



## CITY OF BANNING STAFF REPORT

**TO:** CITY COUNCIL

**FROM:** Douglas Schulze, City Manager

**PREPARED BY:** Adam Rush, Community Development Director  
Adam B. Rush, M.A., AICP

**MEETING DATE:** February 13, 2024

**SUBJECT:** Consideration and Introduction of Ordinance 1598, Adding a New Chapter 1.32 to Title 1 of the Banning Municipal Code and Amending Other Sections of the Banning Municipal Code to Create and Implement a Comprehensive Cost Recovery Program for All Nuisance Abatement Actions, and Making a Determination of Exemption under CEQA pursuant to CEQA Guidelines 15060(c)(2)(3) and 15061(b)(3)

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### **RECOMMENDATION:**

Waive full reading and introduce, as read by title only, Ordinance 1598. An Ordinance of the City of Banning, California, Adding a New Chapter 1.32 to Title 1 of the Banning Municipal Code and Amending Other Sections of the Banning Municipal Code to Create and Implement a Comprehensive Cost Recovery Program for All Nuisance Abatement Actions.

### **BACKGROUND:**

Assembly Bill ("AB") 2495 was approved by the Governor on September 5, 2018, and became effective on January 1, 2019. AB 2495 puts limitations on cost recovery by cities, counties, and cities and counties, in criminal code enforcement cases.

AB 2495 added Section 688.5 to the California Penal Code, which prohibits a local agency from charging a defendant for the costs of an investigation, prosecution, or appeal in a criminal case, including a criminal violation of a local ordinance.

Various state laws authorize local governments to declare what is a nuisance, and also to approach Code Enforcement either administratively, civilly or criminally. A local entity may also pursue cost recovery options as long as they have adopted a local ordinance specifically allowing for it. Typically, costs are recovered in connection with civil litigation or administrative enforcement actions. Before the enactment of AB 2495, some cities also sought recoupment of various enforcement costs in connection with criminal cases. AB 2495 was drafted in response. Before this change in the law, the recovery of attorney's fees in connection with a criminal case was sought by some, but not all local agencies. But numerous local agencies regularly sought recovery of investigation costs and other costs incurred by code enforcement staff. Reimbursement of these enforcement costs was typically transparent — accomplished either by an agreement during the plea bargain process or by a judge's order judge as restitution.

Under AB 2495, municipalities may still recover costs through administrative processes, but local agencies will no longer be able to seek costs related to the investigation and prosecution of a criminal case.

## **JUSTIFICATION:**

The City Council conducted a workshop on August 22, 2023 that reviewed the functions, resources and staffing associated with the Code Enforcement Division. In addition, the Council regularly receives updates on the Code Enforcement Statistics generated from the previous month. Currently, the Department is fully staffed within the parameters set by the City Council; nevertheless, the amount and complexity of active cases, combined with at least a half-dozen cases referred to the City's Code Enforcement Legal Counsel (Silver & Wright) and regular enforcement of unpermitted sidewalk street vendors, staffing resources are not sufficient to efficiently and effectively manage every element under our charge.

California Assembly Bill 2495 was approved by the Governor in 2018 and placed limitations on cities and counties concerning the recovery of costs in criminal code enforcement cases. Furthermore, this legislation prohibits a local agency from charging a defendant for the costs of an investigation, prosecution or appeal in a criminal case, such as criminal violations of a local ordinance.

Code Enforcement activities rarely result in 100% cost recovery of all labor and equipment costs (both "hard" and "soft" costs) and with the passage of AB 2495, the ability to recover costs associated with investigations and attorney's fees were further eliminated. These investigation services are required in order to ensure and preserve the Due Process Rights (4th and 14th Amendment protections afforded by the U.S. Constitution). As such, if detailed and timely investigations were not conducted, then the violators could have their cases dismissed based upon a "lack of due process protections", which further contributes to the degradation and blight of our community. In effect, the City is prohibited from collecting reimbursement from property owners and businesses that continue to operate illegally and perpetuate a public nuisance and threat to public safety.

However, a local entity may pursue cost recovery options as long as they have adopted a local ordinance specifically allowing for it. Ordinance 1598 has been prepared by the City's Code Enforcement legal counsel - Silver & Wright - and forwarded to City Council, by the Community Development Director, for introduction and first reading. Ordinance 1598 seeks to provide this enabling authority, which is provided under California Government Code Sections 36901, 38771, 38773.1, and 38773.5, as well as Article XI, Section 7 of the California Constitution. These Government Code provisions are rooted in the City's authority, under Article XI, Section 7 of the California Constitution, which grants a city broad discretionary power to "make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws."

In summary, these Government Code provisions allow the City Council to impose fines, penalties, and forfeitures for violations of ordinances. The City may fix the penalty by fine or imprisonment, or both; however, a fine may not exceed \$1,000. In addition, Sections 38771, 38771, 38773.1, and 38773.5 allow the City to declare, by ordinance, what constitutes a public nuisance; meaning a use or property presents a clear danger to the safety or welfare of the public. Also, by ordinance, the City may establish a procedure to collect abatement and related administrative costs by nuisance abatement lien. Subsequently, the City can record a special assessment against the subject parcel for said cost.

City staff has determined that the proposed Ordinance 1598 is not subject to the California Environmental Quality Act ("CEQA") pursuant to Sections 15060(c)(2) of the CEQA Guidelines (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and 15060(c)(3) (the activity is not a project as defined in Section 15378) because it has no potential for resulting in physical change to the environment, directly or indirectly. Further, if the activity is deemed a project, the City Council finds that this Ordinance is exempt pursuant to CEQA Guidelines Section

15061(b)(3). Should the City Council adopt the proposed Ordinance 1598, staff will file the attached draft Notice of Exemption ("NOE") with the County and, pursuant to Senate Bill 69, will also file the NOE with the Office of Planning & Research (OPR).

**FISCAL IMPACT:**

The City's Code Enforcement Legal Counsel - Silver & Wright works on contingency, based upon the recovery of certain costs received through the Receivership Process that is pursued for properties that qualify as a Public Nuisance and constitute a clear threat to the Public Safety and Welfare. As such, no cost was incurred for Silver & Wright to prepare this Ordinance.

The City Attorney's Office has reviewed the formatting of the draft Ordinance, and provided suggested changes to staff, in their regular course of business operations and contracted services to the City. While a specific dollar amount is not yet tabulated, this review does not constitute more than a couple hours.

The Community Development Director acted as the primary staff contact with the City's Legal Team and prepared the staff report under his normal duties. As such, no additional costs were incurred that are not already allocated for this position.

**Approximate Costs are: \$2,670.00 in staff time and \$750.00 in advertising with the Record Gazette.**

**ALTERNATIVES:**

1. Waive full reading and introduce, as read by title only, Ordinance 1598. An Ordinance of the City of Banning, California, Adding a New Chapter 1.32 to Title 1 of the Banning Municipal Code and Amending Other Sections of the Banning Municipal Code to Create and Implement a Comprehensive Cost Recovery Program for All Nuisance Abatement Actions.
2. Do Not Conduct the First Reading and Provide Direction to Staff
3. Continue this Item and Provide Direction to Staff
4. Request Additional Input, Research, Justification, etc. from Staff

**ATTACHMENTS:**

1. [Banning - Ordinance 1598 \(Nuisance Abatement Cost Recovery Program\)-CLEAN.docx](#)
2. [08-22-23 CC\\_Code E. Workshop.pdf](#)
3. [AB 2495.pdf](#)
4. [NOE Copy.pdf](#)