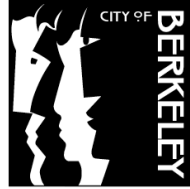


## DRAFT AGENDA



### BERKELEY CITY COUNCIL MEETING

TUESDAY, OCTOBER 28, 2014

7:00 PM

COUNCIL CHAMBERS - 2134 MARTIN LUTHER KING JR. WAY

TOM BATES, MAYOR

Councilmembers:

DISTRICT 1 – LINDA MAIO  
 DISTRICT 2 – DARRYL MOORE  
 DISTRICT 3 – MAX ANDERSON  
 DISTRICT 4 – JESSE ARREGUIN

DISTRICT 5 – LAURIE CAPITELLI  
 DISTRICT 6 – SUSAN WENGRAF  
 DISTRICT 7 – KRISS WORTHINGTON  
 DISTRICT 8 – GORDON WOZNAK

*This meeting will be conducted in accordance with the Brown Act, Government Code Section 54953. Any member of the public may attend this meeting. Questions regarding this matter may be addressed to Mark Numainville, CMC, City Clerk, 981-6900.*

*The City Council may take action related to any subject listed on the Agenda. The Mayor may exercise a two minute speaking limitation to comments from Councilmembers. Meetings will adjourn at 11:00 p.m. - any items outstanding at that time will be carried over to a date/time to be specified.*

### Preliminary Matters

#### Roll Call:

**Ceremonial Matters:** *In addition to those items listed on the agenda, the Mayor may add additional ceremonial matters.*

**City Manager Comments:** *The City Manager may make announcements or provide information to the City Council in the form of an oral report. The Council will not take action on such items but may request the City Manager place a report on a future agenda for discussion.*

**Public Comment on Non-Agenda Matters:** *Five persons selected by lottery will have two minutes each to address matters not on the Council agenda. Persons wishing to address the Council on matters not on the Council agenda during the initial ten-minute period for such comment, must submit a name card to the City Clerk in person at the meeting location and prior to commencement of that meeting. Five cards will be drawn by the City Clerk to determine the speakers who will be allowed to comment during the first round of public comment on non-agenda matters. The remainder of the speakers wishing to address the Council on non-agenda items will be heard at the end of the agenda. Name cards are not required for this second round of public comment on non-agenda matters.*

**Public Comment on Consent Calendar and Information Items Only:** *The Council will take public comment on any items that are either on the amended Consent Calendar or the Information Calendar. Up to three speakers will be entitled to two minutes each to speak in opposition to or support of a Consent Calendar Item. The Presiding Officer will ask additional persons in the audience to stand to demonstrate their respective opposition to or support of the item.*

*In the event that there are more than three persons wishing to speak either in opposition to or support of a "Consent" item, the Presiding Officer will move the item to the beginning of the Action Calendar. Prior to moving the item, the Presiding Officer will fully inform those persons in the audience of this process.*

*Additional information regarding public comment by City of Berkeley employees and interns: Employees and interns of the City of Berkeley, although not required, are encouraged to identify themselves as such, the department in which they work and state whether they are speaking as an individual or in their official capacity when addressing the Council in open session or workshops.*

## **Consent Calendar**

*The Council will first determine whether to move items on the agenda for action or "Information" to the "Consent Calendar", or move "Consent Calendar" items to action. Items that remain on the "Consent Calendar" are voted on in one motion as a group. "Information" items are not discussed or acted upon at the Council meeting unless they are moved to "Action" or "Consent".*

*After hearing from public speakers regarding items remaining on the Consent Calendar, any Council Member may move any Information or Consent item to "Action", however no additional items can be moved onto the Consent Calendar at that point. Following this, the Council will vote on the items remaining on the Consent Calendar in one motion.*

*For items removed from the Consent Calendar to the Action Calendar for additional public comment, at the time the matter is taken up during the Action Calendar, public comment will be limited to persons who have not previously addressed that item during the Consent Calendar related public comment period.*

- 1. Formal Bid Solicitation and Request for Proposal Scheduled for Possible Issuance After Council Approval on October 28, 2014**  
**From: City Manager**  
**Recommendation:** Approve the request for proposals or invitation for bids (attached to staff report) that will be, or are planned to be, issued upon final approval by the requesting department or division. All contracts over the City Manager's threshold will be returned to Council for final approval.  
**Financial Implications:** Various Funds - \$120,000  
Contact: Christine Daniel, Finance, 981-7300
  
- 2. California Mental Health Services Authority Joint Exercise of Powers Agreement Update**  
**From: City Manager**  
**Recommendation:** Adopt a Resolution authorizing the City Manager to execute the documents necessary to sign the amended California Mental Health Service Authority (CalMHSA), Joint Exercise of Powers Agreement (JPA), in order to continue jointly participating with other state mental health jurisdictions in developing, funding and administering an expanded array of mental health and/or behavioral health services and programs as determined on a regional, statewide or other basis.  
**Financial Implications:** Mental Health Service Act - \$500  
Contact: Jane Micallef, Health, Housing and Community Services, 981-5400

## Consent Calendar

### 8. Renewal of the Solano Avenue BID for Calendar Year 2015

**From: Solano Avenue BID Advisory Board**

**Recommendation:** Adopt a Resolution: 1. approving the Annual Report and preliminary budget on proposed improvements in the District for calendar year 2015; 2. declaring an intention to levy an assessment to finance improvements in the District for calendar year 2015; and 3. directing the City Clerk to schedule a public hearing on the renewal of the assessment for November 18, 2014.

**Financial Implications:** See report

Contact: Eleanor Hollander, Commission Secretary, 981-7530

## Council Consent Items

### 9. City Manager Referral: Cell Phone Ordinance Referral to City Manager

**From: Councilmember Anderson**

**Recommendation:** Refer to City Manager for the creation of an ordinance to have cell phone retailers give to consumers who purchase a phone, a factual, informational handout referring the user to their cell phone manufacturers' disclosure regarding the recommended separation distance for use against the body.

**Financial Implications:** See report

Contact: Max Anderson, Councilmember, District 3, 981-7130

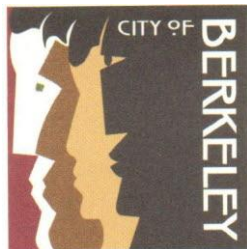
### 10. "Good Government" Package

**From: Councilmember Arreguin**

**Recommendation:** Refer to the following policies to the Fair Campaign Practices and Open Government Commission for discussion and to make a recommendation back to the City Council: 1. Public Calendars: require the Mayor and City Councilmembers to maintain a public calendar of meetings that relate only to City business and require such meetings to be posted in advance to the extent practicable but no later than 1 week after the meeting occurred, along with a short description of the purpose and attendants of the meeting. The City Clerk will post the public calendars of the Mayor and Council on the city's website. 2. Revolving Door Policy: prohibition of former City staff, for a specified period of time after they left employment with the City, from lobbying current staff on matters relating to City business. 3. Conflict of Interest Disclosures: require outside firms, when commissioned by the City for research report(s), to disclose any relevant conflicts of interest 4. Contract Disclosures: require specified types of contracts under 50k to be reported to Council. Any increase in a city contract resulting in a contract amount over \$50,000 requires Council approval for the increase, even if the initial contract was approved by City Manager action. 5. Political Polling: prohibition on including in city funded community surveys questions on resident favorability of elected officials. 6. Independent Ballot Questions: designation of the City Attorney's Office as the sole drafter of a ballot question on an initiative or Council-initiated ballot measure, and the Council's role is relegated to approving the ballot question without modification.

**Financial Implications:** Staff time

Contact: Jesse Arreguin, Councilmember, District 4, 981-7140



Office of Councilmember  
Max Anderson, District 3

CONSENT CALENDAR

October 28, 2014

To: Honorable Mayor and Members of City Council

From: Councilmember Max Anderson

Subject: City Manager Referral: Cell phone ordinance referral to City Manager

RECOMMENDATION:

Refer to City Manager for the creation of an ordinance to have cell phone retailers give to consumers who purchase a phone, a factual, informational handout referring the user to their cell phone manufacturers' disclosure regarding the recommended separation distance for use against the body.

PROPOSED WORDING:

**"The Federal Government requires that cell phones meet radio frequency (RF) exposure guidelines. Don't carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is turned ON and connected to a wireless network. This will prevent exposure to RF levels that may exceed the federal guidelines.**

***"Refer to the instructions in your phone or user manual for the recommended separation distance."***

The above advisory will appear in the form of an informational handout to be handed to consumers by the retailer at the time of purchasing a cell phone.

NOTE - City staff to provide specific font size and design of the handout as well as text about this being a requirement of the City of Berkeley with the city's official seal.

By adopting this proposal, the City of Berkeley will ensure that consumers are made aware of the Federal Communications Commission (FCC)'s required disclosure to never carry or use a cell phone directly against the body (i.e., in a pocket or tucked into a bra) when turned ON and connected to a wireless network in order to avoid exposure to radio frequency (RF) energy that may exceed the federal exposure guideline.

### FINANCIAL IMPLICATIONS:

World renowned attorney, Harvard Law Professor and Director of Edmund J. Safra Center for Ethics, Lawrence Lessig, has offered to provide legal advice to the City of Berkeley as well as to defend this proposed ordinance pro bono.

### BACKGROUND:

Essential to understanding the intent of this recommendation is the fact that what is proposed is not a new consumer disclosure, but rather an attempt to further the effectiveness of cell phone manufacturers' existing consumer disclosures. The problem with the current manner in which this information is disclosed is that it is written in "legalese" and located in the fine print of user manuals or hidden within screens on the phone itself where it is unlikely to be seen by the typical consumer.

The nature of the disclosure itself is to direct consumers to never wear or use a cell phone directly against the body (as in a pants or shirt pocket or tucked into a bra or waistband) when turned ON and connected to a wireless network. Doing so, the consumer risks exposure to radiofrequency (RF) radiation that may exceed the federal exposure guideline established by the Federal Communications Commission (FCC).

### **Why are the "fine print" separation distance advisories located within phones and user manuals?**

FCC rules state that cell phones must be tested for compliance with exposure guidelines - but, they allow the phones to be tested held a small "separation distance" away from the torso simulating being carried or used in a belt clip or holster.

The testing protocol for "body-worn" use was established prior to 1996 when phones were assumed to be carried on the body in a holster or belt clip and when they were not designed to be worn and/or used in pockets or tucked into bras, typical ways that phones are used today.

Because the 18 year old federal guidelines have not been updated since they were originally established in 1996, the FCC still assumes that all cell phones are only carried or used on the body in a holster or belt clip. Manufacturers (wrongfully) assert that all their customers always use a holster or belt clip to maintain the required separation distance when carried or used on the body.

### **The FCC does not test cell phones the way they are typically used in a pocket directly against the body.**

Therefore, if a cell phone is used in a pocket or tucked into a bra or waistband, the consumer may be exposed to RF radiation levels that exceed the federal exposure guideline.

In July, 2012, the Government Accountability Office (GAO) issued a report called Exposure and Testing Requirements for Mobile Phones Should Be Reassessed in which the following statements appear:

***"FCC has also not reassessed its testing requirements to ensure that they identify the maximum RF energy exposure a user could experience. Some consumers may use mobile phones against the body, which FCC does not currently test, and could result in RF energy exposure higher than the FCC limit. " ... "FCC should formally reassess and, if appropriate, change its current RF energy exposure limit and mobile phone testing requirements related to likely usage configurations, particularly when phones are held against the body. "***

Because of the separation distance allowed during testing against the body (torso), the FCC requires that manufacturers must inform consumers to always maintain this separation distance used at testing to ensure that the exposure levels remain below the "as tested" levels:

***"Specific information must be included in the operating manuals to enable users to select body-worn accessories that meet the minimum test separation distance requirements. Users must be fully informed of the operating requirements and restrictions, to the extent that the typical user can easily understand the information, to acquire the required body-worn accessories to maintain compliance. Instructions on how to place and orient a device in body-worn accessories, in accordance with the test results, should also be included in the user instructions. All supported body-worn accessory operating configurations must be clearly disclosed to users through conspicuous instructions in the user guide and user manual to ensure unsupported operations are avoided."***

**[FCC KDB 447498 DOI General RF Exposure Guidance- Section 4.2.2(4)]**

The above FCC guideline is the basis for the advisories that appear in the fine print of every cell phone user manual.

In spite of the FCC requiring that consumers be made aware of this information, manufacturers print this necessary separation distance advisor in fine print "legalese" and locate the consumer disclosure in difficult to find sections of cell phone user manuals or buried within the text on the phone itself.

NOTE: This proposed ordinance seeks to make consumers aware of their cell phone manufactures' "separation distance" disclosure as required by the FCC. It also reiterates in consumer-friendly language the manufacturers' message that consumers must never use or carry a cell phone directly against the body (while turned ON and connected to a wireless network).

Examples of "fine print" separation distance advisories for popular cell phones:

Apple iPhone 5- Found on the Apple website at:  
<https://www.apple.com/legal/rfexposure/iphone5,1/e/>

And, can be found on the iPhone navigating through the following screens:  
Settings>General> About> Legal> RF Exposure

"To reduce exposure to RF energy, use a hands-free option, such as the built-in speakerphone, the supplied headphones or other similar accessories. Carry iPhone at least 10mm away from your body to ensure exposure levels remain at or below the as-tested levels. "

**Samsung Galaxy 85** - Refer to "Health & Safety & Warranty Guide" (pg 3)

Also found on the phone navigating through the following screens: Settings>About Device>Legal Information>Samsung Legal>Health & Safety

"For body-worn operation, this phone has been tested and meets FCC RF exposure guidelines when used with an accessory that contains no metal and that positions the mobile device a minimum of 1.0 cm from the body."

**BlackBerry Bold** - Found in user guide "Safety and Product Information"-

"Use hands-free operation if it is available and keep the BlackBerry device at least 0.59 in (15mm) from your body (including the abdomen of pregnant women and the lower abdomen of teenagers) when the BlackBerry device is turned on and connected to a wireless network."

**Motorola Moto X** - Found in user guide in the section titled "Safety, Regulatory & Legal" (pg 64)

"When using the mobile phone next to your body (other than in your hand or against your head), maintain a distance of 1.5 cm (3/4 inch) from your body to be consistent with how the mobile phone is tested for compliance with RF exposure requirements."

**Why should we be concerned about consumers not seeing the manufacturers' "fine print" advisories to keep their cell phone a small distance from the body?**

The manufacturers' separation distance consumer advisories hidden in the manuals range from requiring a minimum usage distance of from 5 mm (1/5 inch) to 25 mm (1 inch) away from the torso. They seem like such small distances - why should consumers be informed?

Because, as a matter of physics, the microwave emissions from cell phones decrease sharply as the distance is increased. Even a 5 mm separation distance makes a significant difference in reducing the exposure levels consumers will receive when the phone is used or carried directly against the body.

**Consumers have the right to know!**

**How is this proposed legislation different from what San Francisco adopted in 2011?**

On September 10, 2012, the 9<sup>th</sup> Circuit Court of Appeals ruled in an unpublished decision that the Cell Phone Fact Sheet the city had required to be distributed at the point of sale went beyond facts as it also contained recommendations from the city that do not appear in the user manuals as to

what consumers should do if they want to reduce exposure to radiofrequency energy emissions (such as to "turn off the phone when not in use").

Because the Court saw this situation as mandating controversial statements that were not purely factual, they ruled that the city's law violated industry's 1st Amendment Constitutional rights. Berkeley's proposed Cell Phone Right to Know ordinance seeks to inform consumers of the "body-worn separation distance" disclosure and directs consumers to their particular phone manufacturers' required "separation distance" as this crucial safety information is not visible in the packaging.

The FCC requires that consumers be made aware of these "body-worn separation distance" disclosures - so, this action is clearly in alignment with requirements already promulgated by the federal regulatory agency that oversees cell phone radiation exposure guidelines.

### **What are the facts about San Francisco's settlement of their Cell Phone Right to Know Law?**

**From the San Francisco Department of Environment website:** "San Francisco believes the Ninth Circuit's opinion is deeply flawed, but the City is bound by that opinion, as the district court would be in further litigation over San Francisco's ordinance. Accordingly, San Francisco settled the case with CTIA in exchange for a waiver of attorneys' fees. However, because the Ninth Circuit's decision is unpublished, it is not binding on any jurisdiction other than San Francisco, and it would not be binding on any other district court in litigation over any legislation from another jurisdiction imposing disclosure requirements on retailers. Furthermore, under the Federal Rules of Appellate Procedure, no party is permitted to cite the Ninth Circuit's unpublished opinion as precedent in future litigation."

The CTIA dropped their suit (upon San Francisco's repeal of the law) **prior to the court ruling on their petition for reimbursement of \$112,097 in attorney fees.**

**For more information, please read these relevant news articles:**

**<http://www.newsweek.com/iphone-6-bendgate-apple-says-your-iphone-shouldnt-go-your>**

**=**

**[pocket-avoid-radiation-273313](#) - "Apple's Instructions Say Not to Keep Your Phone in Your Pocket Anyway"**

**<http://content.time.com/time/magazine/article/0,9171,2029493,00.html> - "Cell-Phone Safety: What the FCC Didn't Test"**

### **CONTACT:**

Councilmember Max Anderson Council District 3 510981-7130