




Office of the City Manager

ACTION CALENDAR

April 4, 2017

(Continued from March 14, 2017)

To: Honorable Mayor and Members of the City Council

From:  Dee Williams-Ridley, City Manager

Submitted by: Phillip Harrington, Director, Public Works

Subject: Traffic Engineer Regulations for Objects on Sidewalks

INTRODUCTION

On November 17, 2015, the Council amended Section 14.48.170 of the Berkeley Municipal Code to authorize the Traffic Engineer to issue regulations governing the placement of objects on sidewalks. The Council also referred to the City Manager the establishment of secure storage with posted hours, the number of storage bins/lockers to be determined at a later date based on usage, and conditioned enforcement of any Traffic Engineer regulations on the availability of lockers.

On December 13, 2016, the Council amended Section 14.48.170 to remove the requirement that lockers be in place before a Traffic Engineer (TE) regulation could be enforced. This report conveys the TE regulations promulgated pursuant to Section 14.48.170 for Council review and, if the Council wishes, modification.

CURRENT SITUATION AND ITS EFFECTS

The Traffic Ordinance (now codified as BMC Title 14.48) was first adopted in 1952. It generally prohibited objects on sidewalks, with specific exceptions set forth in the ordinance, as well as a catch-all provision allowing objects permitted by the "Department of Social Planning". Until 2015, this catch-all provision (former Section 12.1-o of the Traffic Ordinance, now BMC Section 14.48.170) read as follows:

Such items not otherwise prohibited by law designed for temporary non-commercial use at such locations and such times as may be permitted by the Social Planning Department under the following rules and regulations.

(a) Any person desiring such permission shall make application therefor to the Social Planning Department specifying the object or thing to be used, the proposed time and place and the purpose for which it is intended to be used, and such other information as may be required by the Social Planning Department.

(b) If there are no prior applications for such time and place and the use of such object or thing at such time and place will not create a traffic hazard, the permit shall be issued.

In the 1990's staff developed a regulation to implement this section, and specifically to define the types of objects subject to this provision, to establish objective standards and criteria for the exercise of staff discretion and a process for reviewing and approving applications.

BACKGROUND

The operative language of Section 14.48.170 as amended on December 13, 2016, is as follows:

14.48.170 Temporary noncommercial uses.

B. The Traffic Engineer may adopt regulations specifying what objects may be permitted under this Section and where such objects may be permitted, as well as procedures and limitations to implement this Section. Any such regulation shall contain provisions and shall be applied in such a manner as to ensure that it is applied in a manner that does not deprive any person of rights protected by the state or federal constitutions, including freedom of expression, and any size limitation contained therein shall not apply to dogs, or cushions used for sitting. Regulations adopted by the Traffic Engineer under this Section shall not take effect until they have been presented to the City Council for review at a regularly scheduled meeting.

C. After review by the City Council, Traffic Engineer regulations adopted pursuant to this Section shall be publicized by the City in a manner substantially equivalent to the manner in which ordinances are publicized.

D. No person may be cited for a violation of this Section or the regulations adopted pursuant to it unless that person has first been warned that his or her conduct is in violation hereof, is allowed a reasonable opportunity to comply but refuses to do so.

E. Violations of this Section or the regulations adopted pursuant to it shall be charged as infractions, and not as misdemeanors.

The Traffic Engineer has now issued two regulations in response to this provision, both of which are based on the regulation first issued in the 1990s, for Council review.

TE Regulation 17-01 (Attachment 1) generally regulates the placement of objects on sidewalks. It primarily addresses *where* objects may be placed on sidewalks, in order to ensure accessibility and safety, and applies to all objects¹ subject to regulation under BMC Section 14.48.170.

Several categories of objects are *exempt* from the regulation:

¹ It does not apply to dogs, cats or other pets or companion animals.

1. objects placed on the sidewalk by the City;
2. objects permitted under other Chapters of the Berkeley Municipal Code, such as (newsracks, encroachments, tables for licensed street vendors, sidewalk café seating, benches and planters, etc.);
3. objects specifically permitted under Sections of Chapter 14.48 other than section 14.48.170;
4. cushions used for sitting;
5. objects with a footprint of less than 4 square feet;
6. mobile items with operative wheels that are no larger than a single standard grocery store shopping cart;
7. mobility devices being used by pedestrians; or
8. personal baggage in a person's immediate custody and control while the person is actively in transit (e.g., waiting for a bus or taxi), and which can be readily moved by that person or an assisting person.

TE regulation 17-01 also *prohibits* certain objects, regardless of location:

1. collections of objects with a cumulative footprint larger than 15 square feet and any horizontal dimension greater than 5 feet;
2. objects 7 feet or more in height;
3. objects that are not stationary or move in the wind;
4. objects with moving parts or parts that move in the wind, or flashing lights, except those required for safety as determined by the Traffic Engineer;
5. objects that are not in the immediate custody and control of the owner or a person designated by the owner.

The remainder of TE Regulation 17-01 addresses *where* objects may be placed on sidewalks. These limitations are basically intended to ensure pedestrian access and safety, and to protect public improvements.

Finally, TE Regulation 17-01 provides that it must be interpreted consistently with relevant constitutional provisions.

TE Regulation 17-02 (Attachment 2) supplements TE Regulation 17-01 by establishing a process for ministerial permitting of objects that are inextricably entwined with speech or communication – an issue TE Regulation does not address. TE Regulation 17-02. uses the same standards for the size and location of objects as TE Regulation 17-01, and also provides that it must be interpreted consistently with relevant constitutional provisions.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report.

POSSIBLE FUTURE ACTION

No action is needed. The Council may require the Traffic Engineer to make modifications to the TE Regulations, in which case they would return to Council for review before taking effect.

FISCAL IMPACTS OF POSSIBLE FUTURE ACTION

None.

CONTACT PERSON

Hamid Mostowfi, Traffic Engineer, Transportation Division Manager, Public Works, 981-6403

Attachments:

- 1: Traffic Engineer Regulation 17-01
- 2: Traffic Engineer Regulation 17-02

**TRAFFIC ENGINEER REGULATION 17-01
IMPLEMENTING
BERKELEY MUNICIPAL CODE SECTION 14.48.170 –
OBJECTS ON SIDEWALKS**

12/6/16

A. Purpose of Regulation

This Regulation is intended to protect the City's substantial interests in pedestrian safety, access for persons with disabilities, an aesthetically pleasing streetscape and vital commercial areas, all of which are critical to the City's economic well-being, in a manner consistent with the United States Constitution and correlative provisions of the California Constitution, as well as case law interpreting those provisions.

This Regulation provides procedures and specific, ministerial criteria for the implementation of Section 14.48.170, specifically the protection of access on the City's sidewalks.

B. Objects Exempt from this Regulation

This Regulation does not apply to dogs, cats or other pets or companion animals.

The following categories of objects are exempt from this Regulation:

1. objects placed on the sidewalk by the City;
2. objects permitted under other Chapters of the Berkeley Municipal Code, such as (newsracks, encroachments, tables for licensed street vendors, sidewalk café seating, benches and planters, etc.);
3. objects specifically permitted under Sections of Chapter 14.48 other than section 14.48.170;
4. cushions used for sitting;
5. objects with a footprint of less than 4 square feet;
6. mobile items with operative wheels that are no larger than a single standard grocery store shopping cart;
7. mobility devices being used by pedestrians; or
8. personal baggage in a person's immediate custody and control while the person is actively in transit (e.g., waiting for a bus or taxi), and which can be readily moved by that person or an assisting person.

C. Objects Subject to this Regulation

This Regulation applies to all physical objects encompassed by Section 14.48.170. It does not apply to leafleting, hawking, peddling and similar activities to the extent those activities do not involve the placement of physical objects on the sidewalk.

D. Types of Objects Prohibited

The following categories of objects are prohibited by this Regulation:

1. collections of objects with a cumulative footprint larger than 15 square feet and any horizontal dimension greater than 5 feet;
2. objects 7 feet or more in height;
3. objects that are not stationary or move in the wind;
4. objects with moving parts or parts that move in the wind, or flashing lights, except those required for safety as determined by the Traffic Engineer;
5. objects that are not in the immediate custody and control of the owner or a person designated by the owner.

E. Location Requirements for Permissible Objects

No object subject to and permissible under this Regulation may be located or placed:

1. in a location that interferes with access for persons with disabilities to the sidewalk, such as curb ramps or ramps permitting access to or egress from buildings;
2. where it would obstruct, restrict or hinder visibility of traffic control signs to pedestrians or drivers; or
3. at the curb when the curb is yellow, red, white, blue; or when it will interfere with access to a transit stop or bus bench or fire hydrant operations;
4. where there is less than 6 feet of clearance on the sidewalk for pedestrians to pass or where it would reduce pedestrian clearance to less than 6 feet;
5. within any building entrance (defined as the area the same width as a building doorway and extending from a building doorway 10 feet towards the curb);

Within 3 feet:

6. of any curb;
7. in front of a bus bench;
8. to either side of a bicycle rack;
9. of the edge of a tree well;
10. of any raised planter in the City right of way;

Within 6 feet:

11. in front of any display window of any building abutting the sidewalk;
12. of any public or private driveway, fire hydrant, police or fire call box, or other emergency facility, traffic signal controllers, mail boxes, utility boxes, or any fixed object legally placed in the City right-of-way;
13. of any wheelchair ramp;

14. of any trap door in the sidewalk permitted pursuant to Section 14.48.250, or between such a trap door and the curb;

Within 10 feet:

15. of any installation of public art installed by or with the authorization of the City;
16. of the front or rear of any bicycle rack;
17. of any crosswalk (marked or unmarked);

F. Interpretation

This Regulation is intended to be consistent with the United States and California constitutions, and in the event a patent or latent ambiguity in this Chapter requires interpretation by the City or a Court, such interpretation shall, to the extent permissible, be consistent with relevant constitutional provisions.

Dated:

Hamid Mostowfi
Traffic Engineer

**TRAFFIC ENGINEER REGULATION 17-02
IMPLEMENTING
BERKELEY MUNICIPAL CODE SECTION 14.48.170 –
PERMITS FOR OBJECTS USED FOR PURPOSES OF
EXPRESSION**

A. Background and Purpose of Regulation

Former section 12.1-o of the Traffic Ordinance, adopted in 1952, permitted objects “designed for temporary non-commercial use” to be placed on sidewalks subject to approval by the City on a first come/first served basis if “the use of such object or thing at such time and place will not create a traffic hazard” The original purpose of this provision, which was subsequently recodified as section 14.48.170, was to prevent the use of sidewalks for activities that would foreseeably result in clutter and impede access. Since this provision was first adopted, however, the City has enacted ordinances permitting street vending in certain areas (these ordinances were enacted in 1973 and 1981) as well as other commercial-related objects (e.g., sidewalk café seating) and newsracks.

Although all of these ordinances permit the placement of commercial objects on the sidewalk, subject to various limiting standards and/or issuance of appropriate permits, they do so in a manner that protects the aesthetic quality of the City’s streetscape and the resulting economic vitality. For instance, the street vending ordinance permits only sales of merchandise that is hand crafted; the food vending ordinance is intended to allow the sale of diverse foods from attractive food carts, thereby adding to the vitality of the sidewalks and the surrounding area; and the sidewalk café seating ordinance is designed to allow the extension of desirable commercial uses which add to the liveliness and vitality of the City’s streetscape and commercial areas.

Traffic Engineer Regulation 16-01 permits and regulates various other types of objects on sidewalks, specifically objects for non-commercial use, as allowed by Section 14.48.170.

The City has also recognized that the First Amendment may protect the distribution of certain goods which are inextricably intertwined with speech, and that such distribution, whether for sale, exchange or otherwise, may be entitled to protection as “non-commercial” under the First Amendment. However existing ordinance provisions and Traffic Engineer regulation 16-01 do not address this issue.

Accordingly, the purpose of this Regulation is to supplement Traffic Engineer Regulation 16-01, to allow for the safe and appropriate use of sidewalks for expressive purposes that involve the placement of objects on sidewalks.

This Regulation is intended to protect the City's substantial interests in pedestrian safety, access for persons with disabilities, an aesthetically pleasing streetscape and vital commercial areas, all of which are critical to the City's economic well-being, in a manner consistent with the First Amendment of the United States Constitution and correlative provisions of the California Constitution, as well as case law interpreting those provisions.

This Regulation is intended to provide specific, ministerial regulations for such objects, consistent with constitutional protections, while at the same time protecting the City's substantial interests in pedestrian safety, access for persons with disabilities, and an aesthetically pleasing streetscape and vital commercial areas, all of which are critical to the City's economic well-being.

In addition, a particular purpose of this Regulation is to define the term "temporary" so that any area of the sidewalk that is withdrawn from public use for expressive purposes is only temporarily withdrawn.

B. Definitions

Except when otherwise specified in this Regulation, the following terms shall have the following meanings:

1. "Distribute" means to sell, exchange for anything of value, give away or allow to be taken or picked up for free, any object.
2. "Noncommercial expression" when applied to an object means that such object is used and placed on the sidewalk in support of the communication of ideas, whether verbally, in writing, through music or visual art or other means or media, but not solely for the purpose of proposing or entering into a financial transaction. Such objects include books, printed literature, CDs and DVDs, posters, bumper stickers and buttons, where such goods are inextricably intertwined with expression or communication of the person distributing the object, as well as small items of personal property that are integral to the act of speech or communication because they are themselves expressive or communicative, or used in the course of speech or communication. The purpose of this definition is to balance the public interest in free speech with the public interest in attractive, safe and accessible sidewalks and a vital and sustainable local economy, by permitting distribution and display of goods or objects that are inextricably intertwined with noncommercial expression, but limiting the type of such goods to those that themselves essentially constitute speech and do not unduly interfere with other public uses or the general aesthetic appearance of the sidewalk.
3. "Pedestrian" includes all persons defined in Vehicle Code section 467.
4. "Sidewalk" includes both publicly owned property designed for and devoted to pedestrian use, including the planting strip as defined in section 16.04.070, and all privately owned property adjacent to the sidewalk which is subject to an implied easement for public access.
5. "Temporary" means a duration of no greater than 14 calendar days.

C. Permit Process

1. In order to accomplish the purposes of Section 14.48.170 and this Regulation, no object used for noncommercial, expression may be placed on the sidewalk without a permit from the Traffic Engineer.

2. The following process will be employed in considering and acting on applications for permits under this Regulation.

3. The Traffic Engineer will provide a copy of this Regulation and of a blank (*i.e.*, unissued) "Permit to Place Object on Sidewalk" to all persons who wish to apply for a permit.

4. Applicants shall fill in the form and submit it to the Traffic Engineer. Applications should normally be submitted to the Traffic Engineer no later than five (5) working days prior to the proposed effective date of the permit, but the Traffic Engineer may waive this requirement if quicker processing is feasible. Applicants shall also show compliance with all applicable ordinances and laws, including the payment of all applicable license taxes and fees.

5. The Traffic Engineer will review all applications. The Traffic Engineer may, if necessary, conduct a field evaluation to determine a suitable location for the object(s). The field review will be based on the requirements of this Regulation. The Traffic Engineer shall consult with the Finance Department as necessary.

6. In evaluating applications, the Traffic Engineer will not and shall not consider the content of any speech associated with or any other communicative aspect of the object(s) for which the permit is sought.

7. The Traffic Engineer shall approve applications that meet the criteria of this Regulation, subject to compliance with all laws and ordinances.

8. The Traffic Engineer shall indicate the effective date of the permit and file the signed original of the approved permit and provide an official copy to the applicant. The Traffic Engineer will also provide a copy of any permits issued to the Finance Department and the Police Department.

9. Permits will be issued on a first-come/first-served basis, and the Traffic Engineer shall maintain a waiting list of applicants.

10. It is the applicant's responsibility to apply for renewal of the permit, if desired.

D. Location requirements

Objects used for noncommercial expression that are placed on the sidewalk under this Regulation must comply with the location requirements set forth in TE Regulation 17-01, which are intended to maintain the sidewalks of the City as safe, useful and accessible means of pedestrian travel.

E. Size limits

The following objects are prohibited:

1. collections of objects with a cumulative footprint larger than 15 square feet and any horizontal dimension greater than 5 feet;
2. objects 7 feet or more in height;

3. objects that are not stationary or move in the wind;
4. objects with moving parts or parts that move in the wind, or flashing lights, except those required for safety as determined by the Traffic Engineer;
5. objects that are not in the immediate custody and control of the owner or a person designated by the owner.

F. Permit lapse

A permit issued under this Regulation that is not exercised within 2 working days of its effective date (if different than its issuance date) shall be deemed to have lapsed and shall be null and void and of no effect, and shall not constitute permission to place an object on the sidewalk. Upon a showing of good cause, such as serious illness, unusual weather, personal or public emergency or other similar circumstance, the Traffic Engineer may waive the lapse of such a permit and allow it to be exercised for the remainder of its term, if the location that is the subject of the permit has not already been allocated pursuant to another permit for the same period of time.

G. Permit duration and posting

1. Permits issued under this Regulation may be granted for a period from 1 to 14 consecutive days and shall automatically lapse at the end of the permit period.

2. No permit issued under this Regulation may be extended or renewed for the same location beyond 14 days, and no such permit may be issued if it would result in a single location being allocated to the same individual or organization for more than 14 days during any 28-day period.

3. A permittee may apply for a new permit for the same location only after his/her existing permit has expired. No application for the same location will be accepted from an applicant who has either a permit or a pending application for that location.

4. Permits issued pursuant to this Regulation shall be posted or maintained in a conspicuous location on the permitted object, at all times during which the permittee is maintaining it on the sidewalk.

H. Interpretation

This Regulation is intended to be consistent with the United States and California constitutions, and in the event a patent or latent ambiguity in this Chapter requires interpretation by the City or a Court, such interpretation shall, to the extent permissible, be consistent with relevant constitutional provisions.

Dated:

Hamid Mostowfi
Traffic Engineer

