



Housing Advisory Commission

CONSENT CALENDAR

October 27, 2020

To: Honorable Mayor and Members of the City Council

From: Housing Advisory Commission

Submitted by: Xavier Johnson, Chairperson, Housing Advisory Commission

Subject: Smoke-Free Multi-Unit Housing Ordinance Policy and Enforcement Modifications

RECOMMENDATION

The Commission recommends that City Council:

1. Make a short term referral directing the City Manager to correct current City Policies for enforcing BMC 12.70.035 so that these policies do not contradict the ordinance and BMC 12.70.035 requires that second and third complaints must refer to a violation or violations that occur after the 12.70.035(C) notice has been made.
2. Modify BMC 12.70.035 so that the requirement that signs be posted is enforced as part of the Residential Safety ordinance. Failure to post signage may result in fines, accordingly.
3. Modify BMC 12.70.035 so that repeated failure to provide new tenants with the City's brochure shall be guilty of an infraction. It shall also be an infraction for landlords to tell new tenants, in contradiction to the law, that tobacco smoking by some tenants is permitted.
4. Obtain an analysis of the financial impacts of the recommended modifications to the BMC.

POLICY COMMITTEE RECOMMENDATION

On September 29, 2020, the Health, Life Enrichment, Equity & Community Committee adopted the following action: M/S/C (Hahn/Bartlett) to send to Council a qualified positive recommendation including the following referrals: 1. Refer to staff to explore expanding the Ordinance to buildings with one unit; 2. Refer to staff to explore and consider improvements in the interface between the residential and commercial non-smoking Ordinances in mixed-use buildings; 3. Refer to staff to create a web-based complaint filing mechanism/service; 4. Refer to staff to create special protocols for chronic situations and to consider including requirements for better air filtration and purification as well as other measures to effectively manage chronic cases; 5. Refer to

staff to study the infraction and enforcement mechanisms and determine if they have any benefits and to consider other potential enforcement end points; 6. Refer to staff to look for opportunities for bias in enforcement and mechanisms to better guard against bias while still allowing for maximum action to resolve legitimate complaints; 7. Refer to staff to propose funding sources for enforcement; 8. Refer to staff to collect demographic data around complaints and targets of complaints (as much as possible); and 9. To return to Council with Ordinance amendments to accomplish the following: (a) amend or remove the 10-day language element (b) modify or remove the 2-complainant rule if warranted (c) adjust for the medical cannabis state law changes, (d) propose any and all other improvements beneficial to the Ordinance.

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

### SUMMARY

This recommendation proposes changes to the Berkeley Municipal Code to increase enforcement and information about the residential smoking policies by improving enforcement and regulation of our current policies.

### FISCAL IMPACTS OF RECOMMENDATION

The fiscal impacts for this recommendation are unknown at this time.

### CURRENT SITUATION AND ITS EFFECTS

Under the current laws within the City of Berkeley, multi-unit residential property owners are required to provide signage as well as informational brochures. Despite these requirements, code enforcement and other city programs do not presently cite property owners for the failure to provide adequate signage or information to the tenants.

In addition, there are numerous inconsistencies between the ordinance, the informational materials, and administrative processes that the City of Berkeley utilizes. The recommendations in this report are designed to ensure more effective enforcement while at the same time balancing the due process rights of all parties involved.

At its October 3, 2019 meeting the Housing Advisory Commission made the following recommendations:

Action: M/S/C (Sharenko/Lord) to recommend that City Council:

1. Make a short term referral directing the City Manager to correct current City Policies for enforcing BMC 12.70.035 so that these policies do not contradict the ordinance. Details of the contradictions between policy and law are explained below. Additionally, modify BMC 12.70.035 to require that second and third complaints must refer to a violation or violations that occur after the 12.70.035(C) notice has been made.

2. Modify BMC 12.70.035 so that the requirement that signs be posted is enforced as part of the Residential Safety ordinance. Failure to post signage may result in fines, accordingly.
3. Modify BMC 12.70.035 so that repeated failure to provide new tenants with the City's brochure shall be guilty of an infraction. It shall also be an infraction for landlords to tell new tenants, in contradiction to the law, that tobacco smoking by some tenants is permitted.
4. Obtain an analysis of the financial impacts of the recommended modifications to the BMC.

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

### BACKGROUND

The Housing Advisory Commission has received numerous complaints of the pitfalls and challenges present in our current system of enforcing the no smoking ordinance. Namely, there appears to be little means of recourse available to tenants, and little advertisement that the City even has a no-smoking policy. Over a number of meetings the HAC has discussed various ideas and strategies to address these concerns. This report presents a number of approaches approved by the Commission after much thought.

### ENVIRONMENTAL SUSTAINABILITY

There is a net improvement to the environment by advancing these policies as they will help to ensure better air quality for residents specifically and more generally in the City of Berkeley as more enforcement will lead to reduced smoking in residential areas.

### RATIONALE FOR RECOMMENDATION

#### **1. Aligning enforcement policy with the law**

The complaint form on the City's website contains a statement of policy (in an "Information Sheet") that is not consistent with ordinance. Item 5 on the information sheet reads (emphasis in the original):

"If it is the second complaint within a six month period a note is made and no additional notice will be sent to the person(s) responsible. The second complaint can be made by the same resident as the first complaint or by a resident in another unit in the same building. **The second complaint must be dated at least 10 days after the date of the notice sent by City of Berkeley to the person(s) responsible.** You may call the Tobacco Prevention Program (see #10) for this information."

The highlighted section is the problem. BMC 12.70.035(D) says:

"If within a six-month period following issuance of a notice under subdivision C, the City receives at least two complaints from residents of at least two separate units of the same multi-unit residence [...] *the person(s) responsible for the violation shall be guilty of an infraction [...]*" [emphasis added].

The 10-day delay rule, imposed by policy, contradicts the plain language of the law which contains no such delay period.

Presumably the delay period is meant to ensure that the person(s) responsible for the violation have time to receive, read, and act upon the warning. It may in fact be a reasonable ground for appeal that the second and third complaints arrived too quickly for the person(s) accused to have corrected the problem. Nevertheless, in individual circumstances, it might also be an unreasonable ground for appeal.

In any event, the ordinance does not support the 10-day delay policy.

It may be helpful to modify BMC 12.70.035(D) to make it clear that second and third complaints must refer to a violation or violations that occur after section (C) notice has been made.

It may be helpful to modify BMC 12.70.035(D) to use the date of delivery of a notice, and for the City to send notices using the USPS confirmed delivery service.

Returning to the policy declarations on the "Information Sheet", the City declares in item 6 (emphasis in the original):

If it is the third complaint, information about the person(s) responsible is sent to the City Enforcement team and a citation may be issued. ***Please note that the issuance of a citation is an absolutely discretionary process based on the City's resources, competing time constraints, and whether it is clear that the complaints are being filed in good faith.*** Only two complaints may be made by tenants in the same unit. All three complaints may not be made by tenants in the same unit.

The Code Enforcement Officer and City Attorney no doubt enjoy broad prosecutorial discretion but the statement above declares a policy wide open for prosecutorial abuse.

Criteria such as "competing time constraints" and "based on the City's resources" are so vague as to mean nothing more than "we'll enforce it if we feel like it". Further, there are no criteria or checks on the judgment of whether or not a complaint was made in good faith.

Such reservations of discretion are intimidating and excessive for what should be, in many cases, a nearly ministerial process of checking the complaint forms and issuing a citation.

The City Manager should form policy that if the Code Enforcement team decides not to issue an infraction, they must clearly state the reasons for their decision and inform the complaint filers of these reasons. Complaint filers must have a right to appeal and, if appropriate, amend their complaints with further evidence.

## **2. Enforce signage violations under the Residential Safety Program**

Smoke free housing is a safety issue and the signage is part of how that condition is maintained. Since such signage is unambiguously part of the condition of the physical structure, it should be treated as a building code requirement enforced under the Residential Safety program.

## **3. Enforcing brochure requirements**

Evidence from the Berkeley Considers survey and heard by HAC commissioners strongly suggests that in many cases, making everyone aware of the ordinance is enough for some tobacco smokers to change their behavior.

The City should take that seriously, and take steps to boost awareness of the ordinance.

Based on anecdotal evidence, tenants seem generally to have never received the brochure that informs them of their rights and responsibilities under the ordinance. In the Berkeley Considers survey, several respondents indicated their surprise at learning there is such an ordinance.

Making systematic violations of the brochure requirement an infraction provides tenants with an alternative mode of complaint that can potentially help resolve ongoing violations without risking personal retaliation for pointing the finger at a particular tobacco smoker or smokers.

Here, prosecutorial discretion can be again aided by policy. Upon credible evidence that a landlord is in violation, the Code Enforcement Officer might (by policy) issue a first warning to the property owner or landlord, and send the brochure to all units.

Finally, in one instance, an ad for tenants advises potential applicants that the building is "slowly transitioning" to non-smoking, implying that smoking is permitted and lawful by existing tenants. Systematically misinforming potential tenants of their rights should be treated as a violation of the brochure provision.

### **ALTERNATIVE ACTIONS CONSIDERED**

The Commission considered allowing the first complaint, the complaint which triggers a warning, to be made in confidence. The commission also considered affirmatively stating that City enforcement officials may provide evidence of violations based on their

personal observations. Objections were raised that such provisions might be unconstitutional and, even if not, would be used to unfairly evict tenants.

CITY MANAGER

See companion report.

CONTACT PERSON

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