



City Manager

## ACTION CALENDAR

July 23, 2020

To: Honorable Mayor and Members of the City Council  
From: D. Williams-Ridley, City Manager  
Submitted by: A. R. Greenwood, Chief of Police  
Subject: Companion Report: Police Review Commission Recommendation on a Revised Berkeley Police Department Policy 300, Use of Force

### RECOMMENDATION

Adopt Policy 300, as submitted by the Berkeley Police Review Commission, incorporating the amendments proposed in this companion report below; adopt the attached Resolution.

### SUMMARY

The Berkeley Police Department serves our community in a unique, challenging environment, according to policies reflecting our community's values. We have considerable crime issues. As in many cities, our community struggles to respond to those who are visibly suffering from mental illness, drug addiction, and poverty, and other conditions. These all play out within structures fundamentally undermined by systemic racism and injustice. Safety nets for those suffering are broken. Police are often involved because of a safety issue. Resources and health-care and criminal justice systems are over-stressed, and effective solutions are unclear.

Against this backdrop, our officers respond to over 70,000 calls for service each year. We make several thousand arrests, and issue thousands of citations. We do this work with a minimal reliance on force. We accomplish our work with an average of 32.4 uses of force per year from 2015 through 2019<sup>1</sup>.

It is *extremely* rare for the Department to have to use deadly force. In the past ten years, we've been involved in three shootings, the most recent of which occurred in 2012.<sup>2</sup> Over the past four decades, our Special Response Team has been involved in

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<sup>1</sup> 2015-2019: 162 uses over five years, avg. 32.4/yr. By year: 2015-37; 2016-31; 2017-40; 2018-15; 2019-39.

<sup>2</sup> In the past ten years we have had three shootings:

In 2010, [an officer shot at a suspect who was shooting at officers](#).

In 2012, [an officer shot at a suspect](#) who'd just backed his car into an officer, crushing his legs. The suspect survived and the officer was medically retired due to his injuries.

In 2012, [an officer shot a murder suspect who'd just fired on several other officers](#).

only two shootings<sup>3</sup>. This is all the more impressive, given that our officers routinely respond to a multitude of potentially violent situations, including when our officers have been physically assaulted or attacked.

We achieve these results for many reasons, not the least among them: We screen for and hire good, smart, brave, diverse group of people; we train them according to our strong policies and organizational culture; and we provide active supervision in the field.

We strive to treat people with dignity and respect, in accordance with our core values<sup>4</sup>. We implement and follow policies to minimize or eliminate harms, injuries, or deaths. We avoid reliance on use of force whenever we can. We train and employ de-escalation tactics to slow events down; we train in Crisis Intervention Training to respond mindfully to people in crisis.

Our current policy, General Order U-2 Use of Force, has been in place with slight modifications over the past decade. However, as best practices and law have evolved, we at the Department and the City Council recognized the policy needed to be updated. To that end, we substantially updated the policy.

Following the Council's Urgency Item asking for the policy to be presented before the end of the legislative year, a team of subject matter experts and trainers met with the PRC Subcommittee on the Use of Force, and with the full Police Review Commission, participating in robust, intensive discussions as we worked through proposed revisions. The Department's proposed language was heavily amended, modified, and portions deleted through the process, while language from other departments' policies was incorporated into the draft. The Department and the PRC found common ground in some areas and differed in others.

Incorporating the amendments contained in this companion report into the proposed Policy 300 Use of Force, and adopting the attached resolution, will help to ensure our policy is at or ahead of similar policies across the nation, and that we are able to safeguard our community amidst uncertain times.

The matter of greatest concern is how the complete ban on tear gas impacts mutual aid availability. The loss of mutual aid undermines our ability as a department to protect our community members and critical city infrastructure and property during large scale demonstrations. The amended language under section 300.7.1, which was not prepared until recent review, post-PRC discussions, provides for exceptions to the tear gas ban to protect the lives of people, protect people from serious bodily injury, and to prevent the

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<sup>3</sup> In forty years, the Special Response Team has fired on suspects only twice: During [the hostage rescue](#) at Henry's, and at a takeover robbery suspect.

<sup>4</sup> Our BPD core values are: Integrity, Safety, Respect, Diversity, Professionalism

imminent criminal destruction of property, and for use by the Special Response Team for barricaded subject situations.

It is our clear understanding that if a city or Department restricts mutual aid agencies from the use of tools to protect themselves from violent encounters, the Alameda County Sheriff's Office will not provide mutual aid, and other mutual aid agencies' Chiefs will make the decision for their agencies. Several chiefs have indicated they would not be able to provide mutual aid without the ability to protect themselves. Without the policy exceptions presented below, the City of Berkeley will be deprived of Mutual Aid assistance, which is *absolutely* required for success in managing large demonstrations. Since Mutual Aid is a voluntary program, agencies can choose to not provide mutual aid resources if they are not allowed to protect themselves.

Our success has grown from close working relationships with Mutual Aid agency commanders, who have collaborate with our Department, always operating with an understanding of operational goals and operating conditions.

Mutual Aid resources allowed the Berkeley Department to effectively and safely manage large scale demonstrations in 2017, 2018, et al. Our success and safety were contingent on the involvement of large numbers of personnel from other agencies.

Should agencies be prevented from using their tools, training and policies, in support of our City's goals in managing demonstrations, the City will lose Mutual Aid resources, and I and the Department will not be able to fulfill our responsibility, to protect our community members and our City.

#### FISCAL IMPACTS OF RECOMMENDATION

Staff costs associated with training of BPD officers on the policy changes. Substantial costs of potential damage associated with loss of Mutual Aid resources to safely manage large incidents.

#### CURRENT SITUATION AND ITS EFFECTS

##### **Recommendations for Amendments to Language and Rationale**

Below we provide recommendations for amending language, as well as the rationale for each recommendation. New language is underlined, deleted language is shown in strikethrough text.

##### **300.1 Sanctity of Life**

Amend final sentence, adding "strive to", to read:

Officers must respect the sanctity of all human life, and strive to act in all possible respects to preserve human life, do everything possible to avoid unnecessary

use of force, and minimize the force that is used while still protecting themselves and the public.

**Rationale:** The phrase, “strive to” creates an attainable standard to which our members can reasonably be held. If officers were to literally “... act in all possible respects to preserve human life, (and) do everything possible...” officers would not be allowed to use deadly force in *any* case, because one would simply have to not use force—i.e. take no action—regardless of the consequences.

### **300.1.3 CORE PRINCIPLES; A. DE-ESCALATION AND FORCE MINIMIZATION**

Amend first sentence, adding “shall”, to clarify an officer’s goal shall be to de-escalate wherever possible, to read:

Every officer’s goal, throughout an encounter with a member of the public, shall be to de-escalate wherever possible...”

### **300.1.3 CORE PRINCIPLES; C. MINIMIZING THE USE OF DEADLY FORCE**

Replace language in this Core Principle with the language describing use of deadly force as appears in 300.4 USE OF DEADLY FORCE, as follows:

An officer’s use of deadly force is justified only when the officer holds an objectively reasonable belief, based on the totality of the circumstances, that such force is objectively necessary to, 1) defend against an imminent threat of death or serious bodily injury to the officer or another or 2) apprehend a suspected fleeing person for any felony that threatened or resulted in death or serious bodily injury, provided the officer has a objectively reasonable belief that the person will cause imminent death or serious bodily injury to another unless immediately apprehended.

**Rationale:** This provides the reader with an understanding that as a matter of principle, deadly force is to be minimized, while ensuring that the descriptions of when the use of deadly force is justified are identical at both locations within the policy.

### **300.1.4 DEFINITIONS: Control Techniques**

Add the terms “verbalization” and “control holds” to this definition:

**Control Techniques** - Verbalization, Control Holds, Personal Impact Weapons and Take Downs.

**Rationale:** The addition of these terms ensure consistency of terminology across the policy.

### **300.3.3 FACTORS USED TO DETERMINE THE REASONABLENESS, NECESSITY AND PROPORTIONALITY OF FORCE**

Amend the paragraph following the list of factors, to read:

The types of resistance officers may encounter fall along a continuum, from a cooperative person to a combative person ~~an active assailant~~.

**Rationale:** This better aligns with the definitions in 300.1.4, where “Combative Resistance” is defined, in a manner that can be applied to the notion of a “combative person”, while the term “active assailant” is not defined in any way.

### **300.4 USE OF DEADLY FORCE**

The first paragraph of this section uses the word, “imminent” in phrases adapted from the Camden NJ policy. However, the PRC’s definition of “imminent”, appearing in the final paragraph, differs from the Camden definition. We propose language drawn in part from Camden’s definition of “imminent,” thereby better aligning the policy and definition of imminent. Amend the final paragraph of the section, to better define imminent, incorporating some language from Camden, NJ policy, to read:

A threat of “imminent death or serious bodily injury” exists ~~An “imminent” threat of death or serious bodily injury exist~~ when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a ~~person~~ the person threatening danger has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the officer or another person. ~~An officer’s subjective fear of future harm alone is insufficient as an imminent threat. An imminent threat is one that from appearances is reasonably believed to require instant attention.~~ The threatened harm does not have to be instantaneous, but requires immediate action to resolve. The period of time involved is dependent on the circumstances and facts of each situation and is not the same in all situations. An officer’s subjective fear of future harm alone is insufficient as an imminent threat.

**Rationale:** This language more clearly provides for the ability to protect the community from an immediate threat, in keeping with the Federal standard established in *Tennessee v. Garner*. The Camden NJ, BART, San Francisco and Oakland police departments all use language related to deadly force that aligns with case law but that use “immediate” and “imminent” in different ways<sup>1</sup>.

### **300.6 REPORTING REQUIREMENTS**

Amend the language of this section regarding the separate requirement to complete a “Use of Pepper Spray Report,” to read:

All uses of force shall be documented promptly, completely and accurately in an appropriate report, depending on the nature of the incident and the level of force used. The officer should articulate the factors perceived and why he/she believed the use of force was objectively reasonable and objectively necessary under the

~~circumstances. Whenever an officer or employee uses Oleoresin Capsicum (pepper spray) he or she must also complete a "Use of Pepper Spray Report."~~

**Rationale:** As noted in the PRC's Referral Response Report, pepper spray use "... must be documented on a separate "Use of Pepper Spray" report that is distributed to the Mayor and Councilmembers and the PRC. The Council established this requirement in September 1997. Chief Greenwood suggested that, in light of the revised policy's more comprehensive reporting of all types of force used, including pepper spray, this separate reporting requirement be eliminated. The PRC is agreeable to this, as long as the comprehensive use of force reporting requirements become policy."

Reporting Pepper Spray use is required under the comprehensive reporting requirements of Section 300.6.2 of the new policy; we therefore would delete the language as noted above, and no longer separately report use of pepper spray.

### **300.6.2 USE OF FORCE REPORTING LEVELS – LEVEL 1**

Under Level 1, amend the language of paragraph (a), adding "There is no use of force to report when" and "since", to read:

(a) There is no use of force to report when the subject allowed him/herself to be searched, escorted, and/or handcuffed or placed in a control hold, since the officer did not use force to overcome resistance, nor did the officer use force in the absence of resistance.

**Rationale:** This would explicitly confirm there is no use of force involved in the listed scenarios.

Under Level 1, final paragraph, amend the language to read:

Officers shall document Level 1 actions in their a police report, ~~, citation, Field Interview, and/or CAD entry.~~ Supervisors will review police report narratives for approval.

**Rationale:** Our reporting and approval systems do not provide for narrative entry and routine supervisory review for citations, Field Interviews, or CAD entries. Amending this language aligns our systems and procedures with the intent of the policy.

### **300.6.2 USE OF FORCE REPORTING LEVELS – LEVEL 2**

Amend the language in (b)(1) as follows:

- (b) Officer's use of force was limited to the following:
1. Firearm drawn from holster or otherwise deployed ~~in~~ during an interaction with an individual, and/or displayed, and/or pointed at that ~~an~~ individual to compel them to take a desired action. No report is necessary

where an officer draws or deploys a weapon outside of the subject's view, or during any activity, such as a building search, where the firearm was never pointed at a subject in order to gain compliance.

**Rationale:** Amending the language meets our and the PRC's intent, that we are reporting when firearms are drawn and pointed at someone, in order to compel them to take a desired action. The language also recognizes there are instances, as we discussed during meetings with the PRC, where firearms may be drawn or deployed at times, e.g. during building searches, perimeter cover assignments, where there is never any contact with a suspect. These instances would not be reportable as uses of force.

Amend the final paragraph under Level 2 to read:

A supervisor not directly involved in the application of the use of force, An uninvolved supervisor, when practical, ~~when feasible,~~ will shall respond to the scene if not already present, and conduct a Use of Force Investigation, ensuring that statements are taken from the suspect and witnesses, and ensure that photos are taken of all involved parties, as appropriate. If the incident fits the parameters for a Level 2 incident, the supervisor will enter all applicable data into Blue Team and attach a completed Use of Force Investigation Checklist with a brief summary.

**Rationale:** The phrase "when practical" aligns the language of this paragraph to the language of the similar paragraph in the following section, regarding Level 3 use of force reporting. This language reflects the fact that we strive for supervisory presence in situations where force is used or anticipated to be used. Often more than one supervisor may be present. Unless the supervisor was directly involved in the application of the use of force, the supervisor is in the best position to review and approve the use of force.

### **300.6.2 USE OF FORCE REPORTING LEVELS – LEVEL 3**

Amend the final paragraph under Level 3 to read:

A supervisor not directly involved in the application of the use of force, An uninvolved supervisor, when practical, will shall respond to the scene if not already present, and conduct a Use of Force Investigation, ensuring that statements are taken from the suspect and witnesses, and ensure that photos are taken of all involved parties, as appropriate. If the incident fits the parameters for a Level 3 incident, the supervisor will enter all applicable data into Blue Team and attach a completed Use of Force Investigation Checklist.

**Rationale:** This language corresponds directly with the similar language in Level 2, thereby bringing consistency to the policy and procedures.

### **300.6.2 EMPLOYEE USE OF FORCE**

Renumber to 300.6.3

Add (a) and (b) below to the existing language, to read in whole:

When any Berkeley Police Department employee has engaged in a use of force as defined in this policy, the use of force must be reported to a Berkeley Police supervisor and investigated in accordance with this policy.

- (a) In the event a use of force as described as Level 1, Level 2, or Level 3 occurs during an unusual occurrence as described in General Order U-4, the officer shall prepare a supplemental report as soon as practical following the incident.
- (b) Each office shall include in the report, to the extent possible, specific information regarding each use of force, e.g. the reason for the use of force, location, description of the individual(s) upon whom force was used, type of force used, etc.

**Rationale:** This addition of (a) and (b) ensures specific language in GO U-2 which was specifically drafted and incorporated into the use of force policy as part of a settlement agreement in Law et al v. City of Berkeley et al 15-5343 JSC, is retained in the Use of Force policy.

### **300.6.3 REPORTING TO CALIFORNIA DEPARTMENT OF JUSTICE**

Renumber to 300.6.4

### **300.6.4 PUBLIC RECORDS**

Renumber to 300.6.5

#### **300.3.7.1 RESTRAINT AND CONTROL DEVICES**

Amend the language of this section as follows, affirming that tear gas, pepper spray and smoke shall not be used to disperse peaceful demonstrators, while allowing its use under a limited set of circumstances. Adopt the attached resolution. Amend the policy language as follows:

Restraint and control devices shall not be used to punish, to display authority or as a show of force. Handcuffs, body wraps and spit hoods shall only be used consistent with Policy 302. Batons, approved less-lethal projectiles, and approved chemical agents shall only be used consistent with Policy 303. ~~As per City Council resolution (June 9, 2020), the use of tear gas by employees of the Berkeley Police Department, or any outside department or agency called to respond to mutual aid in Berkeley, is prohibited. Pepper spray or smoke for crowd control by employees of the Berkeley Police Department, or any outside department or agency called to respond to mutual aid in Berkeley, is prohibited~~



~~during the COVID-19 pandemic, or until such time as the City Council removes the prohibition.~~

The use of tear gas, pepper spray, or smoke against persons taking part in a protest or demonstration is prohibited.

This prohibition does not apply where, upon the decision of the Chief of Police or Incident Commander, it is determined that the use of tear gas or any other chemical weapons is objectively reasonable and objectively necessary to protect the lives of people, protect people from serious bodily injury, or to prevent the imminent criminal destruction of property, including the Martin Luther King Jr. Civic Center and the Ronald T. Tsukamoto Public Safety Building. To the fullest extent possible, such use of tear gas or other chemical weapons is allowed only after an audible warning of their use has been issued and after sufficient time to comply has been granted. In the event immediate use is necessary, notification to the Chief of Police of his/her designee, shall be made as soon as possible after the deployment.

On Sept. 12, 2017, the Berkeley City Council re-affirmed and further amended the Council's policy regarding the use of pepper spray as such use relates to crowd control, expression of First Amendment speech, and addressing acts of violence by specific individuals within a crowd. Officers shall not use pepper spray as a crowd control technique to disperse or move a crowd. Oleoresin Capsicum (pepper spray) shall not be directed against a person or persons who are engaged in legal speech or other expression that is protected by the First Amendment, nor upon those committing unlawful acts by non-violent or passive resistant means, (e.g. sitting or lying down to block a street or doorway.)

Tear gas may be used by trained personnel in the conduct of Special Response Team operations, e.g. during a barricaded subject operation, when it is objectively reasonable and objectively necessary to protect people from the risk of serious bodily injury or death.

**Rationale regarding Mutual Aid and the effects of the Tear Gas ban:** The full ban on tear gas impacts mutual aid availability, and therefore our ability as a department to protect our community members and critical city infrastructure and property during large scale demonstrations. This amended language provides for exceptions to the tear gas ban to protect the lives of people, protect people from serious bodily injury, and to prevent the imminent criminal destruction of property, and for use by the Special Response Team for barricaded subject situations. This language is similar to a recent court ruling in Oakland.

The language regarding use of Pepper Spray are brought verbatim from GO U-2.

It is our clear understanding that if a city or Department restricts mutual aid agencies from the use of crowd management tools to protect themselves from violent encounters, the Alameda County Sheriff's Office will not provide mutual aid, and other mutual aid agencies' Chiefs will make the decision for their agencies, and likely follow suit. Absent these exceptions, the City of Berkeley will be deprived of the Mutual Aid assistance which has been a key factor in managing numerous large events. Mutual Aid is a voluntary program. Agencies can choose to not provide mutual aid resources.

Mutual Aid agency commanders collaborate with the host agency, gaining an understanding of operational goals and operating conditions.

Mutual Aid allowed the Berkeley Department to effectively and safely manage large scale demonstrations in 2017, 2018, et al. Our success and safety were contingent on the involvement of large numbers of personnel from other agencies. Should agencies be prevented from using their tools, training and policies, in support of our City's goals in managing demonstrations, the City will Mutual Aid resources.

Recently, we have seen federal law enforcement being inserted into cities where there is a claim that "locals authorities" can't provide for their community's safety. The best way to insulate our community from this sort of opportunistic intervention is to ensure we have the ability to safeguard the city through using Law Enforcement Mutual Aid, using our proven strategies, tools, and training, including our mutual aid resources.

Reducing or eliminating our ability to utilize mutual aid severely compromises our ability to safeguard the city. If our City is perceived as not being able to manage community safety, one could conceive that the City could become a target for the opportunistic placement of federal resources here.

### **300.9 USE OF FORCE ADMINISTRATIVE REVIEW**

Amend the first paragraph to read:

The Division Captain shall review the Use of Force Report ~~(and when applicable, Use of Pepper Spray Report)~~ and route the report to the Chief of Police with a recommendation of findings. The Chief of Police may convene a Review Board as outlined in Policy 301 instead of utilizing Division Captain Review.

**Rationale:** This change aligns with the change under 300.6 above, eliminating the legacy Use of Pepper Spray Report.

### **RATIONALE FOR RECOMMENDATIONS**

Rationales are included in each amendment request above.

### ALTERNATIVE ACTIONS CONSIDERED

No viable means of managing large scale demonstrations without Mutual Aid resources were identified by staff, subject matter experts, and other law enforcement resources.

### CONTACT PERSON

A.R. Greenwood, Chief of Police (510) 981-5700

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### **DEADLY FORCE / USE OF FIREARM LANGUAGE:**

**Tennessee v Garner adds to Graham standard, to protect a community from immediate threat.**

Departments discussed during PRC/BPD meetings, such as Camden PD, BART, San Francisco and Oakland all use language related to deadly force that is in line with case law and does not necessarily require an imminent threat when using force against a dangerous fleeing felon – most focus on the need to take immediate action to protect the community from the danger posed by the fleeing felon. Imminent as defined in the policy draft means the danger about to happen in the actual moment (e.g. a suspect is pointing a gun at a victim) as opposed to the concept that there is a need to take immediate action (e.g. an armed homicide suspect is running towards a school). Camden, BART, San Francisco and Oakland policy language covering use of force on a dangerous fleeing felon is excerpted below:

### **CAMDEN POLICE DEPARTMENT**

24. Strict additional requirements must be met before an officer may use deadly force against a fleeing suspect. An officer may use deadly force to prevent the escape of a fleeing person only if all of the following conditions are met:

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- a. The officer has probable cause to believe the suspect has committed an offense in which the suspect caused or attempted to cause death or serious bodily harm; and
  - b. The suspect will pose an imminent danger of death or serious bodily harm should the escape succeed; and
  - c. The use of deadly force presents no substantial risk of injury to innocent persons.

We note Camden's definition of Imminent differs significantly from Berkeley's as proposed by the PRC. If we are going to keep imminent in our policy I suggest we change our definition to align with theirs: Here is their policy language:

Imminent Danger: Imminent danger describes threatened actions or outcomes that are immediately likely to cause death or serious bodily harm to an officer or another person, unless action is taken. In order to be imminent, the person threatening danger must have the means/instruments and opportunity/ability to cause death or serious bodily harm. The threatened harm does not have to be instantaneous. The period of time involved is dependent on the circumstances and facts of each situation and is not the same in all situations.

### **SAN FRANCISCO POLICE DEPARTMENT**

- i. To apprehend a person when both of the following circumstances exist:  
The officer has reasonable cause to believe that the person has committed or has attempted to commit a violent felony involving the use or threatened use of deadly force; AND  
The officer has reasonable cause to believe that a substantial risk exists that the person will cause death or serious bodily injury to officers or others if the person's apprehension is delayed;

### **OAKLAND POLICE DEPARTMENT**

3. To apprehend or arrest a person when the following three conditions are met:
  - a. The member has reasonable cause to believe that the person is involved in the commission of a violent felony that includes the use or threatened use of deadly force; and
  - b. The member has reasonable cause to believe that the person poses an immediate threat of death or serious bodily injury to the member or a third person if not immediately apprehended; and
  - c. Other reasonably known and available means of apprehending the person have failed, are inadequate or are immediately unavailable.

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**BAY AREA RAPID TRANSIT POLICE DEPARTMENT** (BART requires imminent threat for fleeing felons but defines it differently than our policy does)

(b) An officer may use deadly force to stop a fleeing subject when the officer has probable cause to believe that the person has committed, or intends to commit, a felony involving the infliction or threatened infliction of serious bodily injury or death, and the officer reasonably believes that there is an imminent risk of serious bodily injury or death to any other person if the subject is not immediately apprehended. Under such circumstances, a verbal warning should precede the use of deadly force, where feasible.

Imminent does not mean immediate or instantaneous. An imminent danger may exist even if the suspect is not at that very moment pointing a weapon at someone. For example, an imminent danger may exist if an officer reasonably believes any of the following:

- (a) The person has a weapon or is attempting to access one and it is reasonable to believe the person intends to use it against the officer or another.
- (b) The person is capable of causing serious bodily injury or death without a weapon and it is reasonable to believe the person intends to do so.

RESOLUTION NO. ##,### N.S.

A RESOLUTION PROHIBITING THE USE OF TEAR GAS, PEPPER SPRAY, AND SMOKE AND LIMITING THE USE TO PROTECT THE LIVES OF PEOPLE, PROTECT PEOPLE FROM SERIOUS BODILY INJURY, OR TO PREVENT THE IMMINENT DESTRUCTION OF THE MARTIN LUTHER KING JR CIVIC CENTER BUILDING AND THE RONALD T. TSUKAMOTO PUBLIC SAFETY BUILDING

WHEREAS, on June 9, 2020, the City Council prohibited the use of tear gas; and

WHEREAS, on June 9, 2020, the City Council prohibited the use of pepper spray and smoke for crowd control during the COVID-19 pandemic; and

WHEREAS, the Berkeley Police Department seeks the limited use of tear gas, and pepper spray and smoke for crowd control during the COVID-19 pandemic to protect the lives of people, protect people from serious bodily injury, and protect certain City buildings.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley:

Section 1. Using tear gas by the Berkeley Police Department is prohibited.

Section 2. Until repealed by City Council, using pepper spray or smoke for crowd control purposes by the Berkeley Police Department during the declared local state of emergency due to the COVID-19 pandemic is prohibited.

Section 3. The prohibition of Sections 1 and 2 do not apply where, upon the decision of the Chief of Police or Incident Commander, it is determined that the use of tear gas, pepper spray or smoke is objectively reasonable and objectively necessary to protect the lives of people, protect people from serious bodily injury, or to prevent the imminent destruction of the Martin Luther King Jr. Civic Center Building and the Ronald T. Tsukamoto Public Safety Building. To the fullest extent possible, such use of tear gas, pepper spray, or smoke is allowed only after an audible warning of their use has been issued and after sufficient time to comply has been granted. In the event immediate use is necessary, notification to the Chief of Police of his/her designee, shall be made as soon as possible after the deployment.

Section 3. In all actions in which the Berkeley Police Department calls in police personnel from other jurisdictions under mutual aid agreements, to the fullest extent possible, Berkeley Police Department Command shall work with mutual aid personnel to ensure operational goals are understood, and all personnel are deployed in a coordinated manner, in service of those goals.

Section 4. Within ten days of using tear gas, pepper spray and smoke for crowd control purposes during the COVID-19 pandemic, as outlined in this Resolution, the City Manager or City Manager's Designee shall provide written notice to the City Council, unless such information is confidential or privileged.

Section 5. This resolution shall be incorporated into any other pertinent policies or General Orders governing the use of tear gas and pepper spray or smoke for crowd control purposes.