



Office of the City Manager

CONSENT CALENDAR
October 27, 2009

To: Honorable Mayor and Members of the City Council
From: Phil Kamlarz, City Manager
Submitted by: Claudette Ford, Director, Department of Public Works
Subject: Ordinance: BMC New Chapter 9.88 for Tax Relief Action to Cut Commuter Carbon (TRACCC)

RECOMMENDATION

Adopt first reading of an Ordinance adding a new Chapter 9.88 to the Berkeley Municipal Code (BMC) requiring all employers with 10 or more employees to offer employees a pre-tax payroll deduction option for alternative commute expenses as allowed by Federal Tax law, Internal Revenue Code section 132(f).

FISCAL IMPACTS OF RECOMMENDATION

This Ordinance will not impose any significant new costs to the City. The Public Works Transportation Division has existing staff capacity to provide education and instructional materials to employers and employees through the City's web page, printed materials, media outreach, and public presentations. The outreach materials will require modest printing/duplicating expenditure. Informational brochures will be included in the annual business license renewal mailing.

Transportation Division staff will manage the outreach and technical assistance activities to increase compliance. Employees or others may report alleged violations of the ordinance to the City. Transportation Division staff would receive any such complaints and provide information and instructional materials to the employer to support their compliance. If the employer fails to respond to the informational material provided by the City, the employee would have a Private Right of Action, enabling them to bring an action in superior court against the employer.

CURRENT SITUATION AND ITS EFFECTS

This year, there has been a 90% increase in the level of tax relief available to Berkeley employers and employees from participating in a pre-tax commute benefit program that supports commuting by transit, vanpools, and bicycles. In February 2009, the Emergency Economic Recovery Act signed into law by President Obama raised the amount of pre-tax income that workers enrolled in employer-sponsored commuter benefits programs can use to pay for mass transit from \$120 per month to \$230 per month. In addition, Federal Tax Code was also amended to create a new \$20 per month

pre-tax benefit for bicycle commuters that can be used for the purchase of bicycles, bicycle accessories, maintenance, and storage.

Employees who commute by transit or vanpool can reduce their commute costs by 40%, saving up to \$1,000 or more each year. Taking a portion of their salary as a pre-tax benefit reduces the employee's taxable income, which lowers their Federal Insurance Contributions Act (FICA) (7.65%), State (6.5%) and Federal Income Tax (25%-28%, depending on tax bracket.).

Employee pre-tax deductions also lower employers' taxable payroll. Employers save up to 9% on payroll taxes, which include FICA (7.65%), State Unemployment Insurance, and State Disability Insurance (approximately 1.5%.) If employees elect the maximum \$230 deduction, employers would save \$240 per employee per year in payroll taxes.

At present, there are no laws or other regulations that require employers in Berkeley to offer employees a pre-tax payroll deduction option for commute expenses. Regardless, many employers already offer their employees this option, including Bayer, Alta Bates, BUSD, UC Berkeley, Tipping/Mar and the City of Berkeley. Over the years, Conditions of Approval for many development projects have included a requirement to offer transit benefits to employees, although there has been insufficient recordkeeping or enforcement of these Conditions.

Faced with relatively low rates of participation despite the tax advantages and a decade of outreach, some local governments have passed a citywide ordinance requiring participation. In August 2008, the San Francisco Board of Supervisors adopted an ordinance requiring that employers in San Francisco with 20 or more employees offer a commuter benefits program. On July 7, 2009, the City of Richmond, CA unanimously adopted a similar ordinance which applies to employers with 10 or more employees. In July, the San Francisco Airport Commission also adopted an ordinance for SFO employers.

These programs provide several choices for employers; they must offer their employees at least one of the following Federal Internal Revenue Service (IRS) qualifying options:

- (1) the employer authorizes employees to use pre-tax wages to purchase transit passes and/or vouchers for vanpools; or
- (2) the employer provides transit passes and/or vouchers for vanpools at a value at least equal to the value of a transit pass; or
- (3) the employer directly operates vanpools or buses for its employees.

The San Francisco Chamber of Commerce endorsed the San Francisco ordinance, stating that, while "the Chamber generally opposes mandates on business, the city's

newest requirement that businesses with 20 or more employees working in San Francisco establish a program to promote the use of public transit can be an economic benefit. In addition to helping to reduce greenhouse gas emissions by getting people out of cars and onto transit, the law can be a money-saver for businesses.”

BACKGROUND

This Ordinance has been crafted to comply with City Council direction and the General Plan. On March 13, 2007, the City Council approved a recommendation sponsored by Councilmember Dona Spring requesting that the City Manager expand participation in the Commuter Check transit voucher program by having staff develop policies and strategies, *including developing an ordinance*, to increase mass transit use via pre-tax transit benefits.

The proposed Ordinance is also consistent with the General Plan, which calls for the City to encourage the participation of major local employers in transit programs:

Policy T-3, 7: “...encourage area employers to participate in the existing commuter Check program.”

Policy T-10: “To reduce automobile traffic and congestion and increase transit use and alternative modes in Berkeley, support, and when appropriate, *require* programs to encourage Berkeley citizens and commuters to reduce automobile trips, such as:...2. Participation in a Commuter Check Program.”

T-14: “Encourage private employers to reduce the demand for automobile travel through transportation demand management programs that include elements, such as:
1. Trip reduction incentives such as ‘Commuter Check’....”

This ordinance is also consistent with Transportation Control Measures (TCM) in the Bay Area Air Quality Management District’s 2005 Ozone Strategy.

TCM 1 calls for the region to:

- Support legislation to maintain and expand incentives for employer programs, such as tax deductions and/or tax credits for employer efforts to promote ridesharing, transit and other commute alternatives.
- Promote Commuter Check transit subsidy program to employers.

RATIONALE FOR RECOMMENDATION

Commute travel which accounts for approximately 25 percent of trips and 33 percent of vehicle miles traveled on a typical weekday. National research has found that employer trip reduction programs can decrease vehicle trips to a typical worksite by 5-10 percent.

This Ordinance is designed as a “win-win-win”:

- Employers get tax relief from lower payroll taxes, with minimal administrative burden.
- Employees get tax relief from lower taxable earnings, leading to lower income taxes.
- Employees gain a financial incentive to commute via transit, vanpool or bicycle, which reduces vehicle miles traveled, parking problems, air pollution and greenhouse gas emissions.

Staff has developed this Ordinance through a consultative process with local employers and business associations. Staff held two Focus Groups (February 3 & March 10, 2009) with large and small Berkeley employers, met with the Chamber of Commerce Government Affairs Committee, and discussed in detail with business associations and a number of individual businesses.

Most large Berkeley employers already have a transit benefits program in place, including Bayer, Alta Bates Hospital, Safeway, the Berkeley/Albany YMCA, and Clif Bar. Company representatives from these businesses gave unanimous support of the concept. They commented that it is important to hold employer workshops to support businesses starting a program. Among the smaller employers there was unanimous agreement that measures needed to be taken to entice employees out of their cars, both to free up parking for customers and for environmental reasons. Some businesses expressed concern about adding any additional burden on businesses, and about enforcement. Once it was explained that voluntary options have been ineffective and costly, there was an understanding of the need for this approach.

The City has the legal authority to adopt this Ordinance, based on existing City police powers. San Francisco's ordinance has not been challenged to date. This ordinance will apply to approximately 1,000 employers in Berkeley, and would exclude the city's 3,300 employers with fewer than 10 employees.

ALTERNATIVE ACTIONS CONSIDERED

Education encouraging voluntary action has had very limited results. In the past seven years, staff has worked with the YMCA and BUSD to implement pre-tax commute programs. Continuing at this pace would fail to comply with City Council directive to expand and increase pre-tax commute benefit programs.

CONTACT PERSON

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Attachments:

- 1: Ordinance
- 2: Letters of Support
- 3: Example outreach materials (San Francisco)

ORDINANCE NO. #,### - N.S.

ADDING CHAPTER 9.88 TO THE CITY OF BERKELEY MUNICIPAL CODE
MANDATING A COMMUTER BENEFIT PROGRAM

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

Section 1. That a new Chapter 9.88 is added to the Berkeley Municipal Code to read as follows:

CHAPTER 9.88

COMMUTER BENEFIT PROGRAM

Sections:

9.88.010	Findings
9.88.020	Definitions
9.88.030	Commuter Benefit Program
9.88.040	Enforcement
9.88.050	Severability

9.88.10 Findings

- A. The City of Berkeley is committed to protecting the public health, safety, welfare and environment. Air pollution is one of the major public health threats in Berkeley and contributes to asthma and other respiratory diseases. Encouraging commuters to use public transit, vanpools, and bicycles to reach their place of employment will reduce air pollution from private cars.
- B. Berkeley's General Plan Policies T-3, T-10, and T-14 call for programs and laws to encourage employers to enable more employees to use public transit and other alternative commute modes through provision of pre-tax commute benefits.
- B. The Bay Area Air Quality Management District's 2005 Ozone Strategy Transportation Control Measures 1 and 13 target commute travel, which accounts for approximately 25 percent of trips and 33 percent of Vehicle Miles Travelled on a typical weekday.
- C. The Federal Transit Administration Transit Cooperative Research Program Report 107 (2005) reports that employer transit benefits programs reduce single occupancy commuting by an average of 10%.

- D. Expanded commuter benefits programs are expected to help the City achieve its adopted goal to reduce Berkeley greenhouse gas emissions 33% by 2020, and 80% by 2050.
- E. The City of Berkeley and many public and private employers in Berkeley currently offer employees the opportunity to elect to use pre-tax dollars to purchase qualifying transit and vanpool expenses.
- F. The City will assist employers to establish the required commuter benefit programs through its website, print materials, webinars, and other technical assistance.
- G. Federal Tax law, Internal Revenue Code section 132(f), allows employers and employees to reduce the cost of public transit by enabling employers to deduct as a business expense, qualified transportation benefits that the employer provides for employees' personal transportation costs for commuting to and from work, or by allowing employees to elect to purchase qualifying transit passes or reimbursement for vanpool rides with pre-tax dollars. Additional benefits and maximum deduction allowances may be changed or added to IRS Code section 132(f) from time to time. Any commute benefits allowed pursuant to IRS Code section 132(f) as amended from time to time, including any added after passage of this ordinance are to be included in this ordinance by reference, with the exception of pre-tax commute parking benefits.
- H. This Chapter will preserve and enhance the environment within the City of Berkeley and is exempt from the requirements of the California Environmental Quality Act ("CEQA"), pursuant to CEQA Guidelines 15307 and 15308.

9.88.020 Definitions

Whenever used in this Chapter, the following terms shall have the meanings set forth below.

- A. "Alternative Commute Mode" shall mean public transit (bus, train, ferry, etc.) vanpool, carpool (including "casual carpool"), bicycling, and walking.
- B. "City" shall mean the City of Berkeley.
- C. "Covered Employee" shall mean any person who:
 - 1. Performed an average of at least ten (10) hours of work per week for compensation within the geographic boundaries of Berkeley for the same employer within the previous twelve months; and
 - 2. Qualifies as an employee entitled to payment of a minimum wage from the employer under the California minimum wage law, as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission, or is a participant in a Welfare-to-Work Program.
- D. "Covered Employer" shall mean an employer, as defined in Section 18 of the California Labor Code, for which an average of ten (10) or more persons per week performs work for compensation. In determining the number of Covered Employees performing work for an employer during a given week, all persons performing work for compensation on a full-time, part-time or temporary basis, including those who perform work outside of the geographic boundaries of Berkeley, shall be counted, including

persons made available to work through the services of a temporary services or staffing agency or similar entity. "Covered Employer" shall not include any governmental entity.

E. "Transit Expense" shall mean any pass, token, fare card, voucher, or similar item entitling a person to transportation on public transit, including but not limited to, travel by ferry, bus, light rail or train by AC Transit, BART, AMTRAK, Caltrain, or other regional public transit provider.

F. "Vanpool" shall mean a 'commuter highway vehicle' within the meaning of 26 U.S.C. § 132(f)(5)(B), as the federal law may be amended from time to time, which currently means any highway vehicle that has a seating capacity of at least 6 adults (not including the driver), and at least 80% of the mileage use of which can reasonably be expected to be:

1. for the purpose of transporting employees in connection with travel between their residences and their place of employment; and
2. on trips during which the number of employees transported for such purposes is at least ½ of the seating capacity of such vehicle (not including the driver).

G. "Bicycle Expense" shall mean reasonable expenses incurred by the employee for the purchase of a bicycle and bicycle improvements, repair, and storage, if such bicycle is regularly used for travel between the employee's residence and place of employment, or other allowable expenses as allowed by IRS code 132(f).

9.88.030 Commuter Benefit Program,

No later than one (1) year after the effective date of this Chapter, all Covered Employers shall provide at least one of the following transportation benefit programs to Covered Employees:

A. A Pre-Tax Election: A program, consistent with allowable pre-tax commute benefits, except parking benefits, allowed by Internal Revenue Code section 132(f), allowing employees to elect to exclude from taxable wages and compensation employee commuting costs incurred for transit expenses, vanpool expenses, or bicycle expenses, up to the maximum level allowed by federal tax law, or

B. Employer Paid Benefit: A program whereby the employer supplies an annual, monthly or other form of transit pass, or reimbursement for equivalent vanpool expenses at least equal in value to the purchase of the appropriate benefit which shall not exceed the cost of an adult monthly AC Transit regular pass, for the public transit system requested by each employee or to reimburse qualified vanpool charges; or

C. Employer Provided Transit: Commute transportation furnished by the employer at no cost to the employee in a vanpool or bus, or similar multi-passenger vehicle operated by or for the employer.

9.88.040 Enforcement

9.88.041 Employee complaints to City.

A. An employee who alleges violation of any provision of the requirements of this chapter may report such acts to the City. City staff will respond to any such complaints by providing compliance information and instructional materials to the employer.

B. Any complaint received shall be treated as a confidential matter, to the extent permitted by law. Any complaint received and all investigation documents related thereto shall be deemed exempt from disclosure pursuant to California Government Code, Sections [6254](#) and [6255](#). (Ord. 6548-NS § 2, 2000)

9.88.042 Private rights of action.

A. An employee claiming violation of this chapter may bring an action in the Superior Court of the State of California against an employer. In order to file such an action, the employee must have made a complaint to the City and allowed sufficient time for the employer to institute a program as required by this Chapter in response to that complaint.

B. No remedy set forth in this chapter is intended to be exclusive or a prerequisite for asserting a claim for relief to enforce any rights hereunder in a court of law.

C. Nothing in this chapter shall be interpreted to authorize a right of action against the City. (Ord. 6548-NS § 2, 2000)

9.88.050 Severability

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this Chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this title, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional.

Section 2. 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.