuant to the general requirements of as required by this section~~

~~(1) The Police Department shall not cooperate with law enforcement agencies or mutual aid partners that deploy Controlled Equipment that would be subject to this ordinance unless said cooperation and deployment of Controlled Equipment by such agency or mutual aid partner is consistent with the restrictions, use policies, and reporting requirements established by this ordinance.~~

#### (B) Submission to Police Review Commission

~~(1) When seeking the review and recommendation of the Police Review Commission, the Police Department shall submit to the Police Review Commission a proposed Controlled Equipment Impact Report and a Controlled Equipment Use Policy.~~

~~(2)(1) At least 15 days prior to any public hearing meeting to consider the adoption of any Controlled Equipment Use Policy or Controlled Equipment Impact Report, the Use Policy and Impact report shall be published concerning the Controlled Equipment at issue, the Department shall publish the proposed Controlled Equipment Impact Report and Controlled Equipment Use Policy for public review. Publishing to the Department's website shall satisfy the requirements of this subsection.~~

~~(3)(2) In order to facilitate public participation, any proposed or The final Controlled Equipment Impact Report and Controlled Equipment Use Policy shall be made publicly available on the Department's website for as long as the Controlled Equipment is proposed or available for use.~~

~~(4)(3) The Police Review Commission shall consider Controlled Equipment Impact Reports and Controlled Equipment Use Policies as an agenda item for review at an open session of a regularly noticed meeting.~~

#### (C) Criteria for Police Review Commission Recommendations

(1) The Police Review Commission shall **only** recommend approval of a request to fund,

acquire, or use Controlled Equipment pursuant to this chapter only if it determines all of the following:

- (a) The Controlled Equipment is needed despite available alternatives.
- (b) The proposed Controlled Equipment Use Policy will safeguard the public's welfare, safety, civil rights, and civil liberties.
- (c) The use of Controlled Equipment will not be used based on race, national origin, religion, sexual orientation, gender, gender identity, political viewpoint, or disability, or disproportionately impact any community or group.

~~(-) The use of Controlled Equipment is the most cost-effective option among all available alternatives.~~

~~(3)(2)~~ If the submitted Controlled Equipment Impact Report identifies a risk of potential adverse effects on the public's welfare, safety, civil rights, or civil liberties, the Police Review Commission's a recommendation for approval for the funding, acquisition, or use of the Controlled Equipment ~~by the Police Review Commission pursuant to this Ordinance~~ shall not be deemed an acquiescence to those effects, but instead an acknowledgment of the risk of those effects and the need to avoid them proactively.

#### (D) Temporary Use in Exigent Circumstances

~~(1) Notwithstanding the provisions of this Chapter, the Police Department may borrow and/or temporarily use Controlled Equipment in Exigent Circumstances without following the requirements in Section 2.100.040. However, if the Department does so, it must take all of the following actions:~~

- ~~(a) Provide written notice of that acquisition or use to the City Council within 30 days following the commencement of such Exigent Circumstance, unless such information is confidential or privileged;~~
- ~~(b) If it is anticipated that the use will continue beyond the Exigent Circumstance, submit a proposed Controlled Equipment Impact Report and Controlled Equipment Use Policy, as applicable, to the City Council within 90 days following the borrowing, acquisition or temporary use, and receive approval, as applicable, from the City Council pursuant to Section 2.100.040; and~~

~~(-) Include the Controlled Equipment in the Department's next annual Controlled Equipment Report.~~

#### (E) Police Review Commission Review Required Before City Council Consideration of Approval.

(1) The Police Review Commission shall recommend that the City Council adopt, modify, or reject the proposed Controlled Equipment Use Policy, and notify the Police Department of its recommendations.

~~(2) If the Police Review Commission proposes that the Controlled Equipment Use Policy be modified or rejected, the Police Review Commission shall propose such modifications to City Staff. City Staff The Police Department Review Commission shall present such modifications or notice of rejection the Police Review Commission's~~

recommendations to City Council ~~when seeking City Council approval pursuant to this Ordinance.~~

~~(b)(3)~~ Failure by the Police Review Commission to make its recommendation on a proposal within ninety (90) days of submission shall enable City Staff to proceed to the City Council for approval of the proposal.

(F) Police Review Commission Review of Prior Recommendations

(1) The Police Review Commission shall determine, as part of its annual Work Plan, whether to include the review of any Controlled Equipment use policy in the coming year. ~~review any recommendation that it has adopted pursuant to this Ordinance approving the funding, acquisition, or use of Controlled Equipment at least annually and vote on whether to recommend renewal of the approval.~~

(2) A Police Review Commission recommendation to City Council that a prior approval be revoked shall be presented to Council ~~for immediate consideration.~~ If City Council has does not ~~reviewed and taken action on a Police Review Commission~~ such a recommendation ~~that a prior approval be revoked~~ within four (4) City Council meetings from when the item is was initially first scheduled ~~for City Council consideration~~, the City Police Department shall cease its use of the Controlled Equipment.

(G) Review Process for Previously-Acquired Equipment

(1) The Police Department shall have one year from the date of passage of this Ordinance to submit Controlled Equipment Use Policies and Controlled Equipment Impact Statements for approval ~~pursuant to this Ordinance~~ if the Department wishes to continue the use of Controlled Equipment acquired prior to the passage of this Ordinance. If the Department fails to do so, it must cease use of such equipment. ~~The Department shall cease the use of Controlled Equipment acquired prior to the date of passage of this ordinance if, after one year, no approval, pursuant to the requirements of this Ordinance, has been granted.~~

(2) ~~In order t~~Io ensure that the review of previously-acquired Controlled Equipment is appropriately prioritized, the Police Department shall provide a prioritized ranking of such Controlled Equipment ~~possessed and/or used by the City~~, and the Police Review Commission shall consider this ranking in determining the order in which to perform its review. ~~previously acquired Controlled Equipment that is prioritized for review.~~

(H) City Council Approval Process

(1) After the Police Review Commission ~~Notification and R~~eview requirements have been met, ~~City Staff~~ the Police Department ~~seeking City Council approval~~ shall schedule for City Council consideration the proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy, and include Police Review Commission recommendations, at least fifteen (15) days prior to a public meeting.

~~(1) The City Council shall only approve a proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy only after first considering the recommendation of the Police Review Commission, and then subsequently making a~~

~~determination that the City's interest in community safety outweighs the potential adverse effects of using Controlled Equipment.~~

~~(3)(2) For approval of existing Controlled Equipment for which the Police Review Commission has failed to make a recommendation within the required ninety (90) days as provided by this Section, if the City Council has does not reviewed and approved such item within four (4) regular City Council meetings from when the item was is first initially scheduled for City Council consideration, the City Police Department shall cease its use of the Controlled Equipment until such review and approval occurs.~~

## **2.100.0450 Reports on the Use of Controlled Equipment.**

### **(A) Annual Report on Controlled Equipment**

(1) The ~~Berkeley~~ Police Department shall submit ~~to the Police Review Commission an annual~~ report on Controlled Equipment to the Police Review Commission within one year of approval, and annually thereafter for as long as the Controlled Equipment is available for use. The ~~annual~~ report shall be provided no later than March 15<sup>th</sup> of each year, unless the Police Review Commission advises the ~~Police~~ Department that an alternate date is preferred. The ~~Police~~ Department shall also make each annual report ~~required by this section~~ publicly available on its website for as long as the Controlled Equipment is available for use. The annual report shall, at a minimum, include the following information for the immediately preceding calendar year:

(a) Production descriptions for Controlled Equipment and inventory numbers of each product in the Police Department's possession.

(b) A summary of how Controlled Equipment was used. For the purposes of annual reports, "use" of equipment shall refer to deployments in which equipment is publicly displayed or visible, or is deployed in an operation or critical response, not to transfers of location or placement of equipment inside Department vehicles.

(c) If applicable, a breakdown of where Controlled Equipment was used geographically by individual police area. For each police area, the Police Department shall report the number of days Controlled Equipment was used and what percentage of those daily reported uses were authorized by warrant and by non-warrant forms of court authorization.

(d) A summary of any complaints or concerns received concerning Controlled Equipment.

(e) The results of any internal audits, any information about violations of Controlled Equipment Use Policies, and any actions taken in response.

~~(e) The total annual cost for each type of Controlled Equipment, including acquisition, personnel, training, transportation, maintenance, storage, upgrade, and other ongoing costs, and from what source funds will be provided for Controlled Equipment in the calendar year following submission of the annual report.~~

~~(1) Within 60 days of the Police Department submitting and publicly releasing an annual report pursuant to this section, the Police Review Commission shall place the report as~~

~~an agenda item for an open session of a regular meeting. After review and approval by the Police Review Commission, City Staff shall submit the annual report to City Council.~~

(B) Compliance & or Revocation of Approval

~~(1) Within 60 days of the Police Department submitting an annual report, the Police Review Commission shall place the report as an agenda item for an open session of a regular meeting. The Police Review Commission shall determine, based on the annual report, whether each type-piece of Controlled Equipment identified in that reported on has complied with the standards for approval set forth in Section 32.100.040.~~

~~(2) If the Police Review Commission determines that any Controlled Equipment identified in the annual report has not complied with those standards for approval set forth in Section 3, the Police Review Commission it shall either recommend revocation of the authorization for that piece of Controlled Equipment or modify the Controlled Equipment Use Policy in a manner that will resolve the lack of compliance. Recommendations for revocations pursuant to this section shall be forwarded to City Council in accordance with the approval process in Section 32.100.040.~~

~~(3) After review by the Police Review Commission, the Police Department shall submit the annual report to City Council, indicating its approval or lack of compliance for each piece of Controlled Equipment.~~

**2.100.0650 Enforcement.**

(A) Remedies for Violations of this Ordinance

~~This Chapter does not provide a private right of action upon any person or entity to seek injunctive relief against the City or any employee unless that person or entity has first provided written notice to the City Manager by serving the City Clerk, regarding the specific alleged violations of this Chapter. If a specific alleged violation is not remedied within 90 days of that written notice, a person or entity may seek injunctive relief in a court of competent jurisdiction. If the alleged violation is substantiated and subsequently cured, a notice shall be posted in a conspicuous manner on the City's website that describes, to the extent permissible by law, the corrective measures taken to address the violation. If it is shown that the violation is the result of arbitrary or capricious action by the City or an employee or agent thereof in his or her official capacity, the prevailing complainant in an action for relief may collect from the City reasonable attorney's fees in an amount not to exceed \$15,000 if they are personally obligated to pay such fees.~~

~~Any violation of this Ordinance, or of a Controlled Equipment Use Policy promulgated under this Ordinance, constitutes an injury and any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in the Superior Court of the State of California to enforce this Ordinance. An action instituted under this paragraph shall be brought against the respective city department, and the City of Berkeley, and, if necessary to effectuate compliance with this Ordinance or a Controlled Equipment acquisition or use policy, any other governmental agency with possession, custody, or control of Controlled Equipment subject to this Ordinance, to the extent permitted by law.~~

~~(0) Any person who has been subjected to the use of Controlled Equipment in violation-~~



~~of this Ordinance may institute proceedings in the Superior Court of the State of California against the City of Berkeley and shall be entitled to recover actual damages (but not less than liquidated damages of one thousand dollars (\$1,000.00) or one hundred dollars (\$100.00) per day for each day of violation, whichever is greater).~~

~~(0) A court shall award costs and reasonable attorneys' fees to the plaintiff who is the prevailing party in an action brought under subpart (1) or (2) above.~~

~~Violations of this Ordinance by a city employee may result in consequences that may include retraining, suspension, or termination, subject to due process requirement.~~

## **2.100.0670 Transparency**

### **(A) Disclosure Requirements**

(1) It shall be unlawful for the City to enter into any Controlled Equipment-related contract or other agreement that conflicts with the provisions of this Ordinance, and any conflicting provisions in such future contracts or agreements, including but not limited to non-disclosure agreements, shall be deemed void and legally unenforceable.

(2) To the extent permitted by law, the City shall publicly disclose all of its Controlled Equipment-related contracts, including any and all related non-disclosure agreements, if any, regardless of any contract terms to the contrary.

## **2.100.0870 Whistleblower Protections.**

### ~~(A) Protections Against Retaliation~~

~~(1) Neither the City nor anyone acting on behalf of the City may take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment, including but not limited to discriminating with respect to compensation, terms and conditions of employment, access to information, restrictions on due process rights, or civil or criminal liability, because:~~

~~(a) The employee or applicant was perceived to, about to, or assisted in any lawful disclosure of information concerning the funding, acquisition, or use of Controlled Equipment based upon a good faith belief that the disclosure evidenced a violation of this Ordinance; or~~

~~(b) The employee or applicant was perceived to, about to, or assisted or participated in any proceeding or action to carry out the purposes of this Ordinance.~~

~~(c) It shall be grounds for disciplinary action for a city employee or anyone else acting on behalf of the city to retaliate against another city employee or applicant who makes a good faith complaint that there has been a failure to comply with any Controlled Equipment Use Policy or administrative instruction promulgated under this Ordinance.~~

~~(a) Any employee or applicant who is injured by a violation of this Section may institute a proceeding for monetary damages and injunctive relief against the city in any court of competent jurisdiction.~~

All provisions of Berkeley's Protection of Whistleblowers Workplace Policy, as promulgated by the City Manager on November 2, 2016, and including any updates or replacements thereto, shall apply.

**2.100.0980-Severability**

If any section, subsection, sentence, clause, phrase, or word of this Chapter, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of this Chapter. The Council of the City of Berkeley hereby declares that it would have passed this Chapter and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this Chapter or application thereof would be subsequently declared invalid or unconstitutional.

Section 23. 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.

Section 2.100.010

ORDINANCE NO. -N.S.

ADDING A NEW CHAPTER 2.100 TO THE BERKELEY MUNICIPAL CODE  
REGULATING POLICE ACQUISITION AND USE OF CONTROLLED EQUIPMENT

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

Section 1. The Berkeley Municipal Code Chapter 2.100 is amended to read as follows:

**Chapter 2.100**  
**POLICE EQUIPMENT AND COMMUNITY SAFETY ORDINANCE**

**Sections:**

- 2.100.010 Name of Ordinance**
- 2.100.020 Definitions**
- 2.100.030 Controlled Equipment Use Policy Requirement**
- 2.100.040 Acquisition and Use of Controlled Equipment**
- 2.100.050 Reports on the Use of Controlled Equipment**
- 2.100.060 Enforcement**
- 2.100.070 Transparency**
- 2.100.080 Whistleblower Protections**
- 2.100.090 Severability**

**2.100.010 Name of Ordinance**

(A) This Ordinance shall be known as the Police Equipment and Community Safety Ordinance.

**2.100.020 Definitions**

(A) "Controlled Equipment" includes, but is not limited to, all of the following:

- (1) Vehicles that are built or modified to provide ballistic protection to their occupants, such as mine-resistant ambush protected (MRAP) vehicles or armored personnel carriers.
  - (a) Police versions of standard passenger vehicles are specifically excluded from this section.
- (2) Multi-purpose wheeled vehicles that are: built to operate both on-road and off- road, such as a high mobility multipurpose wheeled vehicle (HMMWV), commonly referred to as a Humvee, a two and one-half-ton truck, or a five-ton truck; or built or modified to use a breaching or entry apparatus as an attachment.
  - (a) Unarmored all-terrain vehicles (ATVs) and motorized dirt bikes are specifically excluded from this section.
- (3) Tracked vehicles that are built or modified to provide ballistic protection to their

*Section 2.100.020*

occupants and utilize a tracked system instead of wheels for forward motion.

- (4) Aircraft, vessels, or vehicles of any kind, whether manned or unmanned, with attached or mounted weapons.
- (5) Breaching apparatus designed to provide rapid entry into a building or through a secured doorway, including equipment that is mechanical, such as a battering ram, and equipment that is ballistic, such as a slug, or equipment that is explosive in nature. Items designed to remove a lock, such as bolt cutters, small gauge frangible rounds, or a handheld ram, are excluded from this policy.
- (6) Firearms of .50 caliber or greater.
- (7) Ammunition of .50 caliber or greater.
- (8) Specialized firearms, including the Colt M4, and associated ammunition of less than .50 caliber, as defined in Sections 30510 and 30515 of the California Penal Code.
- (9) Projectile launch platforms and their associated munitions, such as 40mm projectile launchers, "bean bag," rubber bullet, or specialty impact munition (SIM) weapons, and equipment used to disperse chemical agents.
- (10) Any knife designed to be attached to the muzzle of a rifle, shotgun, or long gun for purposes of hand-to-hand combat.
- (11) Explosives, pyrotechnics, such as "flashbang" grenades, and chemical weapons such as "teargas," CS gas, pepper spray, and "pepper balls".
- (12) Batons 30 inches or longer in length.
- (13) Active area denial weapons, such as the Taser Shockwave, microwave weapons, and water cannons.
- (14) Any other equipment as determined by a majority of the City Council to require additional oversight.

(B) "City" means any department, agency, bureau, and/or subordinate division of the City of Berkeley.

(C) "Controlled Equipment Impact Statement" means a publicly released, written document that includes, at a minimum, all of the following:

- (1) Description: A description of each type of Controlled Equipment, the quantity sought, its capabilities, expected lifespan, intended uses and effects, and how it works, including product descriptions from the manufacturer of the Controlled Equipment.
- (2) Purpose: The specific purpose or purposes that each type of Controlled Equipment is intended to achieve-
- (3) Fiscal Cost: The fiscal cost of each type of Controlled Equipment, including the initial costs of obtaining the equipment, the costs of each proposed use, the costs of potential adverse impacts, and the annual, ongoing costs of the equipment, including operating, training, transportation, storage, maintenance, and upgrade costs.
- (4) Impact: An assessment specifically identifying any potential impacts that the use of

*Section 2.100.020*

Controlled Equipment might have on the welfare, safety, civil rights, and civil liberties of the public.

(5) Mitigations: Specific, affirmative technical and procedural measures that will be implemented to safeguard the public from such impacts.

(6) Alternatives: Alternative method or methods by which the Police Department can accomplish the purposes for which the Controlled Equipment is proposed to be used, and rationale for selection over alternative methods.

(7) Third Party Dependence: Whether use or maintenance of the Controlled Equipment will require the engagement of third party service providers.

### **2.100.030 Controlled Equipment Use Policy Requirement**

Controlled Equipment requires a publicly available use policy that identifies the purpose, any prohibited uses, training requirements, and any process required prior to use.

### **2.100.040 Acquisition and Use of Controlled Equipment.**

#### **(A) Restrictions Prior to Submission and Approval**

(1) The Police Department shall not engage in any of the following activities regarding a piece of Controlled Equipment before the Berkeley Police Review Commission ("Police Review Commission"), reviews and recommends, and the City Council approves, a Controlled Equipment Impact Report and a Controlled Equipment Use Policy for that equipment in compliance with this section.

(a) Requesting the transfer of Controlled Equipment pursuant to Section 2576a of Title 10 of the United States Code.

(b) Seeking funds for Controlled Equipment, including, but not limited to, applying for a grant, soliciting or accepting private, local, state, or federal funds, in-kind donations, or other donations or transfers.

(c) Acquiring Controlled Equipment either permanently or temporarily, including by borrowing or leasing.

(d) Using any new Controlled Equipment for a purpose, in a manner, or by a person not previously approved by the City Council pursuant to this Ordinance.

(e) Soliciting or responding to a proposal for, or entering into an agreement with, any other person or entity to seek funds for, apply to receive, acquire, use, or collaborate in the use of, Controlled Equipment.

#### **(B) Submission to Police Review Commission**

(1) At least 15 days prior to any public meeting to consider the adoption of any Controlled Equipment Use Policy or Controlled Equipment Impact Report, the Use Policy and Impact report shall be published for public review.

(2) The final Controlled Equipment Impact Report and Controlled Equipment Use Policy shall be made publicly available on the Department's website for as long as the

*Section 2.100.040*

Controlled Equipment is available for use.

(3) The Police Review Commission shall consider Controlled Equipment Impact Reports and Controlled Equipment Use Policies as an agenda item for review at an open session of a meeting.

(C) Criteria for Police Review Commission Recommendations

(1) The Police Review Commission shall recommend approval of a request to fund, acquire, or use Controlled Equipment pursuant to this chapter only if it determines all of the following:

(a) The Controlled Equipment is needed despite available alternatives.

(b) The proposed Controlled Equipment Use Policy will safeguard the public's welfare, safety, civil rights, and civil liberties.

(c) The use of Controlled Equipment will not be used based on race, national origin, religion, sexual orientation, gender, gender identity, political viewpoint, or disability, or disproportionately impact any community or group.

(2) If the submitted Controlled Equipment Impact Report identifies a risk of potential adverse effects on the public's welfare, safety, civil rights, or civil liberties, the Police Review Commission's recommendation for approval for the funding, acquisition, or use of the Controlled Equipment shall not be deemed an acquiescence to those effects, but instead an acknowledgment of the risk of those effects and the need to avoid them proactively.

(D) Temporary Use in Exigent Circumstances

(1) Notwithstanding the provisions of this Chapter, the Police Department may borrow and/or temporarily use Controlled Equipment in Exigent Circumstances without following the requirements in Section 2.100.040. However, if the Department does so, it must take all of the following actions:

(a) Provide written notice of that acquisition or use to the City Council within 30 days following the commencement of such Exigent Circumstance, unless such information is confidential or privileged;

(b) If it is anticipated that the use will continue beyond the Exigent Circumstance, submit a proposed Controlled Equipment Impact Report and Controlled Equipment Use Policy, as applicable, to the City Council within 90 days following the borrowing, acquisition or temporary use, and receive approval, as applicable, from the City Council pursuant to Section 2.100.040; and

(c) Include the Controlled Equipment in the Department's next annual Controlled Equipment Report.

(2) "Exigent Circumstances" means a law enforcement agency's good faith belief that an emergency involving the danger of, or imminent threat of death or serious physical injury to any person requires the use of unapproved Controlled Equipment.

*Section 2.100.040*

(E) Police Review Commission Review Required Before City Council Consideration of Approval.

- (1) The Police Review Commission shall recommend that the City Council adopt, modify, or reject the proposed Controlled Equipment Use Policy, and notify the Police Department of its recommendations.
- (2) The Police Review Commission shall present its recommendations to City Council.
- (3) Failure by the Police Review Commission to make its recommendation on a proposal within ninety (90) days of submission shall enable City Staff to proceed to the City Council for approval of the proposal.

(F) Police Review Commission Review of Prior Recommendations

- (1) The Police Review Commission shall determine, as part of its annual Work Plan, whether to include the review of any Controlled Equipment use policy in the coming year.
- (2) A Police Review Commission recommendation to City Council that a prior approval be revoked shall be presented to Council. If City Council does not act on such a recommendation within four (4) City Council meetings from when the item is first scheduled, the Police Department shall cease its use of the Controlled Equipment.

(G) Review Process for Previously-Acquired Equipment

- (1) The Police Department shall have one year from the date of passage of this Ordinance to submit Controlled Equipment Use Policies and Controlled Equipment Impact Statements for approval if the Department wishes to continue the use of Controlled Equipment acquired prior to the passage of this Ordinance. If the Department fails to do so, it must cease use of such equipment.
- (2) To ensure that the review of previously-acquired Controlled Equipment is appropriately prioritized, the Police Department shall provide a prioritized ranking of such Controlled Equipment, and the Police Review Commission shall consider this ranking in determining the order in which to perform its review. .

(H) City Council Approval Process

- (1) After the Police Review Commission review requirements have been met, the Police Department shall schedule for City Council consideration the proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy, and include Police Review Commission recommendations, at least fifteen (15) days prior to a public meeting.
- (2) If the City Council does not approve such item within four (4) regular City Council meetings from when the item is first scheduled, the Police Department shall cease its use of the Controlled Equipment until such review and approval occurs.

Section 2.100.050

**2.100.050 Reports on the Use of Controlled Equipment.**

(A) Annual Report on Controlled Equipment

(1) The Police Department shall submit a report on Controlled Equipment to the Police Review Commission within one year of approval, and annually thereafter for as long as the Controlled Equipment is available for use, for any Controlled Equipment not included in a Use of Force report. The report shall be provided no later than March 15<sup>th</sup> of each year, unless the Police Review Commission advises the Department that an alternate date is preferred. The Department shall also make each annual report publicly available on its website for as long as the Controlled Equipment is available for use. The annual report shall, at a minimum, include the following information for the immediately preceding calendar year:

(a) Production descriptions for Controlled Equipment and inventory numbers of each product in the Police Department's possession.

(b) A summary of how Controlled Equipment was used. For the purposes of annual reports, "use" of equipment shall refer to deployments in which equipment is publicly displayed or visible, or is deployed in an operation or critical response, not to transfers of location or placement of equipment inside Department vehicles.

(c) If applicable, a breakdown of where Controlled Equipment was used geographically by individual police area. For each police area, the Police Department shall report the number of days Controlled Equipment was used and what percentage of those daily reported uses were authorized by warrant and by non-warrant forms of court authorization.

(d) A summary of any complaints or concerns received concerning Controlled Equipment.

(e) The results of any internal audits, any information about violations of Controlled Equipment Use Policies, and any actions taken in response.

(B) Compliance or Revocation of Approval

(1) Within 60 days of the Police Department submitting an annual report, the Police Review Commission shall place the report as an agenda item for an open session of a regular meeting. The Police Review Commission shall determine, based on the report, whether each piece of Controlled Equipment reported on has complied with the standards for approval set forth in Section 2.100.040.

(2) If the Police Review Commission determines that any Controlled Equipment has not complied with those standards, it shall either recommend revocation of the authorization for that piece of Controlled Equipment or modify the Controlled Equipment Use Policy in a manner that will resolve the lack of compliance. Recommendations for revocations shall be forwarded to City Council in accordance with the approval process in Section 2.100.040.

(3) After review by the Police Review Commission, the Police Department shall submit



*Section 2.100.050*

the annual report to City Council, indicating its approval or lack of compliance for each piece of Controlled Equipment.

**2.100.060 Enforcement.****(A) Remedies for Violations of this Ordinance**

This Chapter does not provide a private right of action upon any person or entity to seek injunctive relief against the City or any employee unless that person or entity has first provided written notice to the City Manager by serving the City Clerk, regarding the specific alleged violations of this Chapter. If a specific alleged violation is not remedied within 90 days of that written notice, a person or entity may seek injunctive relief in a court of competent jurisdiction. If the alleged violation is substantiated and subsequently cured, a notice shall be posted in a conspicuous manner on the City's website that describes, to the extent permissible by law, the corrective measures taken to address the violation. If it is shown that the violation is the result of arbitrary or capricious action by the City or an employee or agent thereof in his or her official capacity, the prevailing complainant in an action for relief may collect from the City reasonable attorney's fees in an amount not to exceed \$15,000 if they are personally obligated to pay such fees.

**2.100.070 Transparency****(A) Disclosure Requirements**

(1) It shall be unlawful for the City to enter into any Controlled Equipment-related contract or other agreement that conflicts with the provisions of this Ordinance, and any conflicting provisions in such future contracts or agreements, including but not limited to non-disclosure agreements, shall be deemed void and legally unenforceable.

(2) To the extent permitted by law, the City shall publicly disclose all of its Controlled Equipment-related contracts, including any and all related non-disclosure agreements, if any, regardless of any contract terms to the contrary.

**2.100.080 Whistleblower Protections.**

All provisions of Berkeley's Protection of Whistleblowers Workplace Policy, as promulgated by the City Manager on November 2, 2016, and including any updates or replacements thereto, shall apply.

**2.100.090-Severability**

If any section, subsection, sentence, clause, phrase, or word of this Chapter, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of this Chapter. The Council of the City of Berkeley hereby declares that it would have passed this Chapter and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or

*Section 2.100.090*

unconstitutional without regard to whether any other portion of this Chapter or application thereof would be subsequently declared invalid or unconstitutional.

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.

Section 2.100.010

ORDINANCE NO. -N.S.

ADDING A NEW CHAPTER 2.100 TO THE BERKELEY MUNICIPAL CODE  
REGULATING POLICE ACQUISITION AND USE OF CONTROLLED EQUIPMENT

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

Section 1. The Berkeley Municipal Code Chapter 2.100 is amended to read as follows:

**Chapter 2.100**  
**POLICE EQUIPMENT AND COMMUNITY SAFETY ORDINANCE**

**Sections:**

**2.100.010 Name of Ordinance**

**2.100.020 Definitions**

**2.100.030 Controlled Equipment Use Policy Requirement**

**2.100.040 Acquisition and Use of Controlled Equipment**

**2.100.0450 Reports on the Use of Controlled Equipment**

**2.100.0560 Enforcement**

**2.100.0670 Transparency**

**2.100.0780 Whistleblower Protections**

**2.100.0890 Severability**

**2.100.010 Name of Ordinance**

(A) This Ordinance shall be known as the Police Equipment and Community Safety Ordinance.

**2.100.020 Definitions**

(A) "Controlled Equipment" ~~means equipment that is military or militaristic in nature and~~ includes, but is not limited to, all of the following:

(1) ~~Special purpose wheeled vehicles~~ Vehicles that are ~~either~~ built or modified to provide ballistic protection to their occupants, such as mine-resistant ambush protected (MRAP) vehicles or armored personnel carriers.

(a) Police versions of standard passenger vehicles are specifically excluded from this section.

(2) Multi-purpose wheeled vehicles that are: ~~either~~ built to operate both on-road and off-road, such as a high mobility multipurpose wheeled vehicle (HMMWV), commonly referred to as a Humvee, a two and one-half-ton truck, or a five-ton truck; ~~;~~ or ~~vehicles~~ built or modified to use a breaching or entry apparatus as an attachment.

(a) Unarmored all-terrain vehicles (ATVs) and motorized dirt bikes are specifically excluded from this section.

## Section 2.100.020

- (3) Tracked vehicles that are built or modified to provide ballistic protection to their occupants and utilize a tracked system instead of wheels for forward motion.
- (4) ~~Weapon-bearing aircraft~~ Aircraft, vessels, or vehicles of any kind, whether manned or unmanned, with attached or mounted weapons.
- (5) Breaching apparatus designed to provide rapid entry into a building or through a secured doorway, including equipment that is mechanical, such as a battering ram, and equipment that is ballistic, such as a slug, or equipment that is explosive in nature. Items designed to remove a lock, such as bolt cutters, small gauge frangible rounds, or a handheld ram, are excluded from this policy.
- (6) Firearms of .50 caliber or greater.
- (7) Ammunition of .50 caliber or greater.
- (8) Specialized firearms, including the Colt M4, and associated ammunition of less than .50 caliber, as defined in Sections 30510 and 30515 of the California Penal Code.
- (9) Projectile launch platforms and their associated munitions, such as 40mm projectile launchers, "bean bag," rubber bullet, or specialty impact munition (SIM) weapons, and "riot guns" equipment used to disperse chemical agents.
- (10) Any knife designed to be attached to the muzzle of a rifle, shotgun, or long gun for purposes of hand-to-hand combat.
- (11) Explosives, pyrotechnics, such as "flashbang" grenades ~~explosive breaching tools~~, and chemical weapons such as "teargas," CS gas, pepper spray, and "pepper balls".
- (12) ~~Crowd-control equipment, such as riot batons~~ 30 inches or longer in length, ~~riot helmets, and riot shields, but excluding service-issued telescopic or fixed length batons.~~
- (13) Active area denial weapons, such as the Taser Shockwave, microwave weapons, and water cannons, ~~and the Long Range Acoustic Device (LRAD).~~  
(a) Only LRAD as an area denial tool shall trigger the reporting requirements of this ordinance.
- (14) Any other equipment as determined by a majority of the City Council to require additional oversight.
- (B) "City" means any department, agency, bureau, and/or subordinate division of the City of Berkeley.
- ~~(C) "City Staff" means City personnel authorized by the City Administrator or designee to seek City Council approval of the acquisition of Controlled Equipment in conformance with this Ordinance.~~
- ~~(D)~~ (C) "Controlled Equipment Impact Statement" means a publicly released, written document that includes, at a minimum, all of the following:
- (1) Description: A description of each type of Controlled Equipment, the quantity sought,

*Section 2.100.020*

its capabilities, expected lifespan, intended uses and effects, and how it works, including product descriptions from the manufacturer of the Controlled Equipment.

(2) Purpose: The specific purpose or purposes that each type of Controlled Equipment is intended to achieve. ~~The purposes and reasons for which the Berkeley Police Department (hereinafter, "Police Department") proposes to use each type of Controlled Equipment.~~

(3) Fiscal Cost: The fiscal cost of each type of Controlled Equipment, including the initial costs of obtaining the equipment, the costs of each proposed use, the costs of potential adverse impacts, and the annual, ongoing costs of the equipment, including operating, training, transportation, storage, maintenance, and upgrade costs.

(4) Impact: An assessment specifically identifying any potential impacts that the use of Controlled Equipment might have on the welfare, safety, civil rights, and civil liberties of the public, ~~and what specific affirmative measures will be implemented to safeguard the public from potential adverse impacts.~~

(5) Mitigations: Specific, affirmative technical and procedural measures that will be implemented to safeguard the public from such impacts.

(6) Alternatives: Alternative method or methods by which the Police Department can accomplish the purposes for which the Controlled Equipment is proposed to be used, ~~the annual costs of alternative method or methods,~~ and rationale for selection over alternative methods. ~~the potential impacts of alternative method or methods on the welfare, safety, civil rights, and civil liberties of the public.~~

~~(7) Location: The location(s) it may be used, using general descriptive terms.~~

~~(8)~~(7) Third Party Dependence: Whether use or maintenance of the Controlled Equipment will require the engagement of third party service providers.

~~(9)~~(8) Track Record: The relevant experiences of other jurisdictions with the proposed controlled equipment, including its effectiveness at achieving its stated purpose and any know adverse impacts on the public of the experience (if any) other entities, especially government entities have had with the proposed Controlled Equipment, including, if available, quantitative information about the effectiveness of the Controlled Equipment in achieving its stated purpose in other jurisdictions, and any known adverse information about the Controlled Equipment (such as unanticipated costs, failures, or civil rights and civil liberties abuses).

### 2.100.030 Controlled Equipment Use Policy Requirement

Controlled Equipment requires a publicly available use policy that identifies the purpose, any prohibited uses, training requirements, and any process required prior to use. ~~"Controlled Equipment Use Policy" means a publicly released, legally enforceable written document governing the use of Controlled Equipment by the Berkeley Police Department that addresses, at a minimum, all of the following:~~

~~(10) Purpose: The specific purpose or purposes that each type of Controlled Equipment is intended to achieve.~~

## Section 2.100.030

~~(11) Authorized Use: The specific uses of Controlled Equipment that are authorized, and rules and processes required prior to such use.~~

~~(12) Prohibited uses: A non-exclusive list of uses that are not authorized.~~

~~— Training: The course of training that must be completed before any officer, agent, or employee of the Police Department is allowed to use each specific type of Controlled Equipment or a reference to applicable BPD training policy.~~

~~(3) Auditing and Oversight: The mechanisms to ensure compliance with the Controlled Equipment Use Policy, including which independent persons or entities have oversight authority, and what legally enforceable sanctions are put in place for violations of the policy. City Attorney likely to reject codified sanctions.~~

~~(3) Transparency: The procedures by which members of the public may register complaints or concerns or submit questions about the use of each specific type of Controlled Equipment, and how the Police Department will ensure that each complaint, concern, or question receives a response in a timely manner.~~

~~"Police Area" refers to each of the geographic districts assigned to a police commander and as such districts are amended from time to time.~~

~~"Exigent Circumstances" means a law enforcement agency's good faith belief that an emergency involving the danger of, or imminent threat of death or serious physical injury to any person requires the use of unapproved Controlled Equipment.~~

## 2.100.0430 Acquisition and Use of Controlled Equipment.

### (A) Restrictions Prior to Submission and Approval

(1) The ~~Berkeley~~ Police Department shall not engage in any of the following activities regarding a piece of Controlled Equipment before submit to the Berkeley Police Review Commission (hereinafter "Police Review Commission"), or any successive agency, reviews and recommends, and the City Council approves, a Controlled Equipment Impact Report and a Controlled Equipment Use Policy for that equipment in compliance with this section, prior to engaging in any of the following:

(a) Requesting the transfer of Controlled Equipment pursuant to Section 2576a of Title 10 of the United States Code.

(b) Seeking funds for Controlled Equipment, including, but not limited to, applying for a grant, soliciting or accepting private, local, state, or federal funds, in-kind donations, or other donations or transfers.

(c) Acquiring Controlled Equipment either permanently or temporarily, including by borrowing or leasing.

~~(d) Collaborating with another law enforcement agency, such as commanding, controlling, or otherwise directing that agency or its personnel, in the deployment or other use of Controlled Equipment within Berkeley.~~

~~(e)~~(d) Using any new ~~or existing~~ Controlled Equipment for a purpose, in a manner, or by a person not previously approved by the ~~governing body~~ City Council pursuant to this

## Section 2.100.040

## Ordinance.

~~(f)~~(e) Soliciting or responding to a proposal for, or entering into an agreement with, any other person or entity to seek funds for, apply to receive, acquire, use, or collaborate in the use of, Controlled Equipment.

~~(1) The funding, acquisition, or use of Controlled Equipment by the Police Department shall not be permitted without the review and recommendation, by the Police Review Commission, and approval, by City Council, of a Controlled Equipment Impact Report and a Controlled Equipment Use Policy submitted pursuant to this Ordinance.~~

~~(f) Notwithstanding the above, Tthe Chair of the Police Review Commission, in consultation with the Vice Chair, may provide limited approval, in writing, for the Department to solicit funding for Controlled Equipment prior to the submission ofbefore submitting a Controlled Equipment Impact Report and a Controlled Equipment Use Policy.~~

~~(f) If funding is received, the Controlled Equipment funded under the exception provided by this subsection shall not be used unless a Controlled Equipment Impact Report and Controlled Equipment Use Policy is subsequently submitted to the Police Review Commission for review and subsequently approved by City Council, pursuant to the general requirements ofas required by this section~~

~~(1) The Police Department shall not cooperate with law enforcement agencies or mutual aid partners that deploy Controlled Equipment that would be subject to this ordinance unless said cooperation and deployment of Controlled Equipment by such agency or mutual aid partner is consistent with the restrictions, use policies, and reporting requirements established by this ordinance.~~

## (B) Submission to Police Review Commission

~~(1) When seeking the review and recommendation of the Police Review Commission, the Police Department shall submit to the Police Review Commission a proposed Controlled Equipment Impact Report and a Controlled Equipment Use Policy.~~

~~(2)~~(1) At least 15 days prior to any public ~~hearing-meeting~~ to consider the adoption of any Controlled Equipment Use Policy or ~~Controlled Equipment Impact Report~~, the Use Policy and Impact report shall be published concerning the Controlled Equipment at issue, the Department shall publish the proposed Controlled Equipment Impact Report and Controlled Equipment Use Policy for public review. Publishing to the Department's website shall satisfy the requirements of this subsection.

~~(3)~~(2) In order to facilitate public participation, any proposed or ~~The~~ final Controlled Equipment Impact Report and Controlled Equipment Use Policy shall be made publicly available on the Department's website for as long as the Controlled Equipment is ~~proposed or~~ available for use.

~~(4)~~(3) The Police Review Commission shall consider Controlled Equipment Impact Reports and Controlled Equipment Use Policies as an agenda item for review at an open session of a ~~regularly noticed~~ meeting.

## Section 2.100.040

## (C) Criteria for Police Review Commission Recommendations

(1) The Police Review Commission shall ~~only~~ recommend approval of a request to fund, acquire, or use Controlled Equipment pursuant to this chapter only if it determines all of the following:

- (a) The Controlled Equipment is needed despite available alternatives.
- (b) The proposed Controlled Equipment Use Policy will safeguard the public's welfare, safety, civil rights, and civil liberties.
- (c) The use of Controlled Equipment will not be used based on race, national origin, religion, sexual orientation, gender, gender identity, political viewpoint, or disability, or disproportionately impact any community or group.

~~(1) The use of Controlled Equipment is the most cost-effective option among all available alternatives.~~

~~(3)~~(2) If the submitted Controlled Equipment Impact Report identifies a risk of potential adverse effects on the public's welfare, safety, civil rights, or civil liberties, the Police Review Commission's a recommendation for approval for the funding, acquisition, or use of the Controlled Equipment ~~by the Police Review Commission pursuant to this Ordinance~~ shall not be deemed an acquiescence to those effects, but instead an acknowledgment of the risk of those effects and the need to avoid them proactively.

(D) Temporary Use in Exigent Circumstances

~~(1) Notwithstanding the provisions of this Chapter, the Police Department may borrow and/or temporarily use Controlled Equipment in Exigent Circumstances without following the requirements in Section 2.100.040. However, if the Department does so, it must take all of the following actions:~~

- ~~(a) Provide written notice of that acquisition or use to the City Council within 30 days following the commencement of such Exigent Circumstance, unless such information is confidential or privileged;~~
- ~~(b) If it is anticipated that the use will continue beyond the Exigent Circumstance, submit a proposed Controlled Equipment Impact Report and Controlled Equipment Use Policy, as applicable, to the City Council within 90 days following the borrowing, acquisition or temporary use, and receive approval, as applicable, from the City Council pursuant to Section 2.100.040; and~~
- ~~(c) Include the Controlled Equipment in the Department's next annual Controlled Equipment Report.~~

(2) "Exigent Circumstances" means a law enforcement agency's good faith belief that an emergency involving the danger of, or imminent threat of death or serious physical injury to any person requires the use of unapproved Controlled Equipment.

(E) Police Review Commission Review Required Before City Council Consideration of



## Section 2.100.040

## Approval.

(1) The Police Review Commission shall recommend that the City Council adopt, modify, or reject the proposed Controlled Equipment Use Policy, and notify the Police Department of its recommendations.

~~(2) If the Police Review Commission proposes that the Controlled Equipment Use Policy be modified or rejected, the Police Review Commission shall propose such modifications to City Staff. City Staff. The Police Department Review Commission shall present such modifications or notice of rejection the Police Review Commission's recommendations to City Council when seeking City Council approval pursuant to this Ordinance.~~

~~(b)(3)~~ Failure by the Police Review Commission to make its recommendation on a proposal within ninety (90) days of submission shall enable City Staff to proceed to the City Council for approval of the proposal.

(F) Police Review Commission Review of Prior Recommendations

(1) The Police Review Commission shall determine, as part of its annual Work Plan, whether to include the review of any Controlled Equipment use policy in the coming year. ~~review any recommendation that it has adopted pursuant to this Ordinance approving the funding, acquisition, or use of Controlled Equipment at least annually and vote on whether to recommend renewal of the approval.~~

(2) A Police Review Commission recommendation to City Council that a prior approval be revoked shall be presented to Council ~~for immediate consideration.~~ If City Council has does not ~~reviewed and taken action on a Police Review Commission's~~ such a recommendation ~~that a prior approval be revoked~~ within four (4) City Council meetings from when the item is was initially first scheduled ~~for City Council consideration,~~ the City Police Department shall cease its use of the Controlled Equipment.

(G) Review Process for Previously-Acquired Equipment

(1) The Police Department shall have one year from the date of passage of this Ordinance to submit Controlled Equipment Use Policies and Controlled Equipment Impact Statements for approval ~~pursuant to this Ordinance~~ if the Department wishes to continue the use of Controlled Equipment acquired prior to the passage of this Ordinance. If the Department fails to do so, it must cease use of such equipment. ~~The Department shall cease the use of Controlled Equipment acquired prior to the date of passage of this ordinance if, after one year, no approval, pursuant to the requirements of this Ordinance, has been granted.~~

(2) ~~In order to~~ To ensure that the review of previously-acquired Controlled Equipment is appropriately prioritized, the Police Department shall provide a prioritized ranking of such Controlled Equipment ~~possessed and/or used by the City,~~ and the Police Review Commission shall consider this ranking in determining the order in which to perform its review. ~~previously acquired Controlled Equipment that is prioritized for review.~~

## Section 2.100.040

(H) City Council Approval Process

(1) After the Police Review Commission ~~Notification and R~~ review requirements have been met, ~~City Staff~~ the Police Department seeking City Council approval shall schedule for City Council consideration the proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy, and include Police Review Commission recommendations, at least fifteen (15) days prior to a public meeting.

~~(1) The City Council shall only approve a proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy only after first considering the recommendation of the Police Review Commission, and then subsequently making a determination that the City's interest in community safety outweighs the potential adverse effects of using Controlled Equipment.~~

~~(3)~~(2) For approval of existing Controlled Equipment for which the Police Review Commission has failed to make a recommendation within the required ninety (90) days as provided by this Section, ~~if~~ the City Council has does not ~~reviewed and~~ approved such item within four (4) regular City Council meetings from when the item was is first initially scheduled ~~for City Council consideration~~, the City Police Department shall cease its use of the Controlled Equipment until such review and approval occurs.

**2.100.0450 Reports on the Use of Controlled Equipment.**

## (A) Annual Report on Controlled Equipment

(1) The ~~Berkeley~~ Police Department shall submit ~~to the Police Review Commission an annual~~ report on Controlled Equipment to the Police Review Commission within one year of approval, and annually thereafter for as long as the Controlled Equipment is available for use, for any Controlled Equipment not included in a Use of Force report. The ~~annual~~ report shall be provided no later than March 15<sup>th</sup> of each year, unless the Police Review Commission advises the ~~Police~~ Department that an alternate date is preferred. The ~~Police~~ Department shall also make each annual report ~~required by this section~~ publicly available on its website for as long as the Controlled Equipment is available for use. The annual report shall, at a minimum, include the following information for the immediately preceding calendar year:

(a) Production descriptions for Controlled Equipment and inventory numbers of each product in the Police Department's possession.

(b) A summary of how Controlled Equipment was used. For the purposes of annual reports, "use" of equipment shall refer to deployments in which equipment is publicly displayed or visible, or is deployed in an operation or critical response, not to transfers of location or placement of equipment inside Department vehicles.

(c) If applicable, a breakdown of where Controlled Equipment was used geographically by individual police area. For each police area, the Police Department shall report the number of days Controlled Equipment was used and what percentage of those daily reported uses were authorized by warrant and by non-warrant forms of court

## Section 2.100.050

authorization.

(d) A summary of any complaints or concerns received concerning Controlled Equipment.

(e) The results of any internal audits, any information about violations of Controlled Equipment Use Policies, and any actions taken in response.

~~(e) The total annual cost for each type of Controlled Equipment, including acquisition, personnel, training, transportation, maintenance, storage, upgrade, and other ongoing costs, and from what source funds will be provided for Controlled Equipment in the calendar year following submission of the annual report.~~

~~(1) Within 60 days of the Police Department submitting and publicly releasing an annual report pursuant to this section, the Police Review Commission shall place the report as an agenda item for an open session of a regular meeting. After review and approval by the Police Review Commission, City Staff shall submit the annual report to City Council.~~

(B) Compliance & or Revocation of Approval

~~(1) Within 60 days of the Police Department submitting an annual report, the Police Review Commission shall place the report as an agenda item for an open session of a regular meeting.~~ The Police Review Commission shall determine, based on the annual report, whether each ~~type-piece~~ of Controlled Equipment ~~identified in that reported on~~ has complied with the standards for approval set forth in Section ~~32.100.040~~.

~~(2) If the Police Review Commission determines that any Controlled Equipment identified in the annual report has not complied with those standards for approval set forth in Section 3, the Police Review Commission it shall either recommend revocation of the authorization for that piece of Controlled Equipment or modify the Controlled Equipment Use Policy in a manner that will resolve the lack of compliance. Recommendations for revocations pursuant to this section shall be forwarded to City Council in accordance with the approval process in Section 32.100.040.~~

~~(3) After review by the Police Review Commission, the Police Department shall submit the annual report to City Council, indicating its approval or lack of compliance for each piece of Controlled Equipment.~~

**2.100.0650 Enforcement.**

(A) Remedies for Violations of this Ordinance

This Chapter does not provide a private right of action upon any person or entity to seek injunctive relief against the City or any employee unless that person or entity has first provided written notice to the City Manager by serving the City Clerk, regarding the specific alleged violations of this Chapter. If a specific alleged violation is not remedied within 90 days of that written notice, a person or entity may seek injunctive relief in a court of competent jurisdiction. If the alleged violation is substantiated and subsequently cured, a notice shall be posted in a conspicuous manner on the City's website that describes, to the extent permissible by law, the corrective measures taken to address the violation. If it is shown that the violation is the result of arbitrary or capricious action

## Section 2.100.060

by the City or an employee or agent thereof in his or her official capacity, the prevailing complainant in an action for relief may collect from the City reasonable attorney's fees in an amount not to exceed \$15,000 if they are personally obligated to pay such fees.

~~Any violation of this Ordinance, or of a Controlled Equipment Use Policy promulgated under this Ordinance, constitutes an injury and any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in the Superior Court of the State of California to enforce this Ordinance. An action instituted under this paragraph shall be brought against the respective city department, and the City of Berkeley, and, if necessary to effectuate compliance with this Ordinance or a Controlled Equipment acquisition or use policy, any other governmental agency with possession, custody, or control of Controlled Equipment subject to this Ordinance, to the extent permitted by law.~~

~~(0) Any person who has been subjected to the use of Controlled Equipment in violation of this Ordinance may institute proceedings in the Superior Court of the State of California against the City of Berkeley and shall be entitled to recover actual damages (but not less than liquidated damages of one thousand dollars (\$1,000.00) or one hundred dollars (\$100.00) per day for each day of violation, whichever is greater).~~

~~(0) A court shall award costs and reasonable attorneys' fees to the plaintiff who is the prevailing party in an action brought under subpart (1) or (2) above.~~

~~Violations of this Ordinance by a city employee may result in consequences that may include retraining, suspension, or termination, subject to due process requirement.~~

## **2.100.0670 Transparency**

### (A) Disclosure Requirements

(1) It shall be unlawful for the City to enter into any Controlled Equipment-related contract or other agreement that conflicts with the provisions of this Ordinance, and any conflicting provisions in such future contracts or agreements, including but not limited to non-disclosure agreements, shall be deemed void and legally unenforceable.

(2) To the extent permitted by law, the City shall publicly disclose all of its Controlled Equipment-related contracts, including any and all related non-disclosure agreements, if any, regardless of any contract terms to the contrary.

## **2.100.0870 Whistleblower Protections.**

### ~~(A) Protections Against Retaliation~~

~~(1) Neither the City nor anyone acting on behalf of the City may take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment, including but not limited to discriminating with respect to compensation, terms and conditions of employment, access to information, restrictions on due process rights, or civil or criminal liability, because:~~

~~(a) The employee or applicant was perceived to, about to, or assisted in any lawful disclosure of information concerning the funding, acquisition, or use of Controlled~~

*Section 2.100.080*

~~Equipment based upon a good faith belief that the disclosure evidenced a violation of this Ordinance; or~~

~~(b) The employee or applicant was perceived to, about to, or assisted or participated in any proceeding or action to carry out the purposes of this Ordinance.~~

~~(c) It shall be grounds for disciplinary action for a city employee or anyone else acting on behalf of the city to retaliate against another city employee or applicant who makes a good-faith complaint that there has been a failure to comply with any Controlled-Equipment Use Policy or administrative instruction promulgated under this Ordinance.~~

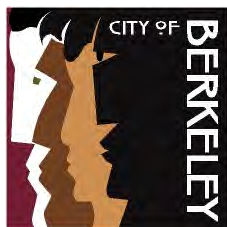
~~(a) Any employee or applicant who is injured by a violation of this Section may institute a proceeding for monetary damages and injunctive relief against the city in any court of competent jurisdiction.~~

All provisions of Berkeley's Protection of Whistleblowers Workplace Policy, as promulgated by the City Manager on November 2, 2016, and including any updates or replacements thereto, shall apply.

**2.100.0980-Severability**

If any section, subsection, sentence, clause, phrase, or word of this Chapter, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of this Chapter. The Council of the City of Berkeley hereby declares that it would have passed this Chapter and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this Chapter or application thereof would be subsequently declared invalid or unconstitutional.

Section 23. 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

## REVISED AGENDA MATERIAL

**Meeting Date:** July 28, 2020

**Item Number:** 42

**Item Description:** Adopt an Ordinance Adding Chapter 2.100 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

**Submitted by:** Councilmember Harrison

### Revisions

1. Modified transmittal and ordinance to conform to BMC numbering format.
2. Added background information in transmittal.
3. Fixed typos in ordinance.



Kate Harrison  
Councilmember District 4

ACTION CALENDAR

July 28, 2020

To: Members of the City Council

From: Councilmember Harrison

Subject: Adopt an Ordinance Adding Chapter 2.~~64.100.170~~ to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

RECOMMENDATION

1. Refer draft Ordinance to the Police Review Commission for further consideration and policy development and submit recommendations to the Public Safety Committee and author within 60 days; and
2. Adopt an Ordinance Adding Chapter 2.~~64.170~~100 to the Berkeley Municipal Code to Regulate Police Acquisition and Use of Controlled Equipment.

BACKGROUND

The acquisition and use of certain police equipment and weapons pose grave threats to civil liberties and public health and safety. It is in the public interest that acquisition of any police equipment with the potential to impose physical or psychological harm to community members should be thoroughly reviewed by the Police Review Commission and Council; legally enforceable safeguards, including transparency, oversight, and accountability measures, must be in place to protect the public's welfare, safety, civil rights, and civil liberties before certain categories of equipment are funded, acquired, or used.

The Council already relies on the Police Review Commission to review certain Police equipment acquisitions and uses. In addition, the Council has imposed limits directly, for example: limiting further acquisition of military material from the Department of Defense 1033 Program, acquisitions of armored vehicles and surveillance equipment, the use of pepper spray in crowd control situations, and the use of tear gas. However, the City currently lacks a comprehensive framework for reviewing and regulating the acquisition of a broad spectrum of potentially problematic equipment, including use of such equipment by other departments during mutual aid events.

Adopt an Ordinance Adding Chapter 2.64.170100 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

The Oakland Police Commission is currently in the process of recommending to the Oakland City Council a new policy inspired by Berkeley's Surveillance Technology Ordinance and California Assembly Bill AB3131, a prior attempt to regulate military equipment statewide, to thoroughly consider the proposed acquisition and use of potentially problematic police equipment *before* community members can be harmed.

The list of Controlled Equipment defined in the ordinance is in part inspired by equipment definitions President Obama's Executive Order 13688 and California Assembly Bill AB3131. The list of equipment is not exhaustive and may be added to or subtracted from as needed.

The primary concepts of the proposed Oakland and Berkeley Ordinances are as follows:

1. Controlled Equipment Use Policies and Controlled Equipment Impact Reports must be reviewed and adopted before the use of Controlled Equipment may be authorized.
2. Requires the Police Department to submit Controlled Equipment Use Policies and Controlled Equipment Impact Reports to the Police Commission for review and recommendation.
3. Requires the Police Commission to review submissions at a public hearing and determine whether such submissions warrant a recommendation to Council for adoption or rejection.
4. Requires the City Council to ratify or reverse the Police Commission's recommendations following the Commission's review of Controlled Equipment Use Policies.
5. Requires the Police Department to submit an annual report describing the use of authorized Controlled Equipment during the year prior.
6. Requires the Police Commission to review the annual Controlled Equipment report, determine whether covered equipment has complied with the standards for approval, and recommend renewal or modification of Use Policies, or the revocation of authorization for use.
7. Requires the City Council to ratify or reverse the Police Commission's recommendations following the Commission's review of the Controlled Equipment annual report.



Adopt an Ordinance Adding Chapter 2.64.170100 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

The Berkeley Surveillance Ordinance model of thoroughly considering the impact of acquiring and using certain technology has served the public well since adoption in early 2018. A similar regime is appropriate for consideration of police equipment.

Similar to the Surveillance Ordinance, the item provides the Police Department with a year from the date of passage to submit Controlled Equipment Use Policies and Controlled Equipment Impact Statements for approval. This process will assist the public, Council and Commission in better understanding the scope of controlled equipment inventory, use policies and impact.

The ordinance includes enforcement remedies for alleged violations of the ordinance, including injunctive relief, declaratory relief, writ of mandate in the Superior Court of the State of California to enforce this Ordinance and attorneys' fees. Individuals subject to the use of Controlled Equipment in violation of this Ordinance may institute proceedings in the Superior Court of the State of California against the City of Berkeley and shall be entitled to recover actual damages (but not less than liquidated damages of one thousand dollars (\$1,000.00) or one hundred dollars (\$100.00) per day for each day of violation, whichever is greater). Violators of the ordinance may result in consequences that may include retraining, suspension, or termination, subject to due process requirements and applicable City policies.

The intent of this item is to provide the Police Review Commission with sufficient time to review the draft ordinance and provide input and feedback to the Public Safety Committee and author before proceeding to the full Council.

#### FINANCIAL IMPLICATIONS

Staff time.

#### ENVIRONMENTAL SUSTAINABILITY

No environmental impact.

#### CONTACT

Councilmember Kate Harrison  
kharrison@cityofberkeley.info | 510-981-7140

#### ATTACHMENTS:

1. Ordinance

ORDINANCE NO. -N.S.

ADDING A NEW CHAPTER 2. ~~10064.170~~ TO THE BERKELEY MUNICIPAL CODE REGULATING POLICE ACQUISITION AND USE OF CONTROLLED EQUIPMENT

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

Section 1. The Berkeley Municipal Code Chapter 2. ~~64.100.170~~ is amended to read as follows:

**Chapter 2. ~~64.170~~100  
POLICE EQUIPMENT AND COMMUNITY SAFETY ORDINANCE**

**Sections:**

- 2. ~~6100.0104.170~~ Name of Ordinance**
- 2. ~~10064.020~~171 Definitions**
- 2. ~~64.172~~100.030 Acquisition and Use of Controlled Equipment**
- 2. ~~6100.0404.173~~ Reports on the Use of Controlled Equipment**
- 2. ~~64.174~~100.050 Enforcement**
- 2. ~~64.175~~100.060 Transparency**
- 2. ~~64.176~~100.070 Whistleblower Protections**
- 2. ~~64.177~~100.080 Severability**

**2. ~~64100.010~~170.010 Name of Ordinance.**

(A) This Ordinance shall be known as the Police Equipment and Community Safety Ordinance.

**2. ~~64.1710.020.100.020~~ Definitions**

(A) "Controlled Equipment" means equipment that is military or militaristic in nature and includes, but is not limited to, all of the following:

(1) Special-purpose wheeled vehicles that are either built or modified to provide ballistic protection to their occupants, such as mine-resistant ambush protected (MRAP) vehicles or armored personnel carriers.

(a) Police versions of standard passenger vehicles are specifically excluded from this section.

(2) Multi-purpose wheeled vehicles that are either built to operate both on-road and off-road, such as a high mobility multipurpose wheeled vehicle (HMMWV), commonly referred to as a Humvee, a two and one-half-ton truck, or a five-ton truck, or vehicles built or modified to use a breaching or entry apparatus as an attachment.

(a) Unarmored all-terrain vehicles (ATVs) and motorized dirt bikes are specifically excluded from this section.

- (3) Tracked vehicles that are built or modified to provide ballistic protection to their occupants and utilize a tracked system instead of wheels for forward motion.
- (4) Weapon-bearing aircraft, vessels, or vehicles of any kind, whether manned or unmanned.
- (5) Breaching apparatus designed to provide rapid entry into a building or through a secured doorway, including equipment that is mechanical, such as a battering ram, and equipment that is ballistic, such as a slug, or equipment that is explosive in nature.
- (6) Firearms of .50 caliber or greater.
- (7) Ammunition of .50 caliber or greater.
- (8) Specialized firearms and associated ammunition of less than .50 caliber, as defined in Sections 30510 and 30515 of the California Penal Code.
- (9) Projectile launch platforms and their associated munitions, such as 40mm projectile launchers, "bean bag", rubber bullet, or specialty impact munition (SIM) weapons, and "riot guns" used to disperse chemical agents.
- (10) Any knife designed to be attached to the muzzle of a rifle, shotgun, or long gun for purposes of hand-to-hand combat.
- (11) Explosives, pyrotechnics, such as "flashbang" grenades, explosive breaching tools, and chemical weapons such as "teargas", CS gas, pepper spray, and "pepper balls".
- (12) Crowd-control equipment, such as riot batons, riot helmets, and riot shields, but excluding service-issued telescopic or fixed length straight batons.
- (13) Active area denial weapons, such as the Taser Shockwave, microwave weapons, water cannons, and the Long Range Acoustic Device (LRAD).
  - (a) Only LRAD as an area denial tool shall trigger the reporting requirements of this ordinance.
- (13) Any other equipment as determined by the City Council to require additional oversight.

(B) "City" means any department, agency, bureau, and/or subordinate division of the City of Berkeley.

(C) "City Staff" means City personnel authorized by the City Administrator or designee to seek City Council approval of the acquisition of Controlled Equipment in conformance with this Ordinance.

(D) "Controlled Equipment Impact Statement" means a publicly released, written document that includes, at a minimum, all of the following:

- (1) Description: A description of each type of Controlled Equipment, the quantity sought, its capabilities, expected lifespan, intended uses and effects, and how it works, including product descriptions from the manufacturer of the Controlled Equipment.
- (2) Purpose: The purposes and reasons for which the Berkeley Police Department (hereinafter, "Police Department") proposes to use each type of Controlled Equipment.
- (3) Fiscal Cost: The fiscal cost of each type of Controlled Equipment, including the initial costs of obtaining the equipment, the costs of each proposed use, the costs of potential

adverse impacts, and the annual, ongoing costs of the equipment, including operating, training, transportation, storage, maintenance, and upgrade costs.

(4) Impact: An assessment specifically identifying any potential impacts that the use of Controlled Equipment might have on the welfare, safety, civil rights, and civil liberties of the public, and what specific affirmative measures will be implemented to safeguard the public from potential adverse impacts.

(5) Mitigations: Specific, affirmative technical and procedural measures that will be implemented to safeguard the public from such impacts.

(6) Alternatives: Alternative method or methods by which the Police Department can accomplish the purposes for which the Controlled Equipment is proposed to be used, the annual costs of alternative method or methods, and the potential impacts of alternative method or methods on the welfare, safety, civil rights, and civil liberties of the public.

(7) Location: The location(s) it may be used, using general descriptive terms.

(8) Third Party Dependence: Whether use or maintenance of the Controlled Equipment will require the engagement of third party service providers.

(9) Track Record: A summary of the experience (if any) other entities, especially government entities have had with the proposed Controlled Equipment, including, if available, quantitative information about the effectiveness of the Controlled Equipment in achieving its stated purpose in other jurisdictions, and any known adverse information about the Controlled Equipment (such as unanticipated costs, failures, or civil rights and civil liberties abuses).

(E) "Controlled Equipment Use Policy" means a publicly released, legally enforceable written document governing the use of Controlled Equipment by the Berkeley Police Department that addresses, at a minimum, all of the following:

(1) Purpose: The specific purpose or purposes that each type of Controlled Equipment is intended to achieve.

(2) Authorized Use: The specific uses of Controlled Equipment that are authorized, and rules and processes required prior to such use.

(3) Prohibited uses: A non-exclusive list of uses that are not authorized.

(4) Training: The course of training that must be completed before any officer, agent, or employee of the Police Department is allowed to use each specific type of Controlled Equipment.

(4) Auditing and Oversight: The mechanisms to ensure compliance with the Controlled Equipment Use Policy, including which independent persons or entities have oversight authority, and what legally enforceable sanctions are put in place for violations of the policy.

(5) Transparency: The procedures by which members of the public may register complaints or concerns or submit questions about the use of each specific type of Controlled Equipment, and how the Police Department will ensure that each complaint, concern, or question receives a response in a timely manner.

(F) "Police Area" refers to each of the geographic districts assigned to a police commander and as such districts are amended from time to time.

(G) "Exigent Circumstances" means a law enforcement agency's good faith belief that an emergency involving the danger of, or imminent threat of death or serious physical injury to any person requires the use of unapproved Controlled Equipment.

**2. ~~100.03064-1720-030~~. Acquisition and Use of Controlled Equipment.**

(A) Restrictions Prior to Submission and Approval

(1) The Berkeley Police Department shall submit to the Berkeley Police Review Commission (hereinafter "Police Review Commission"), or any successive agency, a Controlled Equipment Impact Report and a Controlled Equipment Use Policy prior to engaging in any of the following:

(a) Requesting the transfer of Controlled Equipment pursuant to Section 2576a of Title 10 of the United States Code.

(b) Seeking funds for Controlled Equipment, including, but not limited to, applying for a grant, soliciting or accepting private, local, state, or federal funds, in-kind donations, or other donations or transfers.

(c) Acquiring Controlled Equipment either permanently or temporarily, including by borrowing or leasing.

(d) Collaborating with another law enforcement agency, such as commanding, controlling, or otherwise directing that agency or its personnel, in the deployment or other use of Controlled Equipment within Berkeley.

(e) Using any new or existing Controlled Equipment for a purpose, in a manner, or by a person not previously approved by the governing body pursuant to this Ordinance.

(f) Soliciting or responding to a proposal for, or entering into an agreement with, any other person or entity to seek funds for, apply to receive, acquire, use, or collaborate in the use of, Controlled Equipment.

(2) The funding, acquisition, or use of Controlled Equipment by the Police Department shall not be permitted without the review and recommendation, by the Police Review Commission, and approval, by City Council, of a Controlled Equipment Impact Report and a Controlled Equipment Use Policy submitted pursuant to this Ordinance.

(a) The Chair of the Police Review Commission, in consultation with the Vice Chair, may provide limited approval, in writing, for the Department to solicit funding for Controlled Equipment prior to the submission of a Controlled Equipment Impact Report and a Controlled Equipment Use Policy.

(b) Controlled Equipment funded under the exception provided by this subsection shall not be used unless a Controlled Equipment Impact Report and Controlled Equipment Use Policy is subsequently submitted to the Police Review Commission for review and subsequently approved by City Council, pursuant to the general requirements of this section.

(3) The Police Department shall not cooperate with law enforcement agencies or mutual aid partners that deploy Controlled Equipment that would be subject to this ordinance unless said cooperation and deployment of Controlled Equipment by such agency or mutual aid partner is consistent with the restrictions, use policies, and reporting requirements established by this ordinance.

(B) Submission to Police Review Commission

(1) When seeking the review and recommendation of the Police Review Commission, the Police Department shall submit to the Police Review Commission a proposed Controlled Equipment Impact Report and a Controlled Equipment Use Policy.

(2) At least 15 days prior to any public hearing concerning the Controlled Equipment at issue, the Department shall publish the proposed Controlled Equipment Impact Report and Controlled Equipment Use Policy for public review. Publishing to the Department's website shall satisfy the requirements of this subsection.

(3) In order to facilitate public participation, any proposed or final Controlled Equipment Impact Report and Controlled Equipment Use Policy shall be made publicly available on the Department's website for as long as the Controlled Equipment is proposed or available for use.

(4) The Police Review Commission shall consider Controlled Equipment Impact Reports and Controlled Equipment Use Policies as an agenda item for review at an open session of a regularly noticed meeting.

(C) Criteria for Police Review Commission Recommendations

(1) The Police Review Commission shall only recommend approval of a request to fund, acquire, or use Controlled Equipment pursuant to this chapter if it determines all of the following:

(a) The Controlled Equipment is needed despite available alternatives.

(b) The proposed Controlled Equipment Use Policy will safeguard the public's welfare, safety, civil rights, and civil liberties.

(c) The use of Controlled Equipment will not be used based on race, national origin, religion, sexual orientation, gender, gender identity, political viewpoint, or disability, or disproportionately impact any community or group.

(d) The use of Controlled Equipment is the most cost-effective option among all available alternatives.

(2) If the submitted Controlled Equipment Impact Report identifies a risk of potential adverse effects on the public's welfare, safety, civil rights, or civil liberties, a recommendation for approval for the funding, acquisition, or use of Controlled Equipment by the Police Review Commission pursuant to this Ordinance shall not be deemed an acquiescence to those effects, but instead an acknowledgment of the risk of those effects and the need to avoid them proactively.

(E) Police Review Commission Review Required Before City Council Consideration of Approval.

(1) The Police Review Commission shall recommend that the City Council adopt, modify, or reject the proposed Controlled Equipment Use Policy.

(a) If the Police Review Commission proposes that the Controlled Equipment Use Policy be modified or rejected, the Police Review Commission shall propose such modifications to City Staff. City Staff shall present such modifications or notice of rejection to City Council when seeking City Council approval pursuant to this Ordinance.

(b) Failure by the Police Review Commission to make its recommendation on a proposal within ninety (90) days of submission shall enable City Staff to proceed to the City Council for approval of the proposal.

(F) Police Review Commission Review of Prior Recommendations

(1) The Police Review Commission shall review any recommendation that it has adopted pursuant to this Ordinance approving the funding, acquisition, or use of Controlled Equipment at least annually and vote on whether to recommend renewal of the approval.

(2) A Police Review Commission recommendation to City Council that a prior approval be revoked shall be presented to Council for immediate consideration. If City Council has not reviewed and taken action on a Police Review Commission recommendation that a prior approval be revoked within four (4) City Council meetings from when the item was initially scheduled for City Council consideration, the City shall cease its use of the Controlled Equipment.

(G) Review Process for Previously-Acquired Equipment

(1) The Police Department shall have one year from the date of passage of this Ordinance to submit Controlled Equipment Use Policies and Controlled Equipment Impact Statements for approval pursuant to this Ordinance if the Department wishes to continue the use of Controlled Equipment acquired prior to the passage of this Ordinance. The Department shall cease the use of Controlled Equipment acquired prior to the date of passage of this ordinance if, after one year, no approval, pursuant to the requirements of this Ordinance, has been granted.

(2) In order to ensure that the review of previously-acquired Controlled Equipment is appropriately prioritized, the Police Department shall provide a prioritized ranking of Controlled Equipment possessed and/or used by the City, and the Police Review Commission shall consider this ranking in determining order in which previously-acquired Controlled Equipment that is prioritized for review.

(H) City Council Approval Process

(1) After the Police Review Commission Notification and Review requirements have been met, City Staff seeking City Council approval shall schedule for City Council consideration the proposed Controlled Equipment Impact Report and proposed

Controlled Equipment Use Policy, and include Police Review Commission recommendations, at least fifteen (15) days prior to a public meeting.

(2) The City Council shall only approve a proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy after first considering the recommendation of the Police Review Commission, and subsequently making a determination that the City's interest in community safety outweighs the potential adverse ~~ea~~ffects of using Controlled Equipment.

(3) For approval of existing Controlled Equipment for which the Police Review Commission has failed to make a recommendation within ninety (90) days as provided by this Section, if the City Council has not reviewed and approved such item within four

(4) City Council meetings from when the item was initially scheduled for City Council consideration, the City shall cease its use of the Controlled Equipment until such review and approval occurs.

## **~~2.64.170.0403-100.040~~ Reports on the Use of Controlled Equipment.**

### (A) Annual Report on Controlled Equipment

(1) The Berkeley Police Department shall submit to the Police Review Commission an annual report on Controlled Equipment to the Police Review Commission within one year of approval, and annually thereafter for as long as the Controlled Equipment is available for use. The annual report shall be provided no later than March 15th of each year, unless the Police Review Commission advises the Police Department that an alternate date is preferred. The Police Department shall also make each annual report required by this section publicly available on its website for as long as the Controlled Equipment is available for use. The annual report shall, at a minimum, include the following information for the immediately preceding calendar year:

(a) Production descriptions for Controlled Equipment and inventory numbers of each product in the Police Department's possession.

(b) A summary of how Controlled Equipment was used.

(c) If applicable, a breakdown of where Controlled Equipment was used geographically by individual police area. For each police area, the Police Department shall report the number of days Controlled Equipment was used and what percentage of those daily reported uses were authorized by warrant and by non-warrant forms of court authorization.

(d) A summary of any complaints or concerns received concerning Controlled Equipment.

(e) The results of any internal audits, any information about violations of Controlled Equipment Use Policies, and any actions taken in response.

(f) The total annual cost for each type of Controlled Equipment, including acquisition, personnel, training, transportation, maintenance, storage, upgrade, and other ongoing costs, and from what source funds will be provided for Controlled Equipment in the calendar year following submission of the annual report.



(2) Within 60 days of the Police Department submitting and publicly releasing an annual report pursuant to this section, the Police Review Commission shall place the report as an agenda item for an open session of a regular meeting. After review and approval by the Police Review Commission, City Staff shall submit the annual report to City Council.

(C) Compliance & Revocation of Approval

(1) The Police Review Commission shall determine, based on the annual report submitted pursuant to Section 4, whether each type of Controlled Equipment identified in that report has complied with the standards for approval set forth in Section 3. If the Police Review Commission determines that any Controlled Equipment identified in the annual report has not complied with the standards for approval set forth in Section 3, the Police Review Commission shall either recommend revocation of the authorization for that piece of Controlled Equipment or modify the Controlled Equipment Use Policy in a manner that will resolve the lack of compliance. Recommendations for revocations pursuant to this section shall be forwarded to City Council in accordance with the approval process in Section 3.

**2. ~~64.1740.050.100.050~~ Enforcement.**

(A) Remedies for Violations of this Ordinance

(1) Any violation of this Ordinance, or of a Controlled Equipment Use Policy promulgated under this Ordinance, constitutes an injury and any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in the Superior Court of the State of California to enforce this Ordinance. An action instituted under this paragraph shall be brought against the respective city department, and the City of Berkeley, and, if necessary to effectuate compliance with this Ordinance or a Controlled Equipment acquisition or use policy, any other governmental agency with possession, custody, or control of Controlled Equipment subject to this Ordinance, to the extent permitted by law.

(2) Any person who has been subjected to the use of Controlled Equipment in violation of this Ordinance may institute proceedings in the Superior Court of the State of California against the City of Berkeley and shall be entitled to recover actual damages (but not less than liquidated damages of one thousand dollars (\$1,000.00) or one hundred dollars (\$100.00) per day for each day of violation, whichever is greater).

(3) A court shall award costs and reasonable attorneys' fees to the plaintiff who is the prevailing party in an action brought under subpart (1) or (2) above.

(4) Violations of this Ordinance by a city employee may result in consequences that may include retraining, suspension, or termination, subject to due process requirements.

**2. ~~100.06064.1750.060~~ Transparency**

(A) Disclosure Requirements

(1) It shall be unlawful for the City to enter into any Controlled Equipment-related contract or other agreement that conflicts with the provisions of this Ordinance, and any conflicting provisions in such future contracts or agreements, including but not limited to non-disclosure agreements, shall be deemed void and legally unenforceable.

(2) To the extent permitted by law, the City shall publicly disclose all of its Controlled Equipment-related contracts, including any and all related non-disclosure agreements, if any, regardless of any contract terms to the contrary.

**2. ~~100.07064.1760.070~~ Whistleblower Protections.**

(A) Protections Against Retaliation

(1) Neither the City nor anyone acting on behalf of the City may take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment, including but not limited to discriminating with respect to compensation, terms and conditions of employment, access to information, restrictions on due process rights, or civil or criminal liability, because:

(a) The employee or applicant was perceived to, about to, or assisted in any lawful disclosure of information concerning the funding, acquisition, or use of Controlled Equipment based upon a good faith belief that the disclosure evidenced a violation of this Ordinance; or

(b) The employee or applicant was perceived to, about to, or assisted or participated in any proceeding or action to carry out the purposes of this Ordinance.

(c) It shall be grounds for disciplinary action for a city employee or anyone else acting on behalf of the city to retaliate against another city employee or applicant who makes a good-faith complaint that there has been a failure to comply with any Controlled Equipment Use Policy or administrative instruction promulgated under this Ordinance.

(d) Any employee or applicant who is injured by a violation of this Section may institute a proceeding for monetary damages and injunctive relief against the city in any court of competent jurisdiction.

**2. ~~64.177100.080 0-080~~ Severability**

If any section, subsection, sentence, clause, phrase, or word of this Chapter, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of this Chapter. The Council of the City of Berkeley hereby declares that it would have passed this Chapter and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this Chapter or application thereof would be subsequently declared invalid or unconstitutional.

Section 3. 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

ACTION CALENDAR  
July 28, 2020

To: Members of the City Council

From: Councilmember Harrison

Subject: Adopt an Ordinance Adding Chapter 2.64.170 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

RECOMMENDATION

1. Refer draft Ordinance to the Police Review Commission for further consideration and policy development and submit recommendations to the Public Safety Committee and author within 60 days; and
2. Adopt an Ordinance Adding Chapter 2.64.170 to the Berkeley Municipal Code to Regulate Police Acquisition and Use of Controlled Equipment.

BACKGROUND

The acquisition and use of certain police equipment and weapons pose grave threats to civil liberties and public health and safety. It is in the public interest that acquisition of any police equipment with the potential to impose physical or psychological harm to community members should be thoroughly reviewed by the Police Review Commission and Council; legally enforceable safeguards, including transparency, oversight, and accountability measures, must be in place to protect the public's welfare, safety, civil rights, and civil liberties before certain categories of equipment are funded, acquired, or used.

The Council already relies on the Police Review Commission to review certain Police equipment acquisitions and uses. In addition, the Council has imposed limits directly, for example: limiting further acquisition of material from the Department of Defense 1033 Program, acquisitions of armored vehicles, the use of pepper spray in crowd control situations, and the use of tear gas. However, the City currently lacks a comprehensive framework for reviewing and regulating the acquisition of a broad spectrum of potentially problematic equipment, including use of such equipment by other departments during mutual aid events.

Adopt an Ordinance Adding Chapter 2.64.170 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

The Oakland Police Commission is currently in the process of recommending to the Oakland City Council a new policy inspired by Berkeley's Surveillance Technology Ordinance and California Assembly Bill AB3131, a prior attempt to regulate military equipment statewide, to thoroughly consider the proposed acquisition and use of potentially problematic police equipment *before* community members can be harmed.

The primary concepts of the proposed Oakland and Berkeley Ordinances are as follows:

1. Controlled Equipment Use Policies and Controlled Equipment Impact Reports must be reviewed and adopted before the use of Controlled Equipment may be authorized.
2. Requires the Police Department to submit Controlled Equipment Use Policies and Controlled Equipment Impact Reports to the Police Commission for review and recommendation.
3. Requires the Police Commission to review submissions at a public hearing and determine whether such submissions warrant a recommendation to Council for adoption or rejection.
4. Requires the City Council to ratify or reverse the Police Commission's recommendations following the Commission's review of Controlled Equipment Use Policies.
5. Requires the Police Department to submit an annual report describing the use of authorized Controlled Equipment during the year prior.
6. Requires the Police Commission to review the annual Controlled Equipment report, determine whether covered equipment has complied with the standards for approval, and recommend renewal or modification of Use Policies, or the revocation of authorization for use.
7. Requires the City Council to ratify or reverse the Police Commission's recommendations following the Commission's review of the Controlled Equipment annual report.

The intent of this item is to provide the Police Review Commission with sufficient time to review the draft ordinance and provide input and feedback to the Public Safety Committee and author before proceeding to the full Council.

#### FINANCIAL IMPLICATIONS

Staff time.

#### ENVIRONMENTAL SUSTAINABILITY

No environmental impact.

Adopt an Ordinance Adding Chapter 2.64.170 to the Berkeley Municipal Code Regulating Police Acquisition and Use of Controlled Equipment

CONTACT

Councilmember Kate Harrison

kharrison@cityofberkeley.info | 510-981-7140

ATTACHMENTS:

1. Ordinance

ORDINANCE NO. -N.S.

ORDINANCE ADDING CHAPTER 2.64.170 TO THE BERKELEY MUNICIPAL CODE  
REGULATING POLICE ACQUISITION AND USE OF CONTROLLED EQUIPMENT

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

Section 1. The Berkeley Municipal Code Chapter 2.64.170 is added to read as follows:

**Chapter 2.64.170**  
**POLICE EQUIPMENT AND COMMUNITY SAFETY ORDINANCE**

**Sections:**

- 2.64.170.010 Findings and Purpose**
- 2.64.170.020 Prohibited Conduct**
- 2.64.170.030 Definitions**
- 2.64.170.040 Collection of Back Rent**
- 2.64.170.050 Application**
- 2.64.170.060 Implementing Regulations**
- 2.64.170.070 Waiver**
- 2.64.170.080 Remedies**

**2.64.170.010 Name of Ordinance.**

(A) This Ordinance shall be known as the Police Equipment and Community Safety Ordinance.

**2.64.170.020. Definitions**

A. "Controlled Equipment" means equipment that is military or militaristic in nature and includes, but is not limited to, all of the following:

(1) Special-purpose wheeled vehicles that are either built or modified to provide ballistic protection to their occupants, such as mine-resistant ambush protected (MRAP) vehicles or armored personnel carriers.

(a) Police versions of standard passenger vehicles are specifically excluded from this section.

(2) Multi-purpose wheeled vehicles that are either built to operate both on-road and off-road, such as a high mobility multipurpose wheeled vehicle (HMMWV), commonly referred to as a Humvee, a two and one-half-ton truck, or a five-ton truck, or vehicles built or modified to use a breaching or entry apparatus as an attachment.

(a) Unarmored all-terrain vehicles (ATVs) and motorized dirt bikes are specifically excluded from this section.

- (3) Tracked vehicles that are built or modified to provide ballistic protection to their occupants and utilize a tracked system instead of wheels for forward motion.
- (4) Weapon-bearing aircraft, vessels, or vehicles of any kind, whether manned or unmanned.
- (5) Breaching apparatus designed to provide rapid entry into a building or through a secured doorway, including equipment that is mechanical, such as a battering ram, and equipment that is ballistic, such as a slug, or equipment that is explosive in nature.
- (6) Firearms of .50 caliber or greater.
- (7) Ammunition of .50 caliber or greater.
- (8) Specialized firearms and associated ammunition of less than .50 caliber, as defined in Sections 30510 and 30515 of the California Penal Code.
- (9) Projectile launch platforms and their associated munitions, such as 40mm projectile launchers, "bean bag", rubber bullet, or specialty impact munition (SIM) weapons, and "riot guns" used to disperse chemical agents.
- (10) Any knife designed to be attached to the muzzle of a rifle, shotgun, or long gun for purposes of hand-to-hand combat.
- (11) Explosives, pyrotechnics, such as "flashbang" grenades, explosive breaching tools, and chemical weapons such as "teargas", CS gas, pepper spray, and "pepper balls".
- (12) Crowd-control equipment, such as riot batons, riot helmets, and riot shields, but excluding service-issued telescopic or fixed length straight batons.
- (13) Active area denial weapons, such as the Taser Shockwave, microwave weapons, water cannons, and the Long Range Acoustic Device (LRAD).
  - (a) Only LRAD as an area denial tool shall trigger the reporting requirements of this ordinance.
- (13) Any other equipment as determined by the City Council to require additional oversight.

(B) "City" means any department, agency, bureau, and/or subordinate division of the City of Berkeley.

(C) "City Staff" means City personnel authorized by the City Administrator or designee to seek City Council approval of the acquisition of Controlled Equipment in conformance with this Ordinance.

(D) "Controlled Equipment Impact Statement" means a publicly released, written document that includes, at a minimum, all of the following:

- (1) Description: A description of each type of Controlled Equipment, the quantity sought, its capabilities, expected lifespan, intended uses and effects, and how it works, including product descriptions from the manufacturer of the Controlled Equipment.
- (2) Purpose: The purposes and reasons for which the Berkeley Police Department (hereinafter, "Police Department") proposes to use each type of Controlled Equipment.
- (3) Fiscal Cost: The fiscal cost of each type of Controlled Equipment, including the initial costs of obtaining the equipment, the costs of each proposed use, the costs of potential



adverse impacts, and the annual, ongoing costs of the equipment, including operating, training, transportation, storage, maintenance, and upgrade costs.

(4) Impact: An assessment specifically identifying any potential impacts that the use of Controlled Equipment might have on the welfare, safety, civil rights, and civil liberties of the public, and what specific affirmative measures will be implemented to safeguard the public from potential adverse impacts.

(5) Mitigations: Specific, affirmative technical and procedural measures that will be implemented to safeguard the public from such impacts.

(6) Alternatives: Alternative method or methods by which the Police Department can accomplish the purposes for which the Controlled Equipment is proposed to be used, the annual costs of alternative method or methods, and the potential impacts of alternative method or methods on the welfare, safety, civil rights, and civil liberties of the public.

(7) Location: The location(s) it may be used, using general descriptive terms.

(8) Third Party Dependence: Whether use or maintenance of the Controlled Equipment will require the engagement of third party service providers.

(9) Track Record: A summary of the experience (if any) other entities, especially government entities have had with the proposed Controlled Equipment, including, if available, quantitative information about the effectiveness of the Controlled Equipment in achieving its stated purpose in other jurisdictions, and any known adverse information about the Controlled Equipment (such as unanticipated costs, failures, or civil rights and civil liberties abuses).

(E) "Controlled Equipment Use Policy" means a publicly released, legally enforceable written document governing the use of Controlled Equipment by the Berkeley Police Department that addresses, at a minimum, all of the following:

(1) Purpose: The specific purpose or purposes that each type of Controlled Equipment is intended to achieve.

(2) Authorized Use: The specific uses of Controlled Equipment that are authorized, and rules and processes required prior to such use.

(3) Prohibited uses: A non-exclusive list of uses that are not authorized.

(4) Training: The course of training that must be completed before any officer, agent, or employee of the Police Department is allowed to use each specific type of Controlled Equipment.

(4) Auditing and Oversight: The mechanisms to ensure compliance with the Controlled Equipment Use Policy, including which independent persons or entities have oversight authority, and what legally enforceable sanctions are put in place for violations of the policy.

(5) Transparency: The procedures by which members of the public may register complaints or concerns or submit questions about the use of each specific type of Controlled Equipment, and how the Police Department will ensure that each complaint, concern, or question receives a response in a timely manner.

(F) "Police Area" refers to each of the geographic districts assigned to a police commander and as such districts are amended from time to time.

(G) "Exigent Circumstances" means a law enforcement agency's good faith belief that an emergency involving the danger of, or imminent threat of death or serious physical injury to any person requires the use of unapproved Controlled Equipment.

**2.64.170.030. Acquisition and Use of Controlled Equipment.**

(A) Restrictions Prior to Submission and Approval

(1) The Berkeley Police Department shall submit to the Berkeley Police Commission (hereinafter "Police Commission") a Controlled Equipment Impact Report and a Controlled Equipment Use Policy prior to engaging in any of the following:

(a) Requesting the transfer of Controlled Equipment pursuant to Section 2576a of Title 10 of the United States Code.

(b) Seeking funds for Controlled Equipment, including, but not limited to, applying for a grant, soliciting or accepting private, local, state, or federal funds, in-kind donations, or other donations or transfers.

(c) Acquiring Controlled Equipment either permanently or temporarily, including by borrowing or leasing.

(d) Collaborating with another law enforcement agency, such as commanding, controlling, or otherwise directing that agency or its personnel, in the deployment or other use of Controlled Equipment within Berkeley.

(e) Using any new or existing Controlled Equipment for a purpose, in a manner, or by a person not previously approved by the governing body pursuant to this Ordinance.

(f) Soliciting or responding to a proposal for, or entering into an agreement with, any other person or entity to seek funds for, apply to receive, acquire, use, or collaborate in the use of, Controlled Equipment.

(2) The funding, acquisition, or use of Controlled Equipment by the Police Department shall not be permitted without the review and recommendation, by the Police Commission, and approval, by City Council, of a Controlled Equipment Impact Report and a Controlled Equipment Use Policy submitted pursuant to this Ordinance.

(a) The Chair of the Police Commission, in consultation with the Vice Chair, may provide limited approval, in writing, for the Department to solicit funding for Controlled Equipment prior to the submission of a Controlled Equipment Impact Report and a Controlled Equipment Use Policy.

(b) Controlled Equipment funded under the exception provided by this subsection shall not be used unless a Controlled Equipment Impact Report and Controlled Equipment Use Policy is subsequently submitted to the Police Commission for review and subsequently approved by City Council, pursuant to the general requirements of this section.

(3) The Police Department shall not cooperate with law enforcement agencies or mutual aid partners that deploy Controlled Equipment that would be subject to this ordinance unless said cooperation and deployment of Controlled Equipment by such agency or mutual aid partner is consistent with the restrictions, use policies, and reporting requirements established by this ordinance.

(B) Submission to Police Commission

(1) When seeking the review and recommendation of the Police Commission, the Police Department shall submit to the Police Commission a proposed Controlled Equipment Impact Report and a Controlled Equipment Use Policy.

(2) At least 15 days prior to any public hearing concerning the Controlled Equipment at issue, the Department shall publish the proposed Controlled Equipment Impact Report and Controlled Equipment Use Policy for public review. Publishing to the Department's website shall satisfy the requirements of this subsection.

(3) In order to facilitate public participation, any proposed or final Controlled Equipment Impact Report and Controlled Equipment Use Policy shall be made publicly available on the Department's website for as long as the Controlled Equipment is proposed or available for use.

(4) The Police Commission shall consider Controlled Equipment Impact Reports and Controlled Equipment Use Policies as an agenda item for review at an open session of a regularly noticed meeting.

(C) Criteria for Police Commission Recommendations

(1) The Police Commission shall only recommend approval of a request to fund, acquire, or use Controlled Equipment pursuant to this chapter if it determines all of the following:

(a) The Controlled Equipment is needed despite available alternatives.

(b) The proposed Controlled Equipment Use Policy will safeguard the public's welfare, safety, civil rights, and civil liberties.

(c) The use of Controlled Equipment will not be used based on race, national origin, religion, sexual orientation, gender, gender identity, political viewpoint, or disability, or disproportionately impact any community or group.

(d) The use of Controlled Equipment is the most cost-effective option among all available alternatives.

(2) If the submitted Controlled Equipment Impact Report identifies a risk of potential adverse effects on the public's welfare, safety, civil rights, or civil liberties, a recommendation for approval for the funding, acquisition, or use of Controlled Equipment by the Police Commission pursuant to this Ordinance shall not be deemed an acquiescence to those effects, but instead an acknowledgment of the risk of those effects and the need to avoid them proactively.

(E) Police Commission Review Required Before City Council Consideration of Approval.

(1) The Police Commission shall recommend that the City Council adopt, modify, or reject the proposed Controlled Equipment Use Policy.

(a) If the Police Commission proposes that the Controlled Equipment Use Policy be modified or rejected, the Police Commission shall propose such modifications to City Staff. City Staff shall present such modifications or notice of rejection to City Council when seeking City Council approval pursuant to this Ordinance.

(b) Failure by the Police Commission to make its recommendation on a proposal within ninety (90) days of submission shall enable City Staff to proceed to the City Council for approval of the proposal.

#### (F) Police Commission Review of Prior Recommendations

(1) The Police Commission shall review any recommendation that it has adopted pursuant to this Ordinance approving the funding, acquisition, or use of Controlled Equipment at least annually and vote on whether to recommend renewal of the approval.

(2) A Police Commission recommendation to City Council that a prior approval be revoked shall be presented to Council for immediate consideration. If City Council has not reviewed and taken action on a Police Commission recommendation that a prior approval be revoked within four (4) City Council meetings from when the item was initially scheduled for City Council consideration, the City shall cease its use of the Controlled Equipment.

#### (G) Review Process for Previously-Acquired Equipment

(1) The Police Department shall have one year from the date of passage of this Ordinance to submit Controlled Equipment Use Policies and Controlled Equipment Impact Statements for approval pursuant to this Ordinance if the Department wishes to continue the use of Controlled Equipment acquired prior to the passage of this Ordinance. The Department shall cease the use of Controlled Equipment acquired prior to the date of passage of this ordinance if, after one year, no approval, pursuant to the requirements of this Ordinance, has been granted.

(2) In order to ensure that the review of previously-acquired Controlled Equipment is appropriately prioritized, the Police Department shall provide a prioritized ranking of Controlled Equipment possessed and/or used by the City, and the Police Commission shall consider this ranking in determining order in which previously-acquired Controlled Equipment that is prioritized for review.

#### (H) City Council Approval Process

(1) After the Police Commission Notification and Review requirements have been met, City Staff seeking City Council approval shall schedule for City Council consideration the proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy, and include Police Commission recommendations, at least fifteen (15) days prior to a public meeting.

(2) The City Council shall only approve a proposed Controlled Equipment Impact Report and proposed Controlled Equipment Use Policy after first considering the recommendation of the Police Commission, and subsequently making a determination that the City's interest in community safety outweighs the potential adverse affects of using Controlled Equipment.

(3) For approval of existing Controlled Equipment for which the Police Commission has failed to make a recommendation within ninety (90) days as provided by this Section, if the City Council has not reviewed and approved such item within four (4) City Council meetings from when the item was initially scheduled for City Council consideration, the City shall cease its use of the Controlled Equipment until such review and approval occurs.

#### **2.64.170.040. Reports on the Use of Controlled Equipment.**

##### **(A) Annual Report on Controlled Equipment**

(1) The Berkeley Police Department shall submit to the Police Commission an annual report on Controlled Equipment to the Police Commission within one year of approval, and annually thereafter for as long as the Controlled Equipment is available for use. The annual report shall be provided no later than March 15th of each year, unless the Police Commission advises the Police Department that an alternate date is preferred. The Police Department shall also make each annual report required by this section publicly available on its website for as long as the Controlled Equipment is available for use. The annual report shall, at a minimum, include the following information for the immediately preceding calendar year:

- (a) Production descriptions for Controlled Equipment and inventory numbers of each product in the Police Department's possession.
  - (b) A summary of how Controlled Equipment was used.
  - (c) If applicable, a breakdown of where Controlled Equipment was used geographically by individual police area. For each police area, the Police Department shall report the number of days Controlled Equipment was used and what percentage of those daily reported uses were authorized by warrant and by non-warrant forms of court authorization.
  - (d) A summary of any complaints or concerns received concerning Controlled Equipment.
  - (e) The results of any internal audits, any information about violations of Controlled Equipment Use Policies, and any actions taken in response.
  - (f) The total annual cost for each type of Controlled Equipment, including acquisition, personnel, training, transportation, maintenance, storage, upgrade, and other ongoing costs, and from what source funds will be provided for Controlled Equipment in the calendar year following submission of the annual report.
- (2) Within 60 days of the Police Department submitting and publicly releasing an annual report pursuant to this section, the Police Commission shall place the report as an

agenda item for an open session of a regular meeting. After review and approval by the Police Commission, City Staff shall submit the annual report to City Council.

(C) Compliance & Revocation of Approval

(1) The Police Commission shall determine, based on the annual report submitted pursuant to Section 4, whether each type of Controlled Equipment identified in that report has complied with the standards for approval set forth in Section 3. If the Police Commission determines that any Controlled Equipment identified in the annual report has not complied with the standards for approval set forth in Section 3, the Police Commission shall either recommend revocation of the authorization for that piece of Controlled Equipment or modify the Controlled Equipment Use Policy in a manner that will resolve the lack of compliance. Recommendations for revocations pursuant to this section shall be forwarded to City Council in accordance with the approval process in Section 3.

**2.64.170.050. Enforcement.**

(A) Remedies for Violations of this Ordinance

(1) Any violation of this Ordinance, or of a Controlled Equipment Use Policy promulgated under this Ordinance, constitutes an injury and any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in the Superior Court of the State of California to enforce this Ordinance. An action instituted under this paragraph shall be brought against the respective city department, and the City of Berkeley, and, if necessary to effectuate compliance with this Ordinance or a Controlled Equipment acquisition or use policy, any other governmental agency with possession, custody, or control of Controlled Equipment subject to this Ordinance, to the extent permitted by law.

(2) Any person who has been subjected to the use of Controlled Equipment in violation of this Ordinance may institute proceedings in the Superior Court of the State of California against the City of Berkeley and shall be entitled to recover actual damages (but not less than liquidated damages of one thousand dollars (\$1,000.00) or one hundred dollars (\$100.00) per day for each day of violation, whichever is greater).

(3) A court shall award costs and reasonable attorneys' fees to the plaintiff who is the prevailing party in an action brought under subpart (1) or (2) above.

(4) Violations of this Ordinance by a city employee may result in consequences that may include retraining, suspension, or termination, subject to due process requirements.

**2.64.170.060. Transparency**

(A) Disclosure Requirements

(1) It shall be unlawful for the City to enter into any Controlled Equipment-related contract or other agreement that conflicts with the provisions of this Ordinance, and any conflicting provisions in such future contracts or agreements, including but not limited to non-disclosure agreements, shall be deemed void and legally unenforceable.

(2) To the extent permitted by law, the City shall publicly disclose all of its Controlled Equipment-related contracts, including any and all related non-disclosure agreements, if any, regardless of any contract terms to the contrary.

**2.64.170.070. Whistleblower Protections.**

(A) Protections Against Retaliation

(1) Neither the City nor anyone acting on behalf of the City may take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment, including but not limited to discriminating with respect to compensation, terms and conditions of employment, access to information, restrictions on due process rights, or civil or criminal liability, because:

(a) The employee or applicant was perceived to, about to, or assisted in any lawful disclosure of information concerning the funding, acquisition, or use of Controlled Equipment based upon a good faith belief that the disclosure evidenced a violation of this Ordinance; or

(b) The employee or applicant was perceived to, about to, or assisted or participated in any proceeding or action to carry out the purposes of this Ordinance.

(c) It shall be grounds for disciplinary action for a city employee or anyone else acting on behalf of the city to retaliate against another city employee or applicant who makes a good-faith complaint that there has been a failure to comply with any Controlled Equipment Use Policy or administrative instruction promulgated under this Ordinance.

(d) Any employee or applicant who is injured by a violation of this Section may institute a proceeding for monetary damages and injunctive relief against the city in any court of competent jurisdiction.

**2.64.170.080 Severability**

If any section, subsection, sentence, clause, phrase, or word of this Chapter, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of this Chapter. The Council of the City of Berkeley hereby declares that it would have passed this Chapter and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this Chapter or application thereof would be subsequently declared invalid or unconstitutional.

Section 3. 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.





Cheryl Davila  
Councilmember  
District 2

04

CONSENT CALENDAR  
October 13, 2020

To: Honorable Mayor and Members of the City Council

From: Councilmember Cheryl Davila

Subject: Introduce an Ordinance permanently banning the use of less lethal weaponry, chemical irritants, smoke projectiles, acoustic weapons, directed energy weapons, water cannons, disorientation devices and ultrasonic cannons used by the police on civilians.

RECOMMENDATION

Direct the City Manager and City Attorney to prepare the attached ordinance: "Prohibition On The Use Of Certain Munitions Ordinance" for first reading for the October 27, 2020 Regular City Council Meeting.

BACKGROUND

At the June 9, 2020 City Council Special Meeting, the Council considered an [Urgency Item: Prohibiting the use of Chemical Agents for Crowd Control during the COVID-19 pandemic](#) . The item was to establish an official City of Berkeley policy prohibiting the use of tear gas (CS gas), pepper spray, or smoke for crowd control by the Berkeley Police Department, or any outside department or agency called to respond to mutual aid in Berkeley, during the COVID-19 pandemic, until such time that the City Council removes this prohibition. The Council voted to prohibit the use of tear gas (CS) permanently.

Police officers in Berkeley and other jurisdictions use other chemicals and munitions against civilians such as: less-lethal weaponry (e.g. hard foam, rubber bullets, and pepper spray), chemical irritants, smoke projectiles, acoustic weapons, directed energy weapons, water cannons, disorientation devices, ultrasonic cannons, or any other device that is designed to be used on multiple individuals for crowd control and is designed to cause pain or discomfort.

The 1993 Chemical Weapons Convention banned international militaries from using riot control agents, and chemical weapons, on each other during war. It is unethical for police to use an outlawed chemical weapon on its own civilians. The police should not have the ability to use chemicals that can create life-threatening health consequences on fellow Americans, especially innocent civilians.

The proposed ordinance "Prohibition On The Use Of Certain Munitions" contains the following provisions:

**Definitions:**

1. "City" means the City of Berkeley, California.
2. "Prohibited Munitions" means less-lethal weaponry, chemical irritants, smoke projectiles, acoustic weapons, directed energy weapons, water cannons, disorientation devices, and ultrasonic cannons.

**Prohibition On The Use Of Certain Munitions:**

It shall be a violation of this Ordinance for any City staff to use Prohibited Munitions on any individual.

**Enforcement:**

- A. Any violation of this ordinance constitutes an injury and any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in the Superior Court of the State of California to enforce this ordinance.
- B. Civil Penalties. If the City is found liable in a cause of action brought by an individual under section (b) above, for a violation that is the result of arbitrary or capricious action by the City or an employee or agent thereof in their official capacity, the City shall be liable for a civil penalty no greater than \$5,000 per violation, as determined by the court. In determining the amount of the civil penalty, the court shall consider prior violations of this ordinance by the City department that committed the violation.
- C. Attorney's Fees and Costs. A court shall award a plaintiff who prevails on a cause of action under subsection (a) reasonable attorney's fees and costs.

FINANCIAL IMPLICATIONS

By banning the use of chemicals and less-lethal weaponry, this resolution would avoid future legal costs to the city.

ENVIRONMENTAL SUSTAINABILITY

Protecting our communities during this climate and health crisis is an act of environmental sustainability.

CONTACT PERSONS

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Eshal Sandhu  
Jovi Tseng  
Sanjita Pamidimukkala  
District 2 Interns

ATTACHMENTS:

1. Ordinance
2. City Inventory of less than lethal weapons and munitions

REFERENCES:

1. [Urgency Item: Prohibiting the use of Chemical Agents for Crowd Control during the COVID-19 pandemic](#)
2. City Inventory of less than lethal weapons and munitions

[https://www.cityofberkeley.info/uploadedFiles/Police\\_Review\\_Commission/Commissions/2016/PRC%20Pkt.%2004-27-16.pdf](https://www.cityofberkeley.info/uploadedFiles/Police_Review_Commission/Commissions/2016/PRC%20Pkt.%2004-27-16.pdf)

ORDINANCE NO. XXXX

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BERKELEY, CALIFORNIA, TO PERMANENTLY BAN THE USE OF LESS LETHAL WEAPONRY, CHEMICAL IRRITANTS, SMOKE PROJECTILES, ACOUSTIC WEAPONS, DIRECTED ENERGY WEAPONS, WATER CANNONS, DISORIENTATION DEVICES AND ULTRASONIC CANNONS USED BY THE POLICE ON CIVILIANS.

WHEREAS, At the June 9, 2020 City Council Special Meeting, the Council considered an [Urgency Item: Prohibiting the use of Chemical Agents for Crowd Control during the COVID-19 pandemic](#) . The item was to establish an official City of Berkeley policy prohibiting the use of tear gas (CS gas), pepper spray, or smoke for crowd control by the Berkeley Police Department, or any outside department or agency called to respond to mutual aid in Berkeley, during the COVID-19 pandemic, until such time that the City Council removes this prohibition. The Council voted to prohibit the use of tear gas (CS) permanently.

WHEREAS, Police officers in Berkeley and other jurisdictions use other chemicals and munitions against civilians such as: less-lethal weaponry (e.g. hard foam, rubber bullets, and pepper spray), chemical irritants, smoke projectiles, acoustic weapons, directed energy weapons, water cannons, disorientation devices, ultrasonic cannons, or any other device that is designed to be used on multiple individuals for crowd control and is designed to cause pain or discomfort.

WHEREAS, The 1993 Chemical Weapons Convention banned international militaries from using riot control agents, and chemical weapons, on each other during war. It is unethical for police to use an outlawed chemical weapon on its own civilians. The police should not have the ability to use chemicals that can create life-threatening health consequences on fellow Americans, especially innocent civilians.

NOW, THEREFORE, the Council of the City of Berkeley does ordain as follows:

**Section 1. Title**

This ordinance shall be known as the Prohibition On The Use Of Certain Munitions Ordinance.

**Section 2. Definitions**

1. "City" means the City of Berkeley, California.
2. "Prohibited Munitions" means less-lethal weaponry, chemical irritants, smoke projectiles, acoustic weapons, directed energy weapons, water cannons, disorientation devices, and ultrasonic cannons.

**Section 3. Prohibition On The Use Of Certain Munitions**

It shall be a violation of this Ordinance for any City staff to use Prohibited Munitions on any individual.

**Section 4. Enforcement**

- A. Any violation of this ordinance constitutes an injury and any person may institute proceedings for injunctive relief, declaratory relief, or writ of mandate in the Superior Court of the State of California to enforce this ordinance.
- B. Civil Penalties. If the City is found liable in a cause of action brought by an individual under section (b) above, for a violation that is the result of arbitrary or capricious action by the City or an employee or agent thereof in their official capacity, the City shall be

liable for a civil penalty no greater than \$5,000 per violation, as determined by the court. In determining the amount of the civil penalty, the court shall consider prior violations of this ordinance by the City department that committed the violation.

- C. Attorney's Fees and Costs. A court shall award a plaintiff who prevails on a cause of action under subsection (a) reasonable attorney's fees and costs.

**Section 5. Severability**

The provisions in this Ordinance are severable. If any part of provision of this Ordinance, or the application of this Ordinance to any person or circumstance, is held invalid, the remainder of this Ordinance, including the application of such part or provisions to other persons or circumstances, shall not be affected by such holding and shall continue to have force and effect.

**Section 6. Construction**

The provisions of this Ordinance are to be construed broadly to effectuate the purposes of this Ordinance.

**Section 7. Effective Date**

This Ordinance shall take effect on [DATE].

ATTACHMENT 2:

City Inventory of less than lethal weapons and munitions



Police Department

March 15, 2016

To: Katherine J. Lee, PRC Officer

From: Michael Meehan, Chief of Police

Re: Inventory of Less-than-lethal Weapons and Munitions

The Berkeley Police Department conducted an inventory of less-than-lethal weapons and munitions on February 19, 2016. The 37 mm launchers have smooth bores and are currently used for training purposes only. One 40 mm launcher is out of service while being repaired. An estimate of when it may be back in service is not available.

MAKE	MODEL	Caliber	Type	Year	Comments	#
CTS	4300	40 mm	Liquid Barricade/Training Rounds	2008		3
CTS	4300	40 mm	Liquid Barricade/Training Rounds	2010		17
CTS	4330	40 mm	Liquid CS Barricade Rounds	2008		31
CTS	4330	40 mm	Liquid CS Barricade Rounds	2010		8
CTS	3230	37 mm	Riot CS Smoke Projectile	2003	Training only	11
CTS	4230	40 mm	Riot CS Smoke Projectile	2010		6
CTS	3233	37 mm	Riot CS Smoke Multi-Projectile	2003	Training only	11
CTS	4210	40 mm	White Smoke Projectile	2008		24
CTS	4210	40 mm	White Smoke Projectile	2010		5
CTS	4630	40 mm	Riot CS Powder, Muzzle Blast	2010		16
CTS	4630	40 mm	Riot CS Powder, Muzzle Blast	2014		15
CTS	4557	40 mm	Foam Baton	2014/2015		191
CTS	T4557	40 mm	Training, reloadable Foam Baton	n/a		75
Fed Labs		37 mm	single round launcher		Training only	7
Penn Arms	GL1	40 mm	single round launcher			5
Penn Arms	PGL65	40 mm	multi-round launcher		*1 launcher out of service for repairs	2*
FN Herstal	FN-303	18 mm	multi-round launcher			2

cc: Firearm and Tactics Unit, Specialty Weapons Coordinator



05

Cheryl Davila  
Councilmember  
District 2

CONSENT CALENDAR  
October 27, 2020

To: Honorable Mayor and Members of the City Council

From: Councilmember Cheryl Davila

Subject: Providing our Unhoused Community with Fire Extinguishers

RECOMMENDATION

Direct the City Manager to use existing homeless services funding to develop a program to provide fire extinguishers, fire prevention tools and deploy them through the community based homeless services providers to distribute to our unhoused community.

Short term referral to additionally, require some elements of this program be deployed immediately, with a full program deployment within six months.

BACKGROUND

On any given night, more than 1,000 Berkeley residents do not have shelter (i.e. living outdoors in tents, on sidewalks or in vehicles) according to the [Alameda County 2019 Point-In-Time Count](#). A growing number of residents are housing insecure and at risk of becoming homeless. A majority of unhoused Berkeley residents are people of color, seniors and disabled.

The City of Berkeley spent close to \$20 million on providing homeless services. About \$6.5 million came from its general fund, about \$9.5 million came from regional, state, and federal funds and \$3.9 million were one-time funds from the state's Homeless Emergency Aid Program.

Cooking fires and accidents are common among unhoused populations as they often use portable stoves, wood, and charcoal briquettes which lack safety precautions. Combined with strong winds near brushes these small fires have dangerous implications. For example, in 2018, a fire from a stove at a homeless encampment in Bel Air caused a large brush fire that incinerated several homes. It became dangerous very quickly because the homeless population lacked extinguishing equipment and the winds allowed to fire to travel. This same thing occurred multiple times in Malibu. In just May of this year, a homeless encampment in San Jose was on fire and began to spread to Guadalupe River.

Consider the Homeless has acquired and deployed fire extinguishers to those temporarily living in tents and other alternative housing. They have personally delivered those extinguishers and track use, as well as helping to formulate safety plans. Each time an extinguisher is used it must be replaced or refilled.

With the growing climate concerns and fires plaguing California, it is essential that the City does everything it can to protect the safety of our people and preemptively stop the spread of preventable fires. Recently, there have been a few encampment fires. One fire resulted in injuries to one of the encampment residents leading to extensive burns to their body requiring surgeries and extended hospitalization.

FINANCIAL IMPLICATIONS

An estimate of \$25,000 for the first year, with the purchase of about 500 fire extinguishers to place across encampments and RV and vehicle communities in the City of Berkeley that are easily accessible to our unhoused residents. The average cost of a Fire Extinguishers is \$50. A bulk purchase, as well as reconditioned equipment could result in additional saving. New fire extinguisher equipment comes with approximately a six year warranty. Best Equipment Co. LLC, provided discounted fire extinguishers at the Shake Out last year, for about \$38, \$41.52 with tax. Fire extinguisher boxes to house the extinguishers would require additional costs of approximately \$50 per unit. However, the housing box may not be appropriate for this purpose.

ENVIRONMENTAL SUSTAINABILITY

Allowing communities to have tools to prevent and stop fires furthers protects other communities and the environment.

CONTACT PERSONS

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[cdavila@cityofberkeley.info](mailto:cdavila@cityofberkeley.info)

Sanjita Pamidimukkala  
Eshal Sandhu  
District 2 Interns

ATTACHMENTS:

1. Resolution

REFERENCES:

1. Best Equipment Co. LLC 510.655.8882
2. Fire Extinguisher at Home Depot  
<https://www.homedepot.com/p/Kidde-PRO-210-2A-10B-C-Fire-Extinguisher-21029292/100552654>



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

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BERKELEY, CALIFORNIA,  
PROVIDING OUR HOUSELESSNESS COMMUNITY WITH FIRE EXTINGUISHERS

WHEREAS, On any given night, more than 1,000 Berkeley residents do not have shelter (i.e. living outdoors in tents, on sidewalks or in vehicles) according to the [Alameda County 2019 Point-In-Time Count](#). A growing number of residents are housing insecure and at risk of becoming homeless. A majority of unhoused Berkeley residents are people of color, seniors and disabled; and

WHEREAS, The City of Berkeley spent close to \$20 million on providing homeless services. About \$6.5 million came from its general fund, about \$9.5 million came from regional, state, and federal funds and \$3.9 million were one-time funds from the state's Homeless Emergency Aid Program.

WHEREAS, Cooking fires and accidents are common among unhoused populations as they often use portable stoves, wood, and charcoal briquettes which lack safety precautions. Combined with strong winds near brushes these small fires have dangerous implications. For example, in 2018, a fire from a stove at a homeless encampment in Bel Air caused a large brush fire that incinerated several homes. It became dangerous very quickly because the homeless population lacked extinguishing equipment and the winds allowed to fire to travel. This same thing occurred multiple times in Malibu. In just May of this year, a homeless encampment in San Jose was on fire and began to spread to Guadalupe River.; and

WHEREAS, Consider the Homeless has acquired and deployed fire extinguishers to those temporarily living in tents and other alternative housing. They have personally delivered those extinguishers and track use, as well as helping to formulate safety plans. Each time an extinguisher is used it must be replaced or refilled; and

WHEREAS, With the growing climate concerns and fires plaguing California, it is essential that the City does everything it can to protect the safety of our people and preemptively stop the spread of preventable fires. Recently, there have been a few encampment fires. One fire resulted in injuries to one of the encampment residents leading to extensive burns to their body requiring surgeries and extended hospitalization.

NOW THEREFORE BE IT RESOLVED that the City Council of the City of Berkeley, California supports not only the increased accessibility of fire extinguishers and fire prevention products for the homeless; and

BE IT FURTHER RESOLVED, the Council of the City of Berkeley hereby direct the City Manager to use existing homeless services funding to develop a program to provide fire extinguishers, fire prevention tools and deploy them through the community based homeless services providers to distribute to our unhoused community.

BE IT FURTHER RESOLVED, the Council of the City of Berkeley hereby does a short term referral to additionally, require some elements of this program be deployed immediately, with a full program deployment within six months.