



June 25, 2018

Re: Berkeley City Council authority to set policy for and oversee relationships of the Berkeley Police Department including Urban Shield

Dear Mayor Arreguin, City Council members, City Manager and City Attorney:

On June 20, 2017, the Berkeley City Council voted to set up a subcommittee to develop recommendations regarding future participation by Berkeley agencies, including the Berkeley Police Department (BPD), in Urban Shield. The subcommittee has finished its report, and the Council will hear its recommendations on July 24, 2018, as part of the annual review of BPD relationships.

The subcommittee voted 3-1 to withdraw from Urban Shield's SWAT scenarios and vendor show, but one member, Councilmember Susan Wengraf, called into question the authority of the Council to end BPD's participation, stating she believed the subcommittee could be criminally liable if it went ahead with its recommendation. The mayor then rescinded his vote.

This letter explains that the Berkeley Charter invests the Council with authority in the setting of policies for and practices of the BPD; and that the Mutual Aid Ordinance passed by the voters in 1973 expressly requires City Council approval for BPD participation in programs like Urban Shield.

I. Under the Berkeley City Charter, the Council Is Empowered To "Organize and Maintain the Police Department," Including Formation Of Policies, Practices And Procedures Of the BPD.

In *Brown v. City of Berkeley* (1976) 57 Cal.App.3d 223, the Court of Appeal considered whether a Berkeley ordinance establishing the duties of the Police Review Commission violated City Charter provisions regarding the City Manager's authority over the police department.

The court agreed that the Charter prevents the Council from interfering with the City Manager's authority over police in administrative matters, including individual discipline, hiring and firing. However, the court affirmed City Council's power to "organize and maintain the police department" as set forth under the Charter, art. ix, section 49(5). "The words 'organize and

maintain' connote the power of the council to have an ongoing involvement in the formation of the policies, practices and procedures of the police department. . . . Under the charter sections, it is clearly within the council's power to inquire into said police department practices, procedures and policies and make recommendations concerning same." (*Brown v. City of Berkeley*, 57 Cal.App.3d at p. 233.) For this reason, the court upheld the Police Review Commission ordinance except for specific sections that conflicted with the City Manager's power over individual disciplinary and other personnel proceedings.

II. Under the City Charter, the City Manager Is Responsible For Implementing "Council Policy."

The Charter states in Section 28, "Powers and Duties of the City Manager":

"The City Manager shall be responsible to the Council for the implementation of Council policy and for the efficient administration of all the affairs of the City."

This sentence lays out the respective roles of the Council and its appointee: the former determines policy and the latter implements and administers that policy. The Charter does not limit the authority of the Council to set policy or the meaning of the word "policy."

III. Berkeley's Mutual Aid Ordinance Requires Annual City Council Approval of BPD Relationships With Programs Such As Urban Shield.

Under the Berkeley Mutual Aid ordinance, passed by the voters in 1973 and never overturned in court, City or Police Department participation in activities including mutual aid, information sharing, cooperation and assistance, involving other local, state and federal law enforcement, military and/or intelligence agencies, police departments or private security organizations (including University of California Police Department, Alameda County Sheriff and California Highway Patrol) are subject to approval by the City Council on an annual basis.

The purpose of this law is given in the introductory section, "Purpose of provisions":

The interests of all people of the City, the Police Department which serves those people, and the cause of a more just system of law enforcement will all be furthered by providing for openness and candor and community involvement in the establishment of working relationships between the Berkeley Police Department and other law enforcement agencies, police departments or private security organizations. Law enforcement activities and procedures within the City limits are a major matter of policy in the governance of the City. The general purpose of the ordinance codified in this article is to provide for the public disclosure and **City Council approval** of the terms and conditions of agreements, understandings, or policies reflecting such relationships, and for community involvement in the process of such approval, prior to the date on

which the agreements, understandings or policies take effect and City funds are expended in implementation thereof.

(Berkeley Munic. Code, § 2.04.150, emphasis added).

At least in the past year, the request to approve participation in Urban Shield has not been presented for vote to the City Council, and participation is therefore not permitted under Berkeley law.

IV. The Urban Shield Agreement is Also Invalid under the Mutual Aid Ordinance for Failure to Reduce All Terms and Conditions to Writing.

The Berkeley Mutual Aid Ordinance provides the following process for Council review:

After April 17, 1973, no such agreement, understanding or policy shall be valid or effective unless specifically approved by the City Council following public hearings on the same as hereinafter provided. All terms and conditions of such agreements, understanding or policies shall be reduced to writing and presented to the City Council for approval by the Berkeley Police Department or appropriate City official, accompanied by a statement of the rationale therefor, projections of the costs of implementation, and other information or explanations requested by the council.

(Berkeley Munic. Code, § 2.04.170).

The need for Council review and approval is triggered by the existence or proposal of a relationship, and not from the existence of a written agreement. The existence of a BPD relationship with Urban Shield is undeniable, and the fact that BPD (or appropriate City official) has not reduced to writing and presented to Council for review and approval the terms and conditions of agreements, understandings, or policies reflecting the relationship, is itself a violation of the Berkeley Mutual Aid ordinance. Absent such a review, the City of Berkeley-Urban Shield relationship is invalid and must be immediately terminated unless and until the Berkeley City Council acts affirmatively to approve or amend it.

V. The Council Has the Power to End Berkeley's Relationship With Urban Shield.

The Berkeley City Charter assignment of government policy to the scope of authority of the City Council, the *Brown v. City of Berkeley* decision recognizing the power of the Council to have an ongoing involvement in the formation of the policies, practices, and procedures of the police department, and the Mutual Aid ordinance mandating-- not allowing-- the Council to review and approve or disapprove external relationships of the BPD, all make clear that the Council has full authority to continue, amend, or terminate BPD's and the City's participation in Urban Shield.

Signed:

Jay Kim, Executive Director, National Lawyers Guild, S.F. Bay Area Chapter

James B. Chanin, Civil Rights Attorney

Osha Neumann, East Bay Community Law Center

Anne Weills, Siegel & Yee

Rachel Lederman, Lederman & Beach

John Viola, Attorney

Moni Law, Attorney (licensed in WA)