



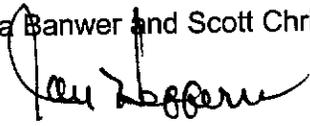
Request for City Council Committee Action From the City Attorney's Office

Date: August 13, 2003
To: Public Safety & Regulatory Services Committee
Referral to:

Subject: Nuisance Night Court Update

Recommendation: That the City Council receive and file this report and direct the City Attorney's Office and the Police Department as indicated.

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Approved by: 
Jay M. Heffern
City Attorney

Presenter in Committee: Dana Banwer

Financial Impact (Check those that apply)

No financial impact - or - Action is within current department budget.
(If checked, go directly to Background/Supporting Information)

Action requires an appropriation increase to the Capital Budget

Action requires an appropriation increase to the Operating Budget

Action provides increased revenue for appropriation increase

Action requires use of contingency or reserves

Other financial impact (Explain): Costs related to creation of alternative processes to handle livability offenses may include personnel costs, space costs, overtime costs, overhead, supplies, etc.

Request provided to the Budget Office when provided to the Committee Coordinator

Community Impact:

Neighborhood Notification N/A

City Goals: Build communities where all people feel safe and trust the City's public safety professionals and systems; Promote public, community, and private partnerships to address disparities and to support strong, healthy families and communities.

Comprehensive Plan N/A

Zoning Code N/A

Other N/A

Background/Supporting Information See attached material.

**REPORT TO PUBLIC SAFETY & REGULATORY SERVICES
COMMITTEE ON NUISANCE NIGHT COURT PROPOSAL**

August 13, 2003

Background

On April 9, 2003, this Committee directed the City Attorney's Office to "work with the Minneapolis Police Department, in consultation with the chief judge of Hennepin County District Court (and other court resources), and others to explore the possibility of creating a nuisance night court, and the feasibility of piloting this program during the summer of 2003." The City Attorney's Office was further directed to report back to this Committee on May 7, 2003.

On May 7, 2003, the City Attorney's Office presented a report to this Committee that outlined the court options available to the City to address livability offenses. Based on a "best practices" analysis of the Midtown Manhattan Community Court and the Philadelphia Nuisance Night Court, the report recommended further study of two main models: 1) Same Day/Night Court and/or 2) Next Day Court.

This Committee then directed staff to move "aggressively forward, with the City Attorney's Office being the coordinator of the project." The Committee action included a reporting schedule encompassing the next three meeting cycles as follows:

1. One cycle-May 21: The CCP/SAFE Team shall provide information through the City Attorney's Office for the Committee to decide on a geographic area to use for a pilot project.
2. Two cycles-June 11: Committee to receive a written update from the City Attorney's Office in terms of the stakeholders' involvement (i.e. the courts being a partner, possible location for the court, resource needs and demands on the various departments).
3. Three cycles-June 25: Staff to provide in person update looking at the specific things that would need to be done in order to implement the project this summer.

On May 21, 2003, the City Attorney's Office and CCP/SAFE presented a report, which outlined the type, incidence, and location of livability offenses occurring within the City in order to provide guidance to the Committee in selecting a geographic area to use for a pilot project. At a special meeting of the Public Safety & Regulatory Services Committee on June 2, 2003, the Committee "identified Downtown as the geographic area for a Pilot Project."

On June 11, 2003, the City Attorney's Office provided a written report to this Committee outlining stakeholders' involvement in the Nuisance Night Court proposal, including courtroom staffing and facilities/equipment needs.

On June 25, 2003, The City Attorney's Office provided a written report to this Committee summarizing the visit to observe Philadelphia's Nuisance Night Court and Summary Diversion Program, estimating staffing and cost requirements of night court/same day or next day court, and

outlining next steps and recommendations. The City Attorney's office was directed to develop "a general idea of the resources needed and the feasibility of initiating a program similar to Philadelphia's Summary Diversion Behavior Class, including a potential Restorative Justice component" and the use of the City's Administrative Adjudication Process on a dual track.

On July 16, 2003, the City Attorney's Office provided this committee with an oral report. Following is a written update of events since the last report to this Committee, a brief analysis of first precinct offenses and dispositions, a discussion of the feasibility of initiating a program similar to Philadelphia's Summary Diversion Behavior Class and possible class referral processes.

Update

Analysis of First Precinct Offenses and Dispositions

The first precinct had 3,821 livability crimes in 2002. Seventy percent of the offenses (2,678) occurred between the hours of 5:00 p.m. and 2:00 a.m. The offenses were twenty-seven percent (27%) consuming alcohol in public; thirteen percent (13%) possession of marijuana; twelve percent (12%) disorderly conduct; four percent (4%) trespass; four percent (4%) begging; two percent (2%) boom cars. The remaining thirty-eight percent (38%) of the cases were offenses comprising less than two percent (2%) of the total cases.

First precinct chronic offenders have received as much as 90 days executed sentences for a consuming in public case and 25 to 30 days executed sentences for theft, open bottle, trespass, loitering, and disorderly conduct. The average amount of executed jail time was 13 days.

To date, no first precinct offenders have been referred to Mental Health Court.

Feasibility of a Livability Offenses Behavior Class

Philadelphia's Summary Diversion Program Behavior Class

The Philadelphia Municipal Court Summary Diversion Program Behavior Class is held on the second Saturday of each month, and is given in the morning and in the afternoon. The class, which is offered only to first time summary offense offenders, is a three-hour, intensive class that addresses social, economic and legal ramifications of summary offenses. When a defendant completes the class and meets other program requirements (including payment of fees and costs), the case is dismissed and the record of arrest is expunged. The fees and costs total \$175 per person. A victims reparation fund receives \$60 of every \$175 fee collected. On the day that the group observed the class, the Court collected over \$40,000 in fees and costs.

The Summary Diversion Behavior Class is presented by a court administrative officer who is also a lawyer. Although the Summary Diversion Program Behavior Class has only been operating for one year, it has already generated over \$200,000 revenue to the City of Philadelphia.

Minneapolis' Current Shoplifting Behavior Class

When Minneapolis Police Officers respond to a misdemeanor shoplifting incident at which they are able to confirm the offender's identity and mailing address, the officers do not issue citations or tab charges. Instead, they simply write reports, which are reviewed by a Minneapolis police officer in

the recap unit. If the offender has no prior convictions and the amount stolen is less than \$50.00, the recap unit refers the offender to an 8-hour shoplifting class taught by the Conduct Modification Center. The Center then sends the offender a letter with the class time, date, and location (See Attachment A, "Class Notification Letter").

The Conduct Modification Center is a licensed distributor of the National Curriculum of Training Institute that operates programs in Minnesota, North Dakota and Wisconsin. In addition to the shoplifting classes it conducts for the City of Minneapolis, it conducts Adult Misdemeanor and Minor in Possession classes for the Kandiyohi County Attorney; a Juvenile Anger Management class for the Hennepin County Attorney; and a DWI class for Winona Community Corrections.

The National Curriculum and Training Institute (NCTI) developed the shoplifting class curriculum. This class offers each offender assistance in changing social behavior patterns through skill-building courses within a context that holds offenders accountable for their actions (See Attachment B, "Developing Positive Behavior" workbook). Each class has a restorative justice aspect, which provides a way to restore those who have been harmed and involve those most directly affected by the offense.

The shoplifting classes are provided pursuant to a personal service agreement between the City and the Conduct Modification Center (See Attachment C, "Sample of Personal Service Agreement"). This program does not generate income for the City of Minneapolis. The Conduct Modification Center charges each offender \$85.00, which covers the costs of the instructors, workbooks, and administrative costs. The classes are held every other month at the Hennepin County Government Center. After each class the Conduct Modification Center provides the recap unit with a list of the offenders who successfully completed the class and those who failed to attend the class. Those who fail to attend are referred to the City Attorney's Office for charging. About thirty percent (30%) of the referred offenders complete the shoplifting class. The low completion rate is largely due to class notification letters being returned because the offender does not live at the address given to the police officer. The Conduct Modification Center, however, reports attendance rates as high as one hundred percent in other jurisdictions where class attendance is court-ordered.

Development of a Livability Offense Behavior Class

The Conduct Modification Center currently offers an 8-hour "Misdemeanor Offenses" class, which focuses on changing negative behavior, understanding how to avoid negative influences, developing plans to alter present behavior, establishing goal-directed behavior patterns, and making a firm commitment not to re-offend (See Attachment D, "Misdemeanor Offense Class Summary"). A review of the "Misdemeanor Offenses" class workbook indicates that this existing class may fully meet the objectives of a "Livability Offense Behavior Class" (See Attachment E, "Misdemeanor Offense Workbook"). In any event, Conduct Modification Center President Linda Axelrod has expressed a willingness to work with the City of Minneapolis to modify this class to meet the City's needs or to develop a completely new class.

Pre-charging Referral Process

A pre-charging referral process could mirror that of the shoplifting cases. There are two advantages to this referral process.

First, it would not require the City Council to decriminalize livability offenses because non-discriminatory, pre-charging diversion of misdemeanors does not trigger a right to counsel, nor does it require the consent of the court.¹ As a result, it would allow the City Attorney's Office to continue to seek appropriate criminal sanctions for those persons who fail to complete the livability offense behavior class and those persons who are chronic offenders.

Second, implementation would be streamlined because it would involve minor training for police officers who are already familiar with the shoplifting diversion process, the assignment of persons to review the reports, and some tailoring of the Conduct Modification Center's existing "Misdemeanor Offenses" class.

One disadvantage of this referral process is it will significantly increase the number of cases to be reviewed by the Police Department. The Minneapolis police officer assigned to the Recap Unit, Officer Judy Perry, estimates that she currently spends ½ FTE screening the shoplifting cases for the Recap Unit. She estimated that one additional FTE would be required to screen all the first precinct livability crimes. This estimate may be conservative in light of 3,821 livability crimes that were committed in the first precinct in 2002. One approach to limiting these numbers might be to focus initially on a few offenses, like public urination,² consuming in public, and begging. It is anticipated that an officer or a civilian from the First Precinct would be assigned to perform this function.

Post-Charging Referral Process

Differences in Minnesota and Pennsylvania law prevent the establishment of a post-charging referral process that would mirror the Philadelphia Summary Diversion Program. Two key components of the Philadelphia program are: (1) the court's ability to certify misdemeanors as petty misdemeanors without the offender's consent, and (2) the hearing officer's ability to find offenders guilty "in absentia" if they fail to appear at the date and time printed on their citation. Minnesota law requires the offender's consent before petty misdemeanor certification. See Minn.

¹ The sixth amendment right to counsel under the United States Constitution does not attach until formal charges are initiated. McDonnell v. Commissioner of Pub. Safety, 473 N.W.2d 848, 853 (Minn. 1991). The article I, section 6 right to counsel under the Minnesota Constitution does not attach until the defendant is at a "critical stage," which is defined as a "pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." Friedman v. Commissioner of Pub. Safety, 473 N.W.2d 828 (Minn. 1991)(decision to submit to chemical testing is a "critical stage"). The decision to accept or reject a pre-charging diversion does not trigger any criminal liability, nor does it impair a defense on the merits, as a result it does not constitute a critical stage. In addition, the right to a public defender does not attach until the defendant has been "charged". Minn. Stat. § 611.26, subd. 6 (2002). Absent evidence of selective or discriminatory prosecutorial intent, courts should not interfere with a prosecutor's decision to charge, or not charge, a particular defendant. State v. Hoelzel, 621 N.W.2d 44 (Minn. Ct. App. 2000); State v. Weltzin, 618 N.W.2d 600, 605 (Minn. Ct. App. 2000)(citing State v. Johnson, 514 N.W.2d 551, 556 (Minn. 1994)).

² There currently is not a "public urination" ordinance. This offense is currently cited as either disorderly conduct or indecent exposure. This approach however dilutes both of those more serious offenses because it is difficult to tell whether a prior conviction was for public urination or for a bar fight or indecent exposure (i.e. flashing). Normal Illinois has an ordinance which provides the following:

Urinate or defecates on any public street, alley, sidewalk or floor of any public building or of any building where the public gathers or has access, or in any other place, whether public or private, where such act could be observed by any member of the public, except in such place that has been designated as a restroom.
Normal Code of Ordinances Sec 17.1-2 (F).

R. Crim. P. 23.04. In addition, Hennepin County District Court currently has adopted a policy against trials "in absentia" in favor of petty misdemeanor citation warrants (See Attachment F, "Non-Appearance at Court Trial"). Keeping these legal limitations in mind, several alternative post-charging referral processes are available.

- A. Current Arraignment System. The Assistant City Attorneys handling out-of-custody and in-custody arraignment calendars could offer offenders three choices: (1) plead guilty; (2) request a court trial; or (3) accept a continuance without a plea (CWOP) on the condition they successfully complete the Livability Offense Behavior Class. This approach would require no changes to the current system.

This approach, however, would not address the large number of persons who fail to respond to their citations and/or appear in court. The Philadelphia program has successfully addressed this issue by printing court date, time, and location on the citation. This approach has reduced non-appearance rates from seventy-two percent (72%) to thirty-three percent (33%) (See Attachment G, "Janet DiTomasso's July 9, 2003 Memorandum).

Minneapolis could adopt a similar approach if Hennepin County District Court and the Minneapolis Police Department could develop a system where out-of-custody arraignment dates were preprinted on the officer's citations.

- B. Prosecutor Only Arraignment Calendar. Every Monday and Tuesday afternoon there is a "prosecutor only" arraignment calendar for petty misdemeanor driving cases. There are no judges or public defenders at this calendar, instead it is staffed by a Sheriff's Deputy, a district court clerk, an Assistant Minneapolis City Attorney, and a law clerk from the Minneapolis City Attorney's Office.

If the City Council were to amend the penalties for livability ordinance violations to include only a fine, these cases could be placed on similar "prosecutor only" arraignment calendars. The Assistant City Attorneys could offer offenders three choices: (1) plead guilty; (2) request a court trial; or (3) accept a continuance without a plea (CWOP) on the condition they successfully complete the Livability Offense Behavior Class.

Again, this approach alone would not address the large number of persons who fail to respond to their citations and/or appear in court. To address this issue Hennepin County District Court and the Minneapolis Police Department would have to develop a system where out-of-custody arraignment dates were preprinted on the officer's citations.

- C. Traffic Violations Bureau. If the City Council were to amend the penalties for livability ordinance violations to include only a fine, if Hennepin County District Court agreed, and if the Traffic Violations Bureau (TVB) were provided additional personnel, petty misdemeanor livability citations could be processed in the same way petty misdemeanor traffic cases are handled. The TVB hearing officer could offer offenders three choices: (1) plead guilty and pay a fine; (2) request an arraignment date; or (3) accept a continuance without a plea (CWOP) on the condition they successfully complete the Livability Offense Behavior Class.

Again, this approach alone would not address the large number of persons who fail to respond to their citations and/or appear in court. To address this issue the Traffic Violation Bureau and the Minneapolis Police Department would have to develop a system where out-of-custody arraignment dates were preprinted on the officers' citations.

- D. Propose Amendments to Minnesota Rules of Criminal Procedure to Allow City Attorney's Office to Certify Misdemeanors to Petty Misdemeanors Without Defendant's Consent. Minnesota Rules of Criminal Procedure provide as follows:

If at or before the time of arraignment or trial on an alleged misdemeanor violation, the prosecuting attorney certifies to the court that in the prosecuting attorney's opinion it is in the interests of justice that the defendant not be incarcerated if convicted, the alleged offense shall be treated as a petty misdemeanor if the defendant consents and the court approves.

Minn. R. Crim. P. 23.04. Currently, a misdemeanor offense may not be certified as a petty misdemeanor without the defendant's consent. As discussed above, this requirement is an impediment to a post-charging diversion process similar to Philadelphia's because both the defendant and the court must agree to a prosecutor's attempt to certify a misdemeanor as a petty misdemeanor. By necessity, this requires at least an initial court appearance. Amending this Rule to allow the prosecutor to certify misdemeanor offenses to petty misdemeanors without consent of the defendant or the court, and without a court appearance, would give prosecutors the ability to offer a diversion program at the post-charging stage as well as the pre-charging stage.

Under Minn. Stat. Section 480.059, Subd. 1 (2002), the Minnesota Supreme Court has the power to regulate the pleadings, practice, procedure and forms thereof in criminal actions in all courts of this state by rules promulgated by it from time to time. Before any such rules are adopted, the Supreme Court shall appoint an advisory committee consisting of eight lawyers licensed to practice law in the state, one judge of the Court of Appeals, and two judges of the district court to assist the Court in considering and preparing such rules. Minn. Stat. §480.059, Subd. 2 (2002).

Currently, the Minnesota Supreme Court has several active advisory committees, including a criminal procedure advisory committee. If the City Council determines to pursue a change in Rule 23.04 of the Rules of Criminal Procedure, the City Council should direct the City's IGR staff and the City Attorney's Office to forward the suggested changes to the appropriate Supreme Court advisory committee for its consideration.

Administrative Enforcement and Hearing Process

The Administrative Enforcement and Hearing Process offers an alternative approach. This process is outlined in Chapter 2 of the Minneapolis Code of Ordinances. If the City Council amended Title 15 "Offenses – Miscellaneous" to: (1) eliminate incarceration as a potential penalty and (2) to ensure that none of the livability ordinances prohibited conduct that is classified as a crime or petty

misdemeanor under Minnesota Statutes,³ police officers would be authorized to issue "administrative citations" for livability offenses.

Under the current administrative enforcement system, the administrative citations would notify the offenders that they are required to pay the scheduled civil fine or request a hearing within twenty (20) days after service of the administrative citation. See Minneapolis Code of Ordinances, Chapter 2.80. If the offender failed to pay the civil fine or schedule a hearing within 20 days, collection proceedings may be initiated to collect the unpaid fine. See Minneapolis Code of Ordinances, Chapter 2.90 (b). These provisions would address the large number of persons who currently fail to respond to their citations and/or appear in court.

It should be noted that the City of New Brighton has established a similar administrative enforcement process, which provides for a seven (7) day period to pay or request a hearing and also makes the process voluntary by allowing a person to opt out and face criminal charges. (See Attachment H, "New Brighton Resolution and Ordinance"). New Brighton began writing administrative citations on July 11, 2003. In July, the City collected \$3,890, representing 102 of the 152 citations written in July. Only one person has requested a hearing and no one has requested to opt out of the program pursuant to the provision which makes participation voluntary.

New Brighton's administrative enforcement process was modeled after White Bear Lake's administrative enforcement process. We are in the process of collecting additional information and statistics from White Bear Lake, and we will supplement this report with that information when we receive it. White Bear Lake has used its administrative enforcement policy for approximately five (5) years.

Under the current administrative enforcement system, if the offender makes a timely request for a hearing, the hearing officer is authorized to mediate and enforce a settlement of the dispute, determine whether a violation occurred,⁴ dismiss the administrative citation, impose the scheduled fine, reduce, stay or waive a scheduled fine upon compliance with appropriate conditions (i.e., attendance the Livability Offenses Behavior Class), and increase the fine when the actual costs of enforcement are shown, by preponderance of the evidence, to be greater than the amount of the scheduled fine. See Minneapolis Code of Ordinances, Chapter 2.100 (g). The fact that the City is able to submit reliable hearsay may reduce, or eliminate, the need for police officers to testify at the administrative hearing, assuming their reports are determined to be reliable hearsay. In addition, the hearing officer's ability to consider the frequency or recurrence of violations in imposing fines should ensure that repeat or chronic offenders receive appropriate sanctions.

³ This would impact the Disorderly Conduct (385.90), Indecent Conduct (385.160), and Trespass (385.320-325, 385.380) Ordinances. The City Council could amend the Administrative Enforcement act to eliminate this restriction, but may want to leave those three offenses as misdemeanors so that police officers and prosecutors have alternative methods of vigorously prosecuting chronic offenders. There would most likely not be any preemption issues. See State v. Dailey, 284 Minn. 212, 214, 169 N.W.2d 746, 748 (1969)(misdemeanor prostitution ordinance violation was not preempted by the gross misdemeanor prostitution statute); Cf. Altenburg v. Pleasant Mound Township, 615 N.W.2d 874 880 (Minn. Ct. App. 2000). It should be noted that the court's have distinguished civil/regulatory laws from criminal/prohibitory by determining whether "the prohibited activity is a small subset or facet of a larger, permitted activity. State Stone, 557 N.W.2d 588, 591 (Minn. Ct. App. 1997).

⁴ The City's burden of proof is preponderance of the evidence and may be based upon hearsay. See Minneapolis Code of Ordinances, Chapter 2.100 (f). See also Price v. City of Honolulu, 883 P.2d 629, 637 (Haw. 1994)

Staffing and Cost Requirements

The staffing and cost requirements will vary depending on the type of referral process adopted. Under each process there would be a need for intensive police training on the new process, most likely provided by the First Precinct Community Attorney.

The specific cost of implementing a pre-charging livability offense diversion program mirroring the Recap Unit's shoplifting program is conservatively estimated at the cost of one MPD, one full time equivalent (FTE). A more liberal estimate is probably three FTE. The City may be able to reach an agreement with the Conduct Modification Center whereby the Center fees, include the City's administrative costs (i.e. charge \$185.00 per class, and sends \$100 back to the City to cover the administrative costs of reviewing and referring cases).

There would be no additional costs associated with a post-charging referral system that uses the current arraignment system or the prosecutor only calendar. The specific costs of an expansion of the Traffic Violation Bureau are currently unknown.

The specific costs of the Administrative Enforcement and Hearing process are also unknown. The current administrative enforcement system may not accurately predict expansion costs because it has been largely limited to business licensing. (See Attachment I, "November 8, 2002 Report on the Administrative Adjudication Pilot Project in Licenses"). Regulatory Services' Deputy Director Clara Schmit-Gonzalez estimates that of the approximately 500 citations issued, only 10 have resulted in proceedings before a hearing officer. These 500 citations have generated approximately \$13,000 in revenue during the period of January 1, 2003 to June 3, 2003. The current system uses three hearing officers who are paid \$100 for a four-hour hearing period. Hearings have been averaging 30 to 45 minutes. If this process were to be expanded, a centralized computer tracking system would be necessary to schedule and track hearing outcomes. Ms. Schmit-Gonzalez estimates that such a system would require one personal computer and about \$6,000 in software. She also suggested that another alternative might be to hire a company like "parking professionals" to do all the scheduling, tracking and fine collection.

Next Steps and Recommendations

Based on the above, we recommend that the City Council:

- 1) Receive and file this report.;
- 2) Direct the City Attorney's Office and the Minneapolis Police Department to report back to the Public Safety & Regulatory Services Committee in two cycles with specific staffing and cost requirements for a pre-charging referral system, a post-charging referral system through the Traffic Violation Bureau and the Administrative Enforcement and Hearing process;
- 3) Direct the City Attorney's Office to report back in two cycles with a proposed curriculum for a Livability Offenses Behavior Class;
- 4) Direct the Minneapolis Police Department First Precinct to work with the City Attorney's Office to further develop the pre-charging referral process, and the increased use of the Administrative Enforcement and Hearing Process, and to report

back in two cycles with specific recommendations regarding a precharging referral process and expanded use of the Administrative Enforcement and Hearing Process; and

- 5) Direct the City Attorney's Office and the City's IGR staff to pursue the legislative options discussed in this report.