



Office of the City Manager

ACTION CALENDAR  
December 11, 2007

To: Honorable Mayor and Members of the City Council

From: *PK* Phil Kamlarz, City Manager

Submitted by: Zach Cowan, Acting City Attorney  
Gregory Daniel, Code Enforcement Supervisor

Subject: Ordinance Establishing Operating Standards for Alcohol Outlets  
and Fee Options

RECOMMENDATIONS

Adopt the first reading of an Ordinance establishing operating standards and an inspection program for alcohol establishments.

FISCAL IMPACTS OF RECOMMENDATION

The additional cost of the inspection program is expected to be \$150,000, to fund 1.5 FTE, annually (General Fund). The proposed fee is designed to yield this amount. Thus this proposal is revenue neutral. Revenue and expenses for this program will be managed through the Code Enforcement Unit of the City Manager's Office.

CURRENT SITUATION AND ITS EFFECTS

On January 30, 2007, the Council directed staff:

- to report back on enforcement resources and approaches, including FTE resources after meeting with BAPAC; and
- to review other agency "deemed approved" ordinances relative to required training (consider recommendation of the California Grocers Association in letter dated January 30, 2007) and record keeping, establishment of "best practices" and minimum operating standards, look at provisions for those that are grandfathered in and options (including amortization) for implementing minimum operating standards that would capture grandfather[ed] and nonconforming uses. Staff reported back on July 10, 2007, with a draft operating standards ordinance and various fee options to fund an inspection program to enforce compliance with those standards.

## BACKGROUND

During the summer and fall of 2007, staff revised the draft operating standards ordinance and developed a fee structure that reflected the Council's comments on July 10<sup>th</sup>.

In brief, the ordinance was revised to eliminate certain standards that did not apply to restaurants, and an hourly fee for inspections was chosen over the various flat fee options presented on July 10<sup>th</sup>.

Staff also met with representatives of BAPAC and industry stakeholders representing restaurants, retail outlets, and the business community at large.

In general, the comments received in those meetings focused on whether there should be any fee at all, the amount and fairness of the proposed fee, and the feasibility of exempting alcohol establishments with good compliance records from the fee. There were few comments on the operating standards themselves.

In this report we will first briefly review the proposed ordinance (Attachment 1), with particular attention to changes proposed since since July 10<sup>th</sup>. We will then discuss the proposed fee (see Attachment 2).

### 1. Proposed Operating Standards Ordinance

The key points of the proposed ordinance are as follows.

All alcohol establishments, both off-sale and on-sale would be required to comply with various operating standards, covering issues such as:

- obeying applicable laws (including Responsible Beverage Service training and avoiding nuisances);
- notifying the City when an outlet closes;
- ensuring that the premises are secure by having adequate lighting and visibility,
- keeping landscaping in good condition;
- removing refuse, litter and graffiti, and repairing broken windows, promptly;
- keeping adequate records of employees and police calls;
- labeling packaging with the name of the outlet;
- refusing to sell to or serve customers who create public nuisances; and
- not allowing loitering inside the outlet.

The operating standards would apply to all retail alcohol outlets. Each outlet would be expected to operate at all times in a manner that fully complies with the proposed operating standards. All outlets would be inspected and monitored on an annual basis for conformance with the proposed operating standards, and off-

sale outlets would be inspected quarterly. As noted, this would require additional staff resources.

We anticipate that minor violations would generally be addressed by giving operators notice and an opportunity to correct. However establishments responsible for material violations would be required to comply with supplemental standards and undergo additional inspections:

- enrollment in a mandatory 2 year supplemental inspection program;
- availability for quarterly meetings with neighborhood residents;
- installation of video cameras; and
- better cash handling procedures.

Significant violations might also trigger nuisance abatement/revocation proceedings under the Zoning Ordinance and/or administrative citations. As with all enforcement, these decisions would be made on a case-by-case basis.

In an October 25<sup>th</sup> letter, BAPAC suggested a number of amendments to the proposed ordinance, most of which have been or already were incorporated. These included making the administrative procedures under the ordinance clear (see § 9.88.070) and explicitly referring to the Responsible Beverage Service Training ordinance (see § 9.88.040.A.2).

BAPAC has also suggested regular data collection and program evaluation and quarterly stakeholders meetings. These are excellent ideas, but cannot be legislated in the ordinance itself.

Another suggestion was to declare all inactive grandfathered alcohol sales uses terminated. The Council previously referred to the Planning Commission a zoning amendment that would allow the City to “lapse” uses where alcohol sales are discontinued for 90 days (down from one year), and this is being heard currently. Staff recommends that the effectiveness of this amendment be evaluated before pursuing additional ones. Moreover, under California law, uses may not be automatically “lapsed”; rather the affected party must be given notice and an opportunity to be heard. In any case, this proposal could only be adopted as a zoning amendment after referral to the Planning Commission, so it could not be adopted as part of the operating standards ordinance now before the Council.

Finally, BAPAC made a suggestion concerning the fee structure, which is addressed in the next section of this report.

A letter from the California Restaurant Association asks that the City “consider such options as requiring restaurants with no major violations during an inspection to have only 1 inspection per year. After 2 consecutive years of compliance, the City would show leniency if a violation were to occur. After 3

consecutive years of compliance, an establishment in good standing would receive a pass and would not have a fee the following year.”

Under the currently proposed ordinance restaurants would already only be inspected once a year. The remainder of this proposal is not currently included in the proposed ordinance and would be very difficult to administer. However if the Council wishes, staff can evaluate other ways to reduce the burden on on-sale establishments that consistently maintain full compliance.

The ordinance would be enforced by an additional FTE City enforcement employee with ½ FTE administrative support, operating out of the Code Enforcement Office. The estimated cost would be \$150,000 per year. We propose that this amount would be raised through an hourly fee as discussed in more detail in the next section of this report. Fees would be charged to the operator of the outlet, but would also be the liability of the property owner.

## 2. Proposed Hourly Fee

On July 10<sup>th</sup>, staff presented to the Council various fee options and variants, but did not proposed any particular fee structure. The Council expressed concern that any fee be fair in the sense that the amount paid by any establishment reflect its level of compliance, and generally expressed its desire that fees be as low as possible.

In response staff developed an hourly fee of \$221.75 per hour for inspections, and this was the fee option that was discussed with the various stakeholders.

The thrust of the comments we received in stakeholder meetings, from both industry and BAPAC representatives, was that the fee structure should be fair, that alcohol establishments should be treated equally (*i.e.*, there should not be differential fees based on the type of outlet), and that responsible outlets should not be punished (via a mandatory fee) because other outlets violate the operating standards.

In principle, staff does not disagree with any of these comments. However if the City is to incur a recurring cost for enforcing the operating standards, as BAPAC has urged repeatedly, it must have a reliable recurring revenue source. The only such source is a fee.

Taking this as a given, there appeared to be general agreement that a fee that reflects the actual enforcement burden imposed by a given establishment is preferable to any sort of flat fee. This is very similar to the guidance the Council gave staff on July 10<sup>th</sup>.

As a result, we propose that operating standard inspections be billed on an hourly basis, at the rate of \$221.75 per hour. The basis for this rate is as follows. It is anticipated that a routine inspection involving no violations would be completed within one hour. Establishments with violations requiring follow-up inspections would, of course require additional time.

The Alcohol Inspection Program will conduct 568 inspections annually. The 86 off-sale outlets will be inspected four times each year for a total 344 annual off-sale inspections. The 224 on-sale outlets will only be inspected once annually.

As shown in Attachment 2, performing this number of inspections, including the anticipated number of violations and reinspections, will require a total of 1770 hours of time by a code enforcement officer and supervisor, plus office support, of which 653 hours will be spent in actual inspections of alcohol establishments. The hourly cost per on site inspection hour is therefore  $\$144,799.52 / 653 = \$221.75$ .

Another alternative, proposed by BAPAC in its October 25<sup>th</sup> letter, is to have a flat annual fee that pays for the full cost of the basic inspection program, with an additional hourly fee for violators. Assuming 310 alcohol establishments, the flat annual fee would be  $\$144,799.52 / 310 = \$467.10$  per alcohol establishment. Violators would be assessed additional fees at the hourly rate of \$221.75 for supplemental inspections.

An alternative flat fee structure could be a two tier flat fee structure involving an annual fee of \$300 for on-sale establishments, which receive only one inspection per year, and \$902.32 for off-sale establishments, which receive four inspections.

These fees are derived as follows. A fee of \$300 per year for 224 on-sale establishments would yield \$67,200, leaving a balance of \$77,599.52. This balance divided by 86 (the number of off-sale establishments) yields an annual fee for off-sale establishments of \$902.32.

The letter from the California Restaurant Association generally requested that fees be as low as possible, and that if inspections are billed on an hourly basis that they be minimized. While we sympathize with the Association's financial concerns, we believe that the fee proposals set forth above are the minimum necessary to sustain a viable program.

Finally, in order to keep pace with inflation, any fee should be indexed to the cost of living in the immediate San Francisco Bay Area, or per capita personal income growth in the state, as verified by official United States Bureau of Labor statistics.

#### RATIONALE FOR RECOMMENDATION

See preceding discussion.

ALTERNATIVE ACTIONS CONSIDERED

See preceding discussion.

CONTACT PERSON

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Attachments:

- 1: Ordinance
- 2: Table showing fee analysis

ADDING NEW CHAPTER 9.88 TO THE BERKELEY MUNICIPAL CODE TO IMPOSE STANDARDS FOR THE PREVENTION OF NUISANCES BY ALCOHOL OUTLETS

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Chapter 9.88 is hereby amended to read as follows:

**Chapter 9.88            Operating Standards for Alcohol Outlets**

- 9.88.010 Applicability**
- 9.88.020 Findings and Purposes.**
- 9.88.030 Definitions.**
- 9.88.040 Operating Standards.**
- 9.88.050 Compliance Inspection**
- 9.88.060 Inspection Program**
- 9.88.070 Enrollment in Supplemental Inspection Program Upon Violation**
- 9.88.080 Violation—Penalty—Public Nuisance—Finality of Administrative Citations.**
- 9.88.090 Private right of action.**
- 9.88.100 Fees.**

**9.88.010 Applicability**

A. The provisions of this Chapter shall apply to all Alcohol Outlets.

B. The provisions of this Chapter are intended to create standards and a monitoring program designed to prevent alcohol outlets from creating a public nuisance, and are in addition to any other applicable obligations imposed on such outlets imposed by federal state or local law.

C. Nothing in this Chapter is intended nor shall prevent the City from imposing more stringent, site-specific operating requirements and conditions through other applicable permitting and approval and enforcement processes. In the event of a conflict between an operating regulation set forth in this Chapter and a requirement or condition contained in any other applicable permit or approval, the more stringent or restrictive requirement or condition shall apply.

**9.88.020 Findings and Purposes.**

A. The City Council finds that there has been a pattern and history of alcohol outlets conducting their operations with respect to the sales and service of Alcoholic Beverages in manner which violate existing laws and standards by

sales to persons who are inebriated, who are under the age of 21 and who engage in public drunkenness drunk driving and other conduct constituting a public nuisance in the vicinity of such outlets and thus that significantly reduce the quality of life in both commercial and residential areas and pose a threat to public safety.

B. The City Council further finds that sales and service of alcohol after 10:00 p.m., in particular, frequently and materially contributes to public nuisance conditions that significantly impair the livability and quality of residential and commercial neighborhoods.

C. According to a 2004 Safer California Universities Study, 28.1% of UC Berkeley students said it was “very easy” or “easy” to find a bar within two miles of campus where they could buy alcohol without showing an ID, 29.5% for a liquor/grocery or convenience store, and 31.40% for a restaurant.

D. Thirty-seven percent (37%) of onsale outlets tested by the Berkeley Police in minor decoy operations between June 2004 and May 2006 sold to a minor.

E. According to a recent Alameda County BHCS AOD Youth Survey 23% of Berkeley High students (and 40% of Berkeley Alternative students) gain access to alcohol through local supermarkets and liquor stores.

F. The purpose of this Chapter is to address these problems by mandating appropriate operating standards for Alcohol Outlets, which will reduce public nuisances associated with Alcohol Outlets.

#### **9.88.030 Definitions.**

As used in this Chapter, the following words and phrases have the meanings set forth in this Section:

A. “Alcoholic Beverage” shall have the same meaning as in Business & Professions Code section 23004 or any successor section.

B. “Alcohol Outlet” means any physical location or structure from which any Alcoholic Beverage may be sold or served at retail pursuant to a license granted by the California Department of Alcoholic Beverage Control.

C. “Problem Alcohol Outlet” means any Alcohol Outlet that has been the location of a violation of any operating standard or supplemental operating standard set forth in this Chapter or any violation of laws or regulations relating to licensing of alcohol sales or service under state law.

D. “Operator” means any person responsible for the way in which an Alcohol Outlet is maintained, managed or operated at any time.

E. “Owner” means any person who owns the real property in which the Alcohol Outlet is located or has an ownership interest in an Alcohol Outlet.

#### **9.88.040 Operating Standards.**

The Owner and Operator of an Alcoholic Outlet shall keep the premises thereof in a clean and safe condition by, at a minimum, complying with the following operating standards.

A. General standards.

1. Taking affirmative steps to ensure that patrons of the establishment do not engage in activities that constitute a nuisance as defined in Section 23B.64.020.

2. Complying with Chapter 9.84 (Responsible Beverage Service) of this Code.

3. Notifying the City of Berkeley Zoning Officer whenever an Alcohol Outlet has been, or is planned to be, closed for at least 15 business days or the licensee has surrendered his or her license to the California Department of Alcoholic Beverage Control.

4. Complying with all provisions of local, state and federal laws, regulations and orders.

B. Security.

1. Windows, including the glass area of doors, shall be kept reasonably clean.

2. Lighting within and at the entrance(s) to the Alcohol Outlet shall be installed and maintained to ensure the safety of the public and the employees of the Alcohol Outlet as determined by the Berkeley Police Department.

3. Landscaping on the premises shall be maintained in such a manner that it does not provide any location for hiding or concealment.

4. The Alcohol Outlet shall be operated in a manner that does not create or result in any significant adverse impacts upon its premises or within 300 feet thereof.

C. Appearance and cleanliness.

1. All refuse on the premises shall be properly removed and stored, and disposed of, each business day.

2. Litter shall be removed from the premises regularly.

3. Broken windows shall be repaired within 48 hours.

4. Paint and trim shall be kept in good condition.

5. Graffiti shall be removed within 24 hours.

6. Driveways, sidewalks and landscaping on the premises of the Alcohol Outlet shall be kept clear and clean.

D. Operations.

1. Records shall be kept of all employees and Operators and the hours each employee or Operator works at the Alcohol Outlet.

2. The Operator and any employees shall log all calls to law enforcement and emergency service agencies. The log shall include at a minimum, the time and date of the call, the agency called, the reason for the call and the person who made the call. Such logs shall be retained for 1 year and shall be made available to the Berkeley Police Department on request.

3. No item sold shall be packaged except in a clear bag bearing the name of the establishment.

4. The Operator and any employees shall refuse to sell any product or provide any service to any patron who, in the vicinity of the Alcohol Outlet, and

shall promptly report all such incidents and the identity of the perpetrator to the Berkeley Police Department:

- a. drinks Alcoholic Beverages in public or on neighbors' properties;
- b. creates excessive noise, particularly between the hours of 11:00 p.m. and 7:00 a.m., that would cause any discomfort or annoyance to any reasonable person of normal sensitiveness residing in the area in connection with his or her patronage of the Alcohol Outlet;
- c. violates chapter 13.36 or 13.37 or impairs the free use of the sidewalk by engaging in intimidating or threatening conduct, such as such as blocking the sidewalk or threatening passers-by;
- d. litters on public or private property;
- e. buys or attempts to buy Alcoholic Beverages while obviously intoxicated;
- f. defecates or urinates on public or the private property of another; or
- g. commits any disturbance of the peace or other violation of law in the vicinity of the Alcohol Outlet.

5. The Owner shall promptly pay any fee or charged imposed under this Chapter.

E. Additional Standards for type 20 and 21 Alcohol Outlets.

1. The area of windows above 36' from exterior grade shall be unobstructed by any window covering which would prevent viewing of the interior of the premises from the exterior of the premises during business hours.
2. No more than 10% of the area of windows and 10% of the glass area of doors may be obscured by signage or personal property or merchandise.
3. No person may loiter inside the Alcohol Outlet for more than 10 minutes without purchasing products sold there.
4. Interior lighting shall be installed and maintained to ensure visibility of all areas to the extent permitted by shelving, stock, etc.
5. A non-flammable refuse container shall be placed inside the premises near the entrance, and shall be emptied frequently enough to ensure that it does not overflow.

F. Additional Standards for Problem Alcohol Outlets.

In addition, Problem Alcohol Outlets shall comply with the following Supplemental Operating Standards, as determined by the Berkeley Police Department, and be enrolled in the mandatory inspection program pursuant to Section 9.88.070.

1. The Operator shall meet with residents within a three-block area to discuss any issues related to the Alcohol Outlet's operation and impact on the neighborhood, at least every quarter.
2. Up to 2 exterior video cameras shall be installed in a location or locations determined by the Berkeley Police Department and maintained to record all activity during operating hours that takes place in the immediate vicinity of the Alcohol Outlet but that is not visible from register. Recording media shall be

retained for a period of 90 days from the date of recordation and shall be made available to the Berkeley Police Department on request.

3. To the extent feasible, cash registers shall be moved to a location that is readily visible from nearby exterior locations.

4. Proper cash handling procedures and practices that reduce the risk of robbery shall be implemented.

#### **9.88.050 Compliance Inspection**

All City employees who have any responsibility for enforcing or administering this Chapter shall have the power and authority to enter an Alcohol Outlet during regular business hours to inspect its and determine compliance with the provisions of this Chapter.

#### **9.88.060 Inspection Program**

A. The Owner of every Alcohol Outlet shall pay an annual inspection program fee as set forth in a resolution adopted by the City Council.

B. The fee shall be used for the administration of the inspection program under this Chapter and to conduct regular inspections.

C. In the event payment has not been received after thirty (30) days from the date the notice to pay was mailed, an additional penalty assessment shall be added to the required inspection program fee pursuant, in an amount set forth in a resolution adopted by the City Council.

D. Failure to pay the fee required pursuant to this Chapter shall not excuse the Operator or Owner from the responsibility of ensuring compliance with the other provisions of this Chapter.

E. The City Manager or his or her designee may cause any Alcohol Outlet to be inspected at any time during regular business hours to determine if it is in compliance with the provisions of this Chapter, other applicable provisions of this Code, and state law. All inspections shall be performed in accordance with Chapter 1.16 of this Code.

F. The Owner and Operator shall be provided with a written report of an inspection within a reasonable time after the inspection.

G. Should any inspection reveal noncompliance with any of the provisions of this Chapter, a reinspection shall be conducted after allowing a reasonable time to cure the violation. The cost of any such reinspection shall be billed to the Owner in the amount set forth in a resolution adopted by the City Council.

#### **9.88.070 Enrollment in Supplemental Inspection Program Upon Violation.**

A. An Alcohol Outlet shall be enrolled in a supplemental inspection and monitoring program:

1. if a reinspection under Section 9.88.060.G discloses that a violation has not been remedied; or

2. in the event of a material violation as determined by the City Manager or his/her designee.

B. Enrollment in the supplemental inspection and monitoring program shall be for an initial period of 24 months. An Alcohol Outlet shall continue to be enrolled in the supplemental monitoring and inspection program until 24 months have passed since its most recent prior violation of an Operating Standard or Supplemental Operating Standard.

C. Notices of violation of this Chapter, including enrollment under this Section, shall be in writing. When an Operator or Owner is notified of a violation of this Chapter, including enrollment under this Section, he or she may appeal the determination of violation as follows.

1. In cases where the written notice required by this Section takes the form of an administrative citation under Chapter 1.28, the cited person, Operator or Owner may appeal the violation as set forth in Chapter 1.28, and the determination of violation shall be final as set forth in Section 9.88.080.

2. In all other cases, the cited person, Operator or Owner may appeal the determination of violation in the same manner and subject to the same timelines and procedures set forth in Chapter 1.28 except that the decision of the hearing officer shall be final.

#### **9.88.080 Violation—Penalty—Public Nuisance—Finality of Administrative Citations.**

A. Violation of this Chapter is a misdemeanor punishable as set forth in Chapter 1.20 of this code, but may be charged, in the discretion of the prosecutor, as an infraction.

B. 1. Nothing in this Chapter in any way limits any other remedy that may be available to the City, or any penalty that may be imposed by the City, including but not limited to, under Chapters 1.24, 9.84, 23B.60 and 23B.64.

2. Any violation of this Chapter is a public nuisance, as well as a violation of applicable law, for purposes of Chapters 1.24, 23B.60 and 23B.64.

C. A person shall be conclusively presumed to have committed any violation of this Chapter that was the subject of any administrative citation that became final within the prior 12 months.

D. For purposes of this Chapter, an administrative citation becomes final upon the expiration of the deadline for the cited person to request an administrative hearing under Chapter 1.28, or, if an administrative hearing is requested and the hearing officer determines that the violation occurred, the expiration of the deadline for seeking judicial relief as set forth in Chapter 1.28.

E. If a person cited seeks judicial relief, the administrative citation is final when the resulting judgment is final if the judgment determines that the violation occurred.

### **9.88.090 Private right of action.**

A. Any person or entity may bring a private action for injunctive relief and/or damages to prevent or remedy a violation of this chapter.

B. No action may be brought under this section until the plaintiff has given written notice of the violation to the defendant and the defendant has failed to take prompt steps to remedy the violation. Any person providing written notice pursuant to this subsection shall provide a copy of such notice to the City Manager at the same time as it is provided to the defendant.

C. In any action prosecuted under this section a prevailing plaintiff may recover reasonable attorneys' fees.

### **9.88.100 Fees.**

The City Council may establish by resolution fees for administration of this chapter, including, but not limited to, flat or graduated annual fees, hourly fees, and supplemental fees, any or all of which may reflect whether and to what extent the Alcohol Outlet upon which the fee is imposed has complied with this chapter.

Section 2. If any section, subsection, sentence, clause or phrase or word of this ordinance is for any reason held to be unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Berkeley hereby declares that it would have passed and adopted this ordinance and each and all provisions thereof irrespective of the fact that any one or more of said provisions be declared unconstitutional.

Section 3. Copies of this Bill shall be posted for two days prior to adoption in the display case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way. Within fifteen days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

## ATTACHMENT 2

### Code Enforcement – Estimated Annual Operating Standards Enforcement Cost

<b>Annual Inspection by Category</b>		
Type 20/21 Off-sale	86 Outlets @ 4 inspections per year	344.00
Type 40/41/42/47/48 On-sale	224 Outlets inspected annually	224.00
<b>Total Annual Inspections</b>		<b>568.00</b>

<b>Code Enforcement Hourly Rates</b>			Including Fringe
Code Enforcement (CE) Officer		\$35.35	\$53.47
Code Enforcement (CE) Supervisor		\$41.69	\$63.06
Office Specialist		\$27.08	\$40.96
<b>Inspection</b>	<b>Time</b>		
Records Research	568 @ 40 min		\$20,247.31
CE Officer Site Inspection <sup>†</sup>	568 @ 40 min		\$20,247.31
CE Officer (.5 FTE) Site Inspection <sup>††</sup>	284 @ 40 min		\$10,123.65
Issue Notice of Violation	170 @ 60 min		\$ 9,089.90
CE Officer Re-inspection <sup>†</sup>	255 @ 20 min		\$ 4,544.95
<b>Supervision</b>			
Pre-Inspection Review	568 @ 30 min		\$17,909.04
Post-Inspection Review	568 @ 30 min		\$17,909.04
<b>Clerical Support</b>		<b>Hours/Week</b>	
File Maintenance	1.5 hr/day	7.5	
Data Entry	1.5 hr/day	7.5	
NOV mail merge/mailing	1.5/2 days	3	
NOV/Inspection Report PDF	1.5/2 days	3	
Total clerical weekly hours/salary		21	\$44,728.32

<b>Total Estimated Annual Cost of Inspection Program</b>	<b>\$144,799.52</b>
<b>Total Program Cost / Total Site Inspection Hours<sup>†</sup></b>	<b>\$144,799.52 / 653 = \$221.75</b>

\*1.5 Code Enforcement Officers are assigned to inspections.