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CONSENT CALENDAR

October 16, 2018

To: Members of the City Council
From: Councilmember Sophie Hahn, Mayor Jesse Arreguin,
Councilmember Linda Maio, and Councilmember Susan Wengraf
Subject: Non-Criminal Options for Enforcement of Sidewalk Regulations

RECOMMENDATION

Refer to the City Manager the development of non-criminal options for the enforcement of Berkeley laws and regulations related to use of public space that:

- Reduce, delay or, if possible, eliminate criminal penalties;
- Offer positive alternatives; and
- Ensure that the City has effective tools for enforcement of laws and regulations.

While ensuring effective enforcement, options should delay or avoid pursuing infractions and misdemeanors and provide options to cure violations through positive actions such as mandated and verified community service, education, or participation in social service programs.

FINANCIAL IMPLICATIONS

Staff time to research and develop alternative enforcement policies. Potential future staffing needed to administer community-driven programs in-lieu of citations. Potential cost-savings in the form of reduced demands on City staff to pursue citations, make arrests, and reduced impact on the criminal justice system.

BACKGROUND

The City of Berkeley has numerous ordinances, administrative regulations, and other rules regarding the appropriate use of sidewalks and other public space. This patchwork of regulations does not include a standard approach to enforcement; rather, violations of policies can result in warnings, infractions and/or misdemeanors, and a variety of combinations thereof.

For example:

- **Chapter 9.49 Food Vending on Sidewalks and Rights-Of-Way**

- Violations of this chapter are generally charged as misdemeanors, “but may be charged as infractions in the discretion of the citing officer”.
- **Chapter 13.36 Disorderly Conduct:** Chapter 13.36 addresses a variety of actions including “obstructing free passage of person or vehicles in public ways” (13.36.010), “accessibility on commercial sidewalks” (13.36.015), “consumption of alcoholic beverages in public” (13.36.070, 13.36.075, 13.36.080) and “obstructing City-owned planters and trees” (13.36.040)
 - Section 13.36.100 provides that “any person who shall be convicted of a violation of any of the provisions of this chapter shall be deemed guilty of a misdemeanor.”
 - Violation of some sections of Chapter 13.36 “shall be charged as infractions, not as misdemeanors,” including 13.36.070, 13.36.075, and 13.36.085, while others are ambiguous as to the type of charges that can be levied for violations (e.g. 13.36.015).
- **Chapter 14.48 Miscellaneous Use of Streets and Sidewalks**
 - 14.48.170 states that violations of the Traffic Engineer Regulations shall be charged as infractions
 - The charges possible for other violations of Chapter 14.48 are unclear.

While it is essential that the City ensure the availability, use, and enjoyment of its public spaces for all, a lack of positive, non-criminal enforcement strategies likely results in too few citations (because penalties - cycling through the legal system and jails - are too harsh and costly *and* are ineffective tools to reduce future violations) and, when citations are issued, can result in penalties that are disproportionate to the harm to the community, and that cause further harm to the vulnerable individual, making them ineligible for public benefits needed to survive.

Effective and positive enforcement mechanisms exist in Berkeley (for violations of other types of rules and regulations) and across many jurisdictions. Berkeley should create positive enforcement options for violations of rules and regulations on use of public space. Like “Fix-It” tickets, Administrative Citations, community service requirements and other positive penalties imposed by some courts, Berkeley should be leveraging any necessary enforcement to achieve positive outcomes for both violators and the City.

Berkeley’s existing tools for enforcement (after warnings, where required) are limited to infractions and misdemeanors. While these may not result in jail time, vulnerable individuals, who are most often the subject of citations, are rarely able to afford fines, appear in court, or correct the circumstances that lead to violations including homelessness, mental health challenges, substance abuse and extreme poverty.

Failure to pay fines can result in additional fines or court summons. Failure to appear in court can result in warrants, future arrests, jail time, and an exponential increase in costs for both the individual and the City - with little, if any, positive effect, and likely harm to the individual. The compounding of violations, unpaid fines, and jail time make it even more difficult to access services and stability.

BMC Chapter 1.20 addresses penalties for violations of the City of Berkeley Charter and ordinances. It authorizes and encourages alternative penalties for violations. While Chapter 1.20 only provides for alternatives *after* a conviction, these types of alternatives can be offered at different junctures in the process of citing and prosecuting violations. The following excerpts demonstrate the City's existing commitment to the concept of positive alternatives for violations of the City's rules and regulations:

Section 1.20.030 Specific restitution required.

A. Whenever any violation of which a person is convicted is capable of being corrected by that person, the court shall order as restitution that said person make such correction by a date certain, in addition to paying any penalty assessed pursuant to Section 1.20.020.

Section 1.20.040 Community service--When authorized--Purposes.

A. Whenever the court finds, based on a factual showing of indigence, that a person convicted of an infraction violation of any City ordinance is unable to pay the monetary penalty assessed by the court, the court shall order that person to perform community service, as specified herein.

B. Any community service ordered pursuant to this section shall be designed to:

- 1. Require the defendant to either directly cure the particular violation for which he/she is convicted, or, if a direct cure is not possible, otherwise provide nonpecuniary restitution to the community for the damage caused by the illegal actions for which he/she was convicted; and*
- 2. Deter similar illegal conduct by the defendant or others. (Ord. 6298-NS § 2, 1995)*

As a compassionate and progressive community, the City of Berkeley must develop positive approaches to preserving public spaces for their intended uses that avoid, to the extent possible, criminalizing vulnerable individuals and reducing their ability to access future services. In general, these approaches offer positive actions that must be completed to avoid charges being brought, convictions, or to take the place of incarceration or parole. Should required positive actions not be completed by the

individual, enforcement usually reverts back to the standard enforcement protocols of an infraction or misdemeanor.

Communities across the United States - including Berkeley - have implemented alternatives to criminal enforcement in a variety of circumstances. Berkeley can emulate or adapt these to create a new system for positive resolution of violations relating to use of public space, leveraging the interaction of the City with vulnerable individuals to encourage positive outcomes. Examples that can be adapted include:

- **Homeless Courts**¹ are treatment-oriented diversionary proceedings with the goal to dismiss misdemeanor offenses in recognition of completion of shelter/service agency activities, as a means to foster the movement of people experiencing homelessness from the streets through a shelter program to self-sufficiency. Alameda County has a Homeless Court but capacity is limited. Berkeley could adopt a program with a similar approach or could help support or expand the County program to ensure individuals cited in Berkeley have access.
- The City of Berkeley's **Administrative Citation program (BMC Chapter 1.28)** is used to gain compliance with City rules and regulations. While these Citations are primarily used to remedy building code violations, a similar framework could be created for violations of Sidewalks and other use of public space rules and regulations.
- **Corrective Action or "Fix-it" Tickets**² traditionally dismiss charges if an individual can show proof of correction. This model could be adapted to require proof of having attended an educational program, completed community service or engaged with social services such as rehousing or substance abuse services.
- **Restorative Justice models**³, including Berkeley High School's program of "Positive Behavior Interventions and Supports".
- **Diversion Programs/Alternatives-to-Incarceration/Problem Solving Courts**⁴⁵ that divert people with nonviolent offenses into supervised treatment in the community, community service or other programs that address underlying causes. This model, of which Homeless Courts are one example, could be adapted to require individuals to engage with appropriate services.

1

https://www.americanbar.org/content/dam/aba/administrative/homelessness_poverty/5b%20Homeless%20Court%20One-Pager%20-%20updated.authcheckdam.pdf

2 <http://www.courts.ca.gov/9529.htm>

3 <https://www.berkeleyschools.net/teaching-and-learning/restorative-justice/>

4 https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf

5 <http://www2.tasc.org/content/tasc-mission-vision>

Service providers that offer legal services to homeless and other vulnerable individuals in Berkeley and Alameda County have experience managing the negative consequences of criminal penalties and should be consulted in the course of formulating Berkeley's alternative, positive approaches. Organizations with expertise include the Homeless Action Center, the ACLU, East Bay Community Law Center and Alameda County's Homeless Court. Homeless individuals and previously homeless individuals can also offer important suggestions and insights. There are many internal experts as well, including our Police, the City Attorney, Health Housing and Community Services, Code Enforcement and Neighborhood Services. These and other internal and external experts may be consulted to ensure a proposal that is effective, humane and administratively feasible.

ENVIRONMENTAL SUSTAINABILITY

This referral is consistent with the City's environmental and sustainability goals.

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