



CITY OF EMERYVILLE

DATE: September 20, 2016

TO: Mayor and City Council

FROM: Michael A. Guina, City Attorney

SUBJECT: **Ordinance Of The City Council Of The City Of Emeryville Adding Sections 08 Through 10 of Chapter 2 of Title 1; And Adding Chapter 7 of Title 1, “Administrative Citations and Summary Abatement”; And Amending Section 5.37-07 of the Emeryville Municipal Code; CEQA Determination: Exempt Pursuant To CEQA Guidelines 15061(b)(3) And 15378(a)**

RECOMMENDATION

Staff recommends the City Council adopt the first reading of the proposed Ordinance (Attachment 1), adding sections 08 through 10 of Chapter 2 of Title 1; and adding Chapter 7 of Title 1, “Administrative Citations and Summary Abatement”; and amending section 5.37-07 of the Emeryville Municipal Code which provides for issuance of administrative citations and fines for violations of the Emeryville Municipal Code. The proposed Ordinance also allows violators to request an administrative hearing before imposition of fines.

BACKGROUND

Currently the Emeryville Municipal Code only allows for criminal and civil enforcement. The purpose of the proposed Administrative Citation Ordinance is to provide a third option in pursuing enforcement of the City’s codes.

Article XI, Section 7 of the California Constitution grants cities the power to make and enforce all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. Pursuant to those constitutional police powers, the City of Emeryville has adopted codes¹ to regulate and protect the public health, welfare, and safety. As discussed in further detail below, cities have several tools (criminal, civil, and administrative) to enforce their codes, and typically the facts and circumstances of the particular case dictate the appropriate tool to utilize to gain compliance with the municipal code.

¹ Examples include the City’s Municipal Code, Fire Code, Building Code, and Abatement of Dangerous Buildings Code.

Criminal Enforcement

Violations of the City's municipal code and all adopted codes may be punishable by criminal penalties. Chapter 2 of Title 1 of the Municipal Code allows for issuance of criminal citations for violations of the municipal code. The municipal code specifies whether a violation is punishable as either a misdemeanor or an infraction. A person convicted of a misdemeanor faces a penalty of a fine up to \$1000 and/or up to six months in jail. A person convicted of an infraction faces escalating fines, \$100 for the first offense, \$200 for the second offense, and \$400 for the third offense within a one year period. Criminal citations are typically issued by the Police Department and typically, are better suited to violations due to a person's conduct. Criminal citations are often used for gang, drug, or prostitution related offenses. The power and/or threat of arrest and jail time may be sufficient to compel the person to stop engaging in the conduct creating the violation. However, Emeryville historically has issued criminal citations for violations of the municipal code sparingly because of the burden on the judicial system. Anyone charged with a misdemeanor is entitled to a jury and a public defender. Moreover, criminal citations do not typically achieve code compliance for violations arising out of the planning or building code. For example, issuing a criminal citation for a land use violation does not necessarily abate the code violation.

Civil Enforcement

Civil enforcement involves the City suing the individual in civil court to enforce the municipal code. In such a lawsuit, the City is usually seeking injunctive relief, e.g., a Court order directing an individual (or entity) to either take affirmative action or to refrain from certain conduct to abate the municipal code violation. In some instances, the City may be able to seek a monetary award to cover its costs and attorney's fees to enforce the municipal code. Historically, the City sparingly has used civil enforcement to enforce the municipal code because of the time and cost of such enforcement. Civil enforcement cases generally require hiring outside counsel, and may be lengthy in nature because of the burdens on the judicial system. When utilized, it can be very effective in compelling code compliance. However, because of the cost of civil enforcement, it is often seen as a tool of last resort when administrative enforcement is not an effective tool.

Administrative Enforcement

Administrative enforcement is a typical code enforcement tool used by many cities to enforce the municipal code with minimal judicial involvement, if any at all. Under an administrative enforcement scheme, the City has the ability to issue administrative citations and fines for violations of the code, collect the fines, and conduct summary abatement if necessary. For the majority of people, the threat of monetary penalty is sufficient to compel code compliance. It is often the preferred enforcement tool for cities because the City is able to exercise control over the enforcement scheme and to develop a scheme that works for its jurisdiction, provided it satisfies due process. It is

also faster and less costly because the judicial system typically is not involved. For these reasons, many cities utilize administrative enforcement. The City does not have a general administrative citation ordinance. Instead, there are provisions in the Minimum Wage Ordinance (Section 5-37.07(b)) that allow for the City to issue administrative citations and fines for violations of the Minimum Wage Ordinance.

An Administrative Citation program is an effective tool to implement the will of the City Council, as expressed through the ordinances adopted into the municipal code. However code enforcement is not a “one size fits all” approach. Although the threat of a financial penalty is an effective tool to compel compliance for the majority of people, it is not necessarily effective to compel compliance amongst people on either end of the financial spectrum. For people who cannot afford to pay the fine and own no property, it is basically impossible to collect the fine, which means they are not deterred from engaging in the violating conduct. For people who are financially well-off, they may view any fine imposed as the cost of doing business, and not be deterred by the financial penalty. In these situations, either criminal or civil enforcement may be the more appropriate tool. Likewise, it is not always desirable or appropriate to use criminal penalties or civil injunctions to enforce provisions of the municipal code. Thus the code enforcement method selected is based on the nature of the violation, the characteristics of the party charged with the violation, and the desired outcome.

Although the City could continue to develop an administrative enforcement program for each regulatory program, similar to the Minimum Wage Ordinance, staff recommends that the City adopt a general administrative enforcement program that can support many, if not all, of the City’s regulatory programs. A single administrative enforcement program enables staff to consistently and efficiently enforce the administrative code. Furthermore, there is less public confusion when enforcement is consistent across the City’s regulatory programs, which ultimately, can lead to greater compliance. For example, the administrative process enforcement (described below and depicted on Attachment 1) would be the same for regulatory programs related to the proposed programs for tenant protections, medical marijuana and short term rentals. If the public knows that a fine always follows after a notice of violation, then hopefully, the majority will comply with the municipal code after receiving the notice of violation.

In addition, an administrative citation ordinance would provide an efficient and effective enforcement tool to support existing regulatory programs, some of which already support Council’s current priorities. Administrative citations, which impose monetary penalties, are commonly used to induce compliance for property-based regulations such as violations of the various property maintenance provisions of the municipal code. For example, an administrative citation ordinance would enable the Chief Building Official to enforce the building codes against substandard rental units to ensure habitable housing is available. Administrative citations may also be appropriate for: failure to obtain an annual business license tax certificate; failure to obtain necessary permits or licenses (such as a cabaret license); or violations of the noise ordinance. Administrative citations may also be useful in enforcing several of the recent and upcoming programs

including the Minimum Wage Ordinance, a Fair Work Week Ordinance, Medical Marijuana regulations, and the Smoking Pollution Control Ordinance.

Overall, an administrative enforcement scheme provides the foundation necessary to build effective regulatory programs.

DISCUSSION

Previous Consideration by the City Council

The City does not have a general administrative citation ordinance. On May 5, 2015, the City Council first considered adoption of a general administrative citation ordinance in conjunction with consideration of the Minimum Wage Ordinance. At the time, the Council was concerned about the impacts of the administrative citation ordinance, and therefore, opted to adopt administrative enforcement procedures only for the Minimum Wage Ordinance. (See Emeryville Municipal Code section 5-37.07(b).)

On July 5, 2016, the City Council considered a proposed ordinance at a study session. At the study session, the Council requested that the proposed ordinance include the ability to recover for staff's costs and attorney's fees. Government Code sections 38773 and 38773.5 provide authority that allows the City to recover its costs and attorney's fees in nuisance abatement actions. It is important to note that City staff will conduct a case by case analysis as to the recovery of costs and attorney's fees because there are other state laws that may govern such recovery, depending upon the nature of the administrative proceeding. However, Section 1-7.14 of the proposed ordinance provides the general authority to seek recovery of City costs and attorney's fees. In addition, the City Council expressed interest in having the Minimum Wage Ordinance subject to the same enforcement provisions of the Administrative Citation Ordinance. Therefore, the proposed ordinance amends Section 5-37.07 to repeal the enforcement mechanisms that are specific to the Minimum Wage Ordinance.

The City Council also requested information regarding whether there were any legal limitations on fines, and indicated that it would like to receive a regular update as to cases in which fines have been issued. Government Code section 53069.4 provides the authority for the City to adopt the administrative citation ordinance. Under this authority, if the violation of the ordinance is only an infraction (opposed to a misdemeanor), then the amount of the fine may not exceed the amount of the penalty associated with the infraction.² Section 1-2.01(b) provides that any person convicted of an infraction shall be punishable by a fine of not more than \$100.00 for the first conviction, not more than \$200 for the second conviction in one year, and not more than \$400 for the third conviction in one year. If the violation of the ordinance is a misdemeanor, then the City may impose a higher fine amount.³ Staff recommends

² Gov. Code, § 53069.4(a)(1).

³ 94 Ops. Cal. Atty. Gen. 39.

developing an administrative fine schedule consistent with the infraction schedule. If the experience with the fine schedule shows that the fines are not sufficient, then the City Council may consider increasing the fines for those violations that would constitute a misdemeanor. If the City Council adopts the first reading of the ordinance, at the next Council meeting, staff will bring forward a proposed resolution to establish a fine schedule upon the effective date of the ordinance as an agenda item following the second reading of the ordinance. The proposed resolution will also direct the City Manager to provide informational reports to the City Council regarding any administrative fines imposed.

Proposed Administrative Citation Program

Notice of Violation and Administrative Citation

The proposed ordinance establishes the authority for City officials who are charged with enforcing the City's codes to issue administrative citations for violations of those codes. The penalty for an administrative citation is a monetary fine, and the fine amount will be established by City Council resolution.

A City enforcement officer may issue an administrative citation for violations of the municipal code. Citations are issued to a responsible person, defined as the person who: causes or permits a code violation; a person whose agent or employee causes or permits a code violation; the owner or lessee of real property on which a violation occurs; or in the case of a minor, the parents or guardians of the responsible person.

Prior to issuing a citation, the enforcement officer shall issue a Notice of Violation. The Notice identifies: the location of the violation; the nature of the violation; a description of actions required to correct the violation and a deadline to comply; an order to abate the violation; a description of fines and penalties for non-compliance; and the ability of the responsible person to appeal the issuance of the citation. The responsible person shall have at least 7 days to comply with the notice of violation and order to abate before any fines are assessed.

If the responsible person does not provide timely compliance, the enforcement officer may issue an administrative citation. The citation orders the responsible person not only to correct the specified code violation but also to pay the specified fine. Payment of the fine does not relieve the responsible person from abating the violation.

Administrative Hearing

A responsible person may contest issuance of the notice of violation or administrative citation by filing a timely request for an administrative hearing. The administrative appeal is conducted by a hearing officer appointed by the City Manager. The City shall have the burden of proving by a preponderance of evidence that a violation exists to

support issuance of the citation. The hearing will take place within 45 days after a request for hearing is filed.

Prior to the hearing, the responsible person shall deposit the fine amount with the City. If the hearing officer upholds the citation and rules in favor of the City, the fine shall be retained by the City. However, if the hearing officer dismisses the citation and rules for the responsible person, the fine shall be returned. Procedures also allow for a responsible person to request a hardship waiver for payment of the advance deposit.

The hearing officer will consider any evidence presented by both the City and responsible person. The formal rules of evidence shall not apply, but all relevant evidence may be considered, and the hearing officer may exclude evidence he or she deems irrelevant or redundant. The responsible person may present witnesses in support of their position or in rebuttal to any witnesses testifying in support of the citation. The responsible person may also designate a representative to appear at the hearing.

The hearing officer shall issue a written decision within 30 days after conclusion of the hearing. The hearing officer may uphold, dismiss, or uphold in part and dismiss the remainder of the citation. As part of the ruling, the hearing officer may impose conditions and deadlines to correct the violation or require payment of penalties and fees. Any person may seek judicial relief from the hearing officer's decision.

Summary Abatement

If a property-related condition causes an imminent danger to the health and safety of the public, or when immediate action is required to prevent or mitigate the loss or impairment of life, health, or property, the City may conduct a summary abatement. A summary abatement will not be subject to the above requirements regarding issuance of a notice of violation or citation. Summary abatement is limited to those actions reasonably necessary to immediately remove the threatening condition.

Collection of Fines and Costs

Unpaid fines and costs, including costs associated with summary abatement, are considered a debt to the City. The City may refer any unpaid fines and costs to a collection agency. In addition, in the case of property-related violations, staff may bring a report to the City Council as a lien-attachment hearing, either to attach a lien or a special assessment against the property. The responsible person will be given notice of the lien-attachment hearing and submit an opposition. The City Council may make modifications to the lien attachment as it deems necessary.

FISCAL IMPACT

The City will also be required to retain one or more hearing officers on an as-needed basis to consider administrative hearings. Hearing officers are chosen based on the code enforcement issue. They may be persons with building, planning, police, or public works backgrounds, or they are attorneys. Hearing officers will charge an hourly rate which will vary based on the person's background.

LEGAL CONSIDERATIONS

The proposed Ordinance provides due process protections for violators. Before fines are assessed, the violator is provided a Notice of Violation and the ability to contest the citation before a neutral hearing officer. In the case of collection of fines and costs, the City also provides notice to the violator before undertaking action to collect the debt. As for property-related fines, the City Council conducts a lien-assessment hearing, at which the property owner has a further opportunity to be heard.

ADVISORY BODY RECOMMENDATION

The Community Preservation Committee considered the proposed Ordinance at its meeting on October 2014. The committee recommended the City Council approve and adopt the Ordinance.

CONCLUSION

Staff recommends that the City Council:

1. Introduce and read the ordinance by title only.
2. Take public comment on the ordinance.
3. Adopt the first reading of the ordinance.
4. Provide direction to staff regarding the proposed fine schedule.

PREPARED BY: Andrea Visveshwara, Assistant City Attorney

APPROVED AND FORWARDED TO THE EMERYVILLE CITY COUNCIL



Michael A. Guina,
City Attorney

Attachments:

1. Proposed Ordinance
2. Process of Administrative Citation