



MEMORANDUM

DATE: September 15, 2020
TO: Mayor and City Council Members
FROM: Michael Guina, City Attorney
SUBJECT: **Consideration Of Eliminating Criminal Penalties For Violations Of The Emeryville Municipal Code**

RECOMMENDATION

At its July 21, 2020 study session regarding Policing Policies, the City Council directed staff to bring forward an agenda item regarding the elimination of some or all criminal penalties for violations of the Emeryville Municipal Code. Per the City Council's direction, staff recommends that the City Council consider this staff report and any public comment and provide direction as to whether staff should begin the process of preparing legislation which would eliminate some or all criminal penalties for violations of the Emeryville Municipal Code.

BACKGROUND

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 its municipal code 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.

Criminal Enforcement

Violations of the City's municipal code may be punishable by criminal penalties.¹ Chapter 2 of Title 1 of the Emeryville Municipal Code allows for issuance of criminal citations for violations of the municipal code. There are two types of criminal penalties for municipal code violations: misdemeanors and infractions. Emeryville Municipal Code sections 1-2.01(e)-(f) provide what sections may be cited as a misdemeanor, and what sections may be cited as an infraction only. However, it is important to note that the charts laid out in Emeryville Municipal Code sections 1-2.01(e)-(f) may need updating to reflect the penalty provisions as specified elsewhere in the municipal code. Generally, all provisions of law that apply to misdemeanors also apply to infractions.²

The procedures for issuance of a citation by a police officer are generally the same for misdemeanors and infractions, especially for municipal code violations. In the field, there

¹ Gov. Code § 36900(a).

² Penal Code § 19.7.

are three levels of criminal/investigative interactions that a police officer may have with an individual. A police officer may have: 1) a consensual encounter; 2) a temporary detention or stop; or 3) an arrest. A temporary detention occurs when there is an official show of authority and a reasonable person would believe that they were not free to leave.³ An arrest is “taking a person into custody, in a case and in the manner authorized by law.”⁴ A police officer must have probable cause that a violation of the municipal code has occurred in the police officer’s presence to arrest an individual to cite the individual for the violation.⁵ Probable cause “exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime.”⁶

A temporary detention may transition to a warrantless, non-custodial arrest⁷ when the officer has probable cause to believe that the individual has committed a municipal code violation in the officer’s presence. During the arrest, the officer cites the individual for the violation. For misdemeanors, unless the individual demands to be taken before a magistrate, the police officer prepares a written notice to appear in court and releases the individual, upon proof of identity from the individual.⁸ For infractions, the police officer also prepares a written notice to appear in court, unless the individual fails to provide proof of identity.⁹ If the individual has been released but subsequently fails to appear in court as indicated on either a misdemeanor or infraction citation, the court theoretically may issue a warrant for the arrest of the individual.¹⁰ However, as a practical matter, the Alameda County Superior Court usually does not issue a warrant for failure to appear on infractions, and instead imposes a fine.

Although misdemeanors and infractions have the same burden of proof (beyond a reasonable doubt), misdemeanors and infractions differ once the citation moves through the judicial process. A person charged with a misdemeanor is entitled to a jury trial and public defender, if the individual cannot afford an attorney. If convicted of a misdemeanor, the individual faces a penalty of a fine up to \$1000 and/or up to six months in jail.¹¹ A person charged solely with an infraction is entitled to a hearing in front of a judge, but is not entitled to a public defender if the individual cannot afford an attorney. A person convicted of an EMC 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.¹² For an individual convicted of an EMC misdemeanor, if the individual cannot pay the fine, then the individual may be subject to imprisonment.¹³ For an individual convicted of an

³ *People v. Linn* (2015) 241 Cal.App.4th 46, 63.

⁴ Penal Code § 834.

⁵ Penal Code §§ 19.7; 836(a).

⁶ *People v. Price* (1991) 1 Cal. 4th 324, 410.)

⁷ A non-custodial arrest occurs when an individual may leave after receiving the citation. A custodial arrest occurs when the individual is taken into police custody. Arrests solely for municipal code violations are non-custodial.

⁸ Penal Code § 853.6(a)(1), (i)(5).

⁹ Penal Code §§ 853.6(a)(1), (i)(5); 19.7.

¹⁰ Penal Code § 853.6(f).

¹¹ Gov. Code § 36900(a); EMC § 1-2.01(a).

¹² Gov. Code § 36900(b); EMC § 1-2.01(b).

¹³ Penal Code § 1205.

infraction who willfully fails to pay the fine, then the individual may be subject to imprisonment for failure to pay the fine.¹⁴ However, if an individual convicted of an infraction has a true inability to pay the fine and has otherwise taken advantage of other options, such as community service, deferred payment date, or installment payments, the individual is not subject to imprisonment. A misdemeanor conviction may serve as the basis for revocation of parole or probation. An infraction conviction is not grounds for suspension, revocation, or denial of a license or revocation of parole or probation.¹⁵

In Alameda County, misdemeanors, even for a municipal code violation, are prosecuted by the Alameda County District Attorney's Office (the "DA").¹⁶ However, staff understands that the DA generally does not charge municipal code violations as misdemeanors. Rather, municipal code infractions are assigned to the Traffic Division of the Alameda Superior Court, and are prosecuted by the citing police officer, not the DA, if contested.

Criminal citations are issued by the Police Department and typically, are better suited to violations due to a person's conduct. The threat of arrest and/or jail time may be sufficient to compel the person to stop engaging in the conduct creating the violation. In addition, police officers have the discretion as to how they may cite an individual. For example, if a person's conduct violates both state law and a municipal code section, the police officer may choose to cite the individual with only an infraction of the municipal code, which only carries a fine, if the facts of the situation warrant a lower penalty. However, criminal citations do not typically achieve code compliance for violations arising out of the planning or building codes because a criminal citation does not compel the individual to abate the code violation.

In 2019, EPD did not issue any misdemeanor citations for violation of the municipal code. The vast majority of the citations written by EPD for violations of the municipal code arose out of parking violations. There were a small number of infraction citations issued for violations related to animal control, and one infraction citation issued for open container.

Civil Enforcement

Civil enforcement involves the City suing the individual or business 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

¹⁴ Penal Code § 1205.

¹⁵ Penal Code § 17(d); 19.8.

¹⁶ In other jurisdictions, the city attorney (or deputy) serves as the city prosecutor to prosecute criminal violations of the municipal code. All municipal code criminal prosecutions are in the name of the people of the State of California. (Gov. Code § 36900(a).)

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 used by many cities to enforce the municipal code with minimal judicial involvement, if any at all. The City has two types of administrative enforcement tools. The first tool is the issuance, modification or revocation of permits to regulate business conduct. Examples of these types of permits include Measure C permits for hotels, and operator permits for cannabis businesses. If the entity does not comply with the municipal code regulations, the City may decline to issue its annual permit, or modify or revoke an issued permit.

The City also has adopted an administrative enforcement scheme set forth in Chapter 7 of Title 1 of the EMC to issue administrative citations and fines for violations of the code, collect the fines, and conduct summary abatement if necessary. The City's administrative citation system is set up pursuant to the authority of Government Code section 53069.4. Although state law permits the City to issue administrative citations and fines for individual conduct, the City's regulatory scheme is designed to use administrative citations primarily for code violations tied to property. For example, prior to issuing an administrative citation or fine, the City must issue a notice of violation, and allow the individual a minimum of seven days to correct the violation.¹⁷ If an individual would like to contest an administrative citation and fine, the individual may appeal the citation and fine to a third-party hearing officer.¹⁸ A person then may file either a small claims lawsuit or a petition for writ of administrative mandate, if the person seeks judicial review of the hearing officer's decision.¹⁹ Fines are collected as a civil debt.²⁰ The City may also recover its costs and attorney's fees incurred in an enforcement action, which may become a lien against the property in certain situations.

Administrative citations are effective when the monetary penalty resulting from the citation (either because of the fine and/or the loss of a permit or license) 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.²¹ For these reasons, many cities utilize administrative enforcement.

An administrative citation program can be an effective tool to implement the will of the City Council, as expressed through the ordinances adopted into the municipal code. Although the threat of a financial penalty is an effective tool to compel compliance for the majority of people or organizations, it is not necessarily effective to compel compliance

¹⁷ EMC § 1-7.04(d).

¹⁸ EMC § 1-7.07.

¹⁹ Gov. Code § 53069.4(b).

²⁰ EMC § 1-7.15(c).

²¹ Occasionally, the City will need to obtain an inspection warrant from a Court to conduct a full investigation of a property.

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 or organizations 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.

Administrative citations and fines work well for violations that are tied to the property, for example a building code violation that requires a repair. However, administrative citations and fines do not work well for personal conduct, such as if a person was smoking in violation of the City's smoking pollution control regulations (codified at Chapter 29 of Title 5 of the EMC). For an administrative citation and fine to issue, the City needs to be able to identify the individual. With criminal violations, the City, through its police officers, has the ability to detain and arrest individuals, and through that process, can confirm identity through background checks. With an administrative citation and fine, the City does not have the power to detain and arrest, and therefore, unless there is consent from the individual to provide identification, the City must confirm an individual's identity through other means. For violations tied to property, staff can confirm an owner's identity through public record searches, such as property records. Furthermore, if an individual's personal conduct violated the municipal code, City staff could only issue the administrative citation and fine if the individual consented to City staff stopping the individual. The City does not have the means to compel the individual to stop for an administrative citation and fine, as it does for a misdemeanor or infraction. For a property related violation, if an individual does not provide consent for the City to inspect the property to document a violation, the City does have the ability to obtain an inspection warrant from the Court to document the violation and issue an administrative citation and fine.

DISCUSSION

Historically, the City has relied on education and technical assistance to gain both individual and business' compliance with the municipal code. For example, for businesses that are regulated through a permit or license regulatory scheme, such as cannabis businesses, cabarets, massage establishments, City staff informs applicants of the requirements, answers questions about code interpretation, and otherwise, assists applicants to achieve compliance so that the City may issue the applicable permit or license. Even with regulations that prescribe individual conduct, such as smoking pollution control regulations, the City engages in an educational campaign to achieve voluntary compliance.

When voluntary compliance cannot be achieved, the type of conduct that is to be deterred informs the type of enforcement tool the City may utilize. Often, the City may use multiple different types of enforcements tools to contain and abate a code violation.

Example 1: Code Enforcement at 6701 Shellmound

The code violations that plagued the property located at 6701 Shellmound ("Shellmound Site") illustrate how each enforcement tool targets different type of behavior. Historically, the property located at the Shellmound Site was occupied by two two-story buildings, an office building and a warehouse building. On March 24, 2016, the Planning Commission

approved a conditional use and design review permit to construct a 186-unit residential development on the Shellmound Site. Per EMC § 9-7.213, the permit would automatically expire after one year if a building permit had not been obtained. Unfortunately, development did not commence at the site immediately, and the property accumulated trash, weeds and graffiti in violation of the municipal code. As the expiration date for the permit approached, City staff urged the owner to clean up the property prior to seeking an extension on the expiration date, which would facilitate approval of an extension. The City's overall goal for this particular property was to have it redeveloped to provide additional housing during the housing crisis. The property owner brought the property into code compliance, and on June 22, 2017, the Planning Commission granted a two-year extension on the conditional use and design review permit.

Unfortunately, redevelopment of the Shellmound Site continued to stagnate, and as a result, trash, weeds, and graffiti began to accumulate. Beginning in December 2017, and continuing over the next six months, the Chief Building Official began to issue administrative Notices Of Violation and Orders To Abate Code Violation, and to work with the property owner to bring the Shellmound Site into compliance. In July 2018, Alameda County Fire Department responded to two fires within the buildings on the Shellmound Site, which were caused by individuals occupying the building. Considering the lack of an active sprinkler system, fire alarm system or public utilities, under the authority provided by the municipal code, which adopts state standard building codes, the Chief Building Official issued an administrative Notice and Order dated July 27, 2018, to immediately vacate the Shellmound Site, to secure and maintain the Shellmound Site and to either rehabilitate or demolish the structures ("Order"). The potential presence of asbestos and hazardous materials also made the Shellmound Site unsafe for occupancy. Despite the Order, individuals continued to occupy the Shellmound Site.

It became imperative to compel compliance with the Order to protect the immediate health, safety and welfare of the public. Given the administrative notices of violations and orders to abate were not effective in deterring individuals from occupying the Shellmound Site, staff needed to utilize a different enforcement tool. Often, if a notice of violation is ineffective at compelling code compliance, the next enforcement action would be to issue an administrative citation and fine. However, in this particular situation, an administrative citation and fine would not be effective in vacating the building. The property owner wanted to bring the property into compliance, but struggled to do so because of certain conditions. The individuals occupying the Shellmound Site in violation of the Order were experiencing homelessness, and could not afford to pay a fine. Furthermore, with an administrative citation or fine, EPD could not compel the individuals to speak with the officers. In sum, the levy of fines would only exacerbate the situation, not compel compliance.

To vacate the Shellmound Site and compel compliance with the Order, the City utilized a two-prong enforcement strategy. With respect to the property owner, the City utilized a civil enforcement tool, by filing a petition to request that the Court appoint a receiver to bring the property into compliance. Ultimately, the property owner did not want to lose control over the property, and came up with the resources necessary to comply with the Order. With respect to the individuals occupying the building, because occupying the building was a criminal violation of both the Order under the municipal code and state

trespass laws, EPD officers had the ability to detain individuals occupying the building in Shellmound Site. By detaining the individuals, EPD was able to connect the individuals to services with Berkley Food and Housing, and compel them to vacate the building in a voluntary manner. No citations, criminal or administrative were actually issued. However, if EPD had encountered resistance in vacating the property, EPD could have cited an individual for an infraction of the Order. If EPD cited for violation of state trespass laws, the citation would be a misdemeanor. With this two-pronged approach, compliance was finally achieved, allowing for the redevelopment of the Shellmound Site to occur.

Example 2: Code Enforcement of Smoking Pollution Control Regulations

Enforcement of the City's smoking pollution control regulations, codified as Chapter 29 of Title 5 of the EMC, illustrates the difference between the use of infractions versus the use of administrative citations and fines. In 2018, the City Council adopted Ordinance No. 18-003 to amend Chapter 29 of Title 5 of the EMC. Overall, Ordinance No. 18-003, amended the City's regulations to treat all smoke, whether tobacco or cannabis, or cigarette versus electronic smoking device the same. The ordinance also amended the City regulations to prohibit smoking in all multi-unit housing, whether it was owned (e.g., condominiums) or rental. To accomplish no smoking in multi-unit housing, the ordinance required either landlords or homeowner's association to take certain actions to notify residents of the prohibition on smoking.

As part of the enforcement strategy, the City and the Alameda County Public Health Department-Tobacco Control Program ("ACPHD-TCP") entered into a memorandum of understanding ("MOU") to identify the roles and responsibilities between ACPHD-TCP and the City as it relates to the City's no smoking regulations. Any complaint about violations of the City's no smoking regulations would be received by ACPHD-TCP. Once a complaint is received, ACPHD-TCP would draft a letter to the landlord, property owner, or condo association to provide education about the impact of secondhand smoke in multi-unit housing and information about the City's smoke-free policy. If the person smoking was known, ACPHD-TCP also would follow up with the smoker to educate the person of the City's no smoking regulations. The goal of ACPHD-TCP would be to obtain voluntary compliance with the City's ordinance. If after several attempts, ACPHD-TCP is not successful in achieving voluntary compliance, then the matter would be referred to the Emeryville Police Department ("EPD") for code enforcement.

If a matter was referred to EPD for enforcement, and a warning/notice of violation from EPD still did not yield code compliance, then EPD would utilize either administrative citation and fines or infraction as a penalty for non-compliance, depending upon whether the landlord or the tenant was the non-compliant party. For example, if a landlord has failed to include the required lease provision prohibiting smoking on site, or has failed to provide notice of the prohibition of smoking, then issuance of an administrative citation and fine may be appropriate to compel compliance. First, issuance of administrative citations and fines to property owners is easier because City staff can easily locate the property owner through public records. Second, a landlord would be subject to a fine for each lease that failed to contain the required lease provision, and for each tenant household who the landlord did not notify. These fines could accrue on a daily basis. Landlords typically are motivated to reduce operational costs, and therefore, would want

to remedy the situation to mitigate against daily fines. Third, the threat of administrative citations and fines are appropriate when after a notice of violation or warning, the party needs time to abate the violation. In this example, a landlord would need time to prepare addendums to leases and to provide notices to tenants.

If a tenant does not comply with the no smoking regulations, then EPD could cite the tenant for an infraction or issue an administrative citation and fine. For EPD to cite an individual for smoking in violation of the municipal code with an infraction, the individual must smoke in the presence of the citing officer, or a neighbor must be willing to make a citizen's arrest. By issuing a citation infraction, the individual who is smoking must provide the person's identification to the citing officer, which allows EPD to issue the citation to the correct individual. For example, the person smoking may be a guest, and not a resident of the building. EPD may also issue an administrative citation and fine, but that may be difficult if the individual who is smoking refuses to provide identification. If the matter is administrative, EPD cannot conduct a background search to identify the individual or compel the individual to provide identification. However, with an administrative citation and fine, EPD does not need to observe the violation to issue the administrative citation and fine. As long as there is substantial evidence to support the administrative citation and fine, EPD could issue it.

The practical enforcement provisions of an infraction and administrative citation and fine differ. With an administrative fine for one violation, if a person does not pay, especially for a first time violation, the City is unlikely to commence a debt collection action to collect the fine.²² With an infraction, the failure to pay a penalty violates a court order, which carries its own penalties.

The two examples illustrate the City's overall approach to code enforcement. First, staff utilizes efforts through education and technical assistance. When those efforts are not effective, staff must determine what is the overall goal and objective for code compliance. In other words, What Problem Needs Solving? Sometimes, the goal may be to facilitate a City goal, such as construction of housing as quickly as possible. Other times, the goal may be to protect the immediate safety, health and welfare of the public, or it may be to improve residents' daily lives. Identification of the goal informs what conduct may need to be deterred, which in turn, informs what code enforcement tool may be effective in the given situation.

Accordingly, as the Council considers whether to eliminate criminal penalties for violations of the municipal code, the Council may want to consider the following questions to guide its discussion and direction to staff:

1. Does the Council have concerns as it relates to making violations of the municipal code (either general or specific code provisions) subject to a misdemeanor violation? Subject to only an infraction penalty?

²² If there are numerous violations, with fines accruing on a daily basis, then there may be incentive for the City to file a debt collection action, especially if the unlawful conduct is willful.

2. If the Council is interested in eliminating only the misdemeanor penalty, is the Council interested in maintaining the misdemeanor penalty for certain types of violations, such as:
 - a. Violations for which there is no similar state law provision?
 - b. Violations that could impact the immediate public health, safety and welfare?
 - c. Violations by repeat offenders? For example, if someone receives three infractions in a one-year period for the same violation, the fourth violation may be subject to a misdemeanor?
3. If the Council is interested in eliminating both the misdemeanor penalty and the infraction penalty, is the Council interested in maintaining at least the infraction penalty for certain types of violations, such as:
 - a. Violations that could impact the immediate public health, safety and welfare?
 - b. Violations that relate to personal conduct (opposed to conduct by a business or entity)?

FISCAL IMPACT

The immediate fiscal impact would be to staff resources, which would be necessary to review the municipal code, and draft the amendments necessary to implement Council's direction. However, depending upon Council's direction, staff resources may need to be allocated differently to account for any changes in code enforcement. For example, if the City utilizes administrative citations and fines more frequently to gain code compliance, then the staff would need to allocate more time and effort to identifying individuals, providing individuals with an appeal process, and retaining regular, qualified, independent hearing officers to hear appeals. The City may need to evaluate how it collects fines on a regular basis. The City also may need to consider whether civil enforcement may need to increase in the absence of criminal penalties.

STAFF COMMUNICATION WITH THE PUBLIC

None.

CONCLUSION

In sum, there are primarily three different types of code enforcement tools: criminal, civil and administrative. The tool utilized depends upon the conduct that is being deterred. Staff requests that the Council provide direction related to the elimination of criminal penalties for violations of the Emeryville Municipal Code.

PREPARED BY: Andrea Visveshwara, Assistant City Attorney

**APPROVED AND FORWARDED TO THE
CITY COUNCIL OF THE CITY OF EMERYVILLE:**



Michael Guina, City Attorney

ATTACHMENTS

- Chart Comparing Penalties