



Office of the City Manager

CONSENT CALENDAR  
October 27, 2020

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

RECOMMENDATION

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

POLICY COMMITTEE RECOMMENDATION

No final action was taken by the Health, Life Enrichment, Equity & Community Committee. Item is automatically returning to the Council agenda pursuant to the 120-day time limit for items referred to policy committees.

FISCAL IMPACTS OF RECOMMENDATION

The modifications proposed by the Housing Advisory Commission could require increase in staffing and resources for Public Health's Tobacco Prevention Program and the City Manager's Code Enforcement Division. A feasibility analysis will provide more insight to the costs of revised program administration as proposed.

CURRENT SITUATION AND ITS EFFECTS

On July 11, 2019, the Housing Advisory Commission adopted a multi-pronged recommendation to modify the SFMUH ordinance. The proposed modifications vary in their scope and will require additional analysis prior to adoption, which fits with the Strategic Plan Priority goal to provide an efficient and financially-healthy City government.

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

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

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

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

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

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

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

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

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

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

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

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

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

#### BACKGROUND

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

#### ENVIRONMENTAL SUSTAINABILITY

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

#### RATIONALE FOR RECOMMENDATION

Staff appreciate the commission’s efforts to respond to community concerns and ensure the City has the most effective and accessible ordinance possible to serve our residents. Due to the varied, multi-pronged nature of their recommendations, staff are recommending a feasibility analysis is first considered to better understand the potential impacts and needs associated with the proposed ordinance modifications.

ALTERNATIVE ACTIONS CONSIDERED

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

CONTACT PERSON

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