



PROCLAMATION CALLING A SPECIAL MEETING OF THE BERKELEY CITY COUNCIL

In accordance with the authority in me vested, I do hereby call the Berkeley City Council in special session as follows:

Tuesday, December 8, 2020

4:00 P.M.

JESSE ARREGUIN, MAYOR

Councilmembers:

DISTRICT 1 – RASHI KESARWANI
DISTRICT 2 – TERRY TAPLIN
DISTRICT 3 – BEN BARTLETT
DISTRICT 4 – KATE HARRISON

DISTRICT 5 – SOPHIE HAHN
DISTRICT 6 – SUSAN WENGRAF
DISTRICT 7 – RIGEL ROBINSON
DISTRICT 8 – LORI DROSTE

PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED EXCLUSIVELY THROUGH VIDEOCONFERENCE AND TELECONFERENCE

Pursuant to Section 3 of Executive Order N-29-20, issued by Governor Newsom on March 17, 2020, this meeting of the City Council will be conducted exclusively through teleconference and Zoom videoconference. Please be advised that pursuant to the Executive Order and the Shelter-in-Place Order, and to ensure the health and safety of the public by limiting human contact that could spread the COVID-19 virus, there will not be a physical meeting location available.

Live audio is available on KPFB Radio 89.3. Live captioned broadcasts of Council Meetings are available on Cable B-TV (Channel 33) and via internet accessible video stream at <http://www.cityofberkeley.info/CalendarEventWebcastMain.aspx>.

To access the meeting remotely: Join from a PC, Mac, iPad, iPhone, or Android device: Please use this URL <https://us02web.zoom.us/j/82201220671>. If you do not wish for your name to appear on the screen, then use the drop down menu and click on "rename" to rename yourself to be anonymous. To request to speak, use the "raise hand" icon by rolling over the bottom of the screen.

To join by phone: Dial **1-669-900-9128** or **1-877-853-5257 (Toll Free)** and enter Meeting ID: **822 0122 0671**. If you wish to comment during the public comment portion of the agenda, Press *9 and wait to be recognized by the Chair.

To submit an e-mail comment during the meeting to be read aloud during public comment, email clerk@cityofberkeley.info with the Subject Line in this format: "PUBLIC COMMENT ITEM ##." Please observe a 150 word limit. Time limits on public comments will apply. Written comments will be entered into the public record.

Please be mindful that the teleconference will be recorded as any Council meeting is recorded, and all other rules of procedure and decorum will apply for Council meetings conducted by teleconference or videoconference.

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, City Clerk, (510) 981-6900. The City Council may take action related to any subject listed on the Agenda. 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:

Public Comment - Limited to items on this agenda only

Action Calendar

The public may comment on each item listed on the agenda for action as the item is taken up. For items moved to the Action Calendar from the Consent Calendar or Information Calendar, persons who spoke on the item during the Consent Calendar public comment period may speak again at the time the matter is taken up during the Action Calendar.

The Presiding Officer will request that persons wishing to speak use the "raise hand" function to determine the number of persons interested in speaking at that time. Up to ten (10) speakers may speak for two minutes. If there are more than ten persons interested in speaking, the Presiding Officer may limit the public comment for all speakers to one minute per speaker. Speakers are permitted to yield their time to one other speaker, however no one speaker shall have more than four minutes. The Presiding Officer may, with the consent of persons representing both sides of an issue, allocate a block of time to each side to present their issue.

Action items may be reordered at the discretion of the Chair with the consent of Council.

1. **Updates to the COVID-19 Emergency Response Ordinance** (Continued from November 17, 2020. Item contains revised material.)

From: 4x4 Joint Task Force Committee on Housing

Recommendation:

1. Adopt first reading of an ordinance (effective February 1) amending Berkeley Municipal Code 13.110, Title 13, "The COVID-19 Emergency Response Ordinance," to enhance emergency tenant protections consistent with recently adopted Alameda County laws, action in other jurisdictions, and consultation with community stakeholders representing marginalized groups.
2. Adopt a resolution, directing the City Manager to promptly issue a written statement, pursuant to Alameda County Municipal Code 6.120.110, affirming or declaring in writing that the City of Berkeley intends to "opt-out" of the County ordinance, enumerating the specific provisions of the County's ordinance from which the City intends to opt out, and including a finding that the City ordinance is stronger.

Financial Implications: See report

Contact: Cheryl Davila, Councilmember, District 2, (510) 981-7120

Adjournment

I hereby request that the City Clerk of the City of Berkeley cause personal notice to be given to each member of the Berkeley City Council on the time and place of said meeting, forthwith.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the City of Berkeley to be affixed on this 4th day of December, 2020.



Jesse Arreguin, Mayor

Public Notice – this Proclamation serves as the official agenda for this meeting.

ATTEST:



Date: December 4, 2020
Mark Numainville, City Clerk

NOTICE CONCERNING YOUR LEGAL RIGHTS: *If you object to a decision by the City Council to approve or deny an appeal, the following requirements and restrictions apply: 1) Pursuant to Code of Civil Procedure Section 1094.6 and Government Code Section 65009(c)(1)(E), no lawsuit challenging a City decision to deny or approve a Zoning Adjustments Board decision may be filed and served on the City more than 90 days after the date the Notice of Decision of the action of the City Council is mailed. Any lawsuit not filed within that 90-day period will be barred. 2) In any lawsuit that may be filed against a City Council decision to approve or deny a Zoning Adjustments Board decision, the issues and evidence will be limited to those raised by you or someone else, orally or in writing, at a public hearing or prior to the close of the last public hearing on the project.*

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Archived indexed video streams are available at <http://www.cityofberkeley.info/citycouncil>. Channel 33 rebroadcasts the following Wednesday at 9:00 a.m. and Sunday at 9:00 a.m.

Communications to the City Council are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service to the City Clerk Department at 2180 Milvia Street. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk Department for further information.

Any writings or documents provided to a majority of the City Council regarding any item on this agenda will be posted on the City's website at <http://www.cityofberkeley.info>.

Agendas and agenda reports may be accessed via the Internet at <http://www.cityofberkeley.info/citycouncil>

COMMUNICATION ACCESS INFORMATION:

To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at (510) 981-6418 (V) or (510) 981-6347 (TDD) at least three business days before the meeting date.



Captioning services are provided at the meeting, on B-TV, and on the Internet.

Communications

Council rules limit action on Communications to referral to the City Manager and/or Boards and Commissions for investigation and/or recommendations. All communications submitted to Council are public record. Copies of individual communications are available for viewing through [Records Online](#).

Item #1: Updates to the COVID-19 Emergency Response Ordinance

1. Matthew Lewis, on behalf of the Berkeley Tenants Union



Office of the City Manager

ACTION CALENDAR

December 8, 2020

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Farimah Faiz Brown, City Attorney

Subject: Proposed Amendments to COVID-19 Emergency Response Ordinance
(Chapter 13.110)

RECOMMENDATION

Adopt a first reading of amendments to the COVID-19 Emergency Response Ordinance to more closely track the Alameda County Eviction Moratorium (County Code Chapter 6.120) and incorporate other proposed amendments while conforming to state law, particularly the COVID-19 Tenant Relief Act of 2020 (Assembly Bill 3088).

FISCAL IMPACTS OF RECOMMENDATION

To be determined.

CURRENT SITUATION AND ITS EFFECTS

The COVID-19 Emergency Response Ordinance was enacted prior to the Alameda County Eviction Moratorium (County Code Chapter 6.120) and there are certain provisions of the County Eviction Moratorium that afford greater protections to unincorporated areas of Alameda County than are afforded in Berkeley. On August 31, 2020 the state legislature enacted the COVID-19 Tenant Relief Act of 2020 (Assembly Bill 3088) which imposes certain changes or limitations on local eviction protections and prevents new or amended eviction protections from taking effect until February 1, 2021.

BACKGROUND

On November 17, 2020, the City Council considered an item from the 4x4 Joint Task Force Committee on Housing that proposed amendments to the COVID-19 Emergency Response Ordinance "to enhance emergency tenant protections consistent with recently adopted Alameda County laws, action in other jurisdictions, and consultation with community stakeholders representing marginalized groups." The Council acted as follows: M/S/C (Hahn/Harrison) to:

- 1) Refer the ordinance as presented in Supplemental Communications Packet #2 to the City Attorney to present a revised ordinance for a first reading at a special meeting on December 8, 2020 at 4:00 p.m. with the second reading to occur on December 15, 2020.
- 2) Request that the City Attorney retain the intent of the proposed ordinance and the

comments by Council on 11/17, clarify the applicability of the ordinance (residents, boarders, tenants), conform the ordinance to state law and adhere closely to the county laws while meeting Berkeley needs, include an Ellis Act carve out option, request collaboration with the Councilmembers on the 4x4 Committee, the City Manager, and Rent Board legal staff.

3) Request that the City Attorney issue a legal memo or schedule a closed session meeting to review legal considerations on the Ellis Act carve out.

Vote: All Ayes.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report.

RATIONALE FOR RECOMMENDATION

As directed by Council, the City Attorney's Office has consulted with the Councilmembers on the 4x4 Committee, the City Manager, and Rent Board legal staff in developing the revised ordinance attached as Attachment 1. The ordinance includes, wherever possible, the amendments presented on November 17, and is designed both to conform as closely as possible to the County Eviction Moratorium and to conform to state law.

ALTERNATIVE ACTIONS CONSIDERED

The City could choose to take no action on these proposals and leave the existing COVID-19 Emergency Response Ordinance in effect.

CONTACT PERSON

Farimah Brown, City Attorney, 981-6998

Attachment:

1: Ordinance

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ORDINANCE NO. -N.S.

ORDINANCE AMENDING CHAPTER 13.110 OF THE BERKELEY MUNICIPAL CODE, THE COVID-19 EMERGENCY RESPONSE ORDINANCE

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. The Berkeley Municipal Code Chapter 13.110 is amended to read as follows:

**Chapter 13.110
COVID-19 EMERGENCY RESPONSE ORDINANCE**

Sections:

- 13.110.010 Findings and Purpose**
- 13.110.020 Prohibited Conduct**
- 13.110.030 Definitions**
- 13.110.040 Collection of Back Rent and Late Fees**
- 13.110.050 Application**
- 13.110.060 Implementing Regulations**
- 13.110.070 Waiver**
- 13.110.080 Remedies**
- 13.110.090 Severability**
- 13.110.100 Liberal Construction**

13.110.010 Findings and Purposes

International, national, state and local health and governmental authorities are responding to an outbreak of respiratory disease caused by a novel coronavirus named "SARS-CoV-2." And the disease it causes has been named "coronavirus disease 2019," abbreviated COVID-19, ("COVID-19"). In response to this emergency, on March 3, 2020, the City Manager acting as the Director of Emergency Services declared a local State of Emergency based on COVID-19 (hereinafter referred to as "the ~~State of Local~~ Emergency"), which the City Council subsequently ratified on March 10, 2020. On April 21, 2020, June 16, 2020, July 28, 2020, September 22, 2020, and November 17, 2020, the council ratified an extension of the local ~~state of~~ emergency. In addition, on March 4, 2020, the Governor declared a state of emergency in California and the President of the United States declared a national state of emergency on March 13, 2020 regarding the novel coronavirus and COVID-19.

On March 16, 2020, the City of Berkeley Public Health Officer, along with several other neighboring jurisdictions issued a Shelter in Place Order directing all individuals living in the City of Berkeley to shelter at their place of residence except that they may leave to provide or receive certain essential services or engage in certain essential activities, and prohibiting non-essential gatherings and ordering cessation of non-essential travel. On March 31, 2020 this Shelter in Place Order was extended to May 3, 2020, and restricted activities further.

Furthermore, on March 16, 2020, the Governor issued Executive Order N-28-20, specifically authorizing local governments to halt evictions for commercial tenants, residential tenants, and homeowners who have been affected by COVID-19, emphasizing that the economic impacts of COVID-19 have been significant and could threaten to undermine housing security as many

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people are experiencing material income loss as a result of business closures, the loss of hours or wages or layoffs related to COVID-19, hindering their ability to keep up with rents, mortgages and utility bills.

The Order also stated that because homelessness can exacerbate vulnerability to COVID-19, Californians must take measures to preserve and increase housing security for Californians to protect public health and specifically stated that local jurisdictions may take measures to promote housing security beyond what the state law would otherwise allow.

~~On April 6, 2020, the Judicial Council of California issued emergency rules suspending court proceedings for unlawful detainer and judicial foreclosures until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted.~~

On April 21, 2020, Alameda County enacted an urgency ordinance prohibiting eviction for any reason other than withdrawal of rental property under the Ellis Act or court-ordered eviction for public safety. Although the Alameda County ordinance does not have effect within the incorporated area of Berkeley, it is desirable to ensure that Berkeley residents have at least the same level of protection as the residents of unincorporated Alameda County.

During this State of Emergency, and in the interests of protecting the public health and preventing transmission of the COVID-19, it is essential to avoid unnecessary displacement and homelessness. It is the intent of this Ordinance to fully implement the suspension of the statutory bases for eviction for nonpayment of rent and for default in the payment of a mortgage as authorized by Executive Order N-28-20.

At the same time, the Governor, as well as, the Berkeley Health Officer, and those of other jurisdictions ordered the closure of businesses, except those deemed essential. Many businesses, such as restaurants, are open only for take-out or pick up services and face a critical loss of business.

The City Council is aware that some landlords of commercial properties are seeking significant rent increases during the period when many commercial tenants are closed or are experiencing substantial and catastrophic reductions in their business and income. Such rent increases force tenants who are closed or have substantially reduced revenues face the choice of accepting a significant rent increase, moving at a time when it is virtually impossible, or closing altogether. Accepting a rent increase while closed or in a reduced state of operations means that the commercial tenants face even more debt to the landlord when the emergency is over, and may face a substantially increased rent when the tenant returns to normal operations, if ever.

Landlords of commercial property that unreasonably increases rents on tenants of commercial property during the COVID-19 emergency significantly impacts vulnerable small businesses, nonprofits, and artists who form a large part of the backbone of Berkeley's economy, revenue sources, and employment opportunities. These rent increases are coming at a time when the commercial rents are likely falling due to business closures and potential loss of businesses at the end of the emergency. Thus, these rent increases appear as a way of evading the Governor's and Berkeley's commercial tenant eviction moratorium by forcing tenants to agree to rent increases or leave. Such conduct constitutes constructive evictions in contravention of the eviction moratorium. Furthermore, such rent increases may affect businesses providing goods and essential services, resulting in increases in those costs of essential goods and services contravening the intent of anti-price gouging laws.

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On expiration of leases when the emergency order is in place, unreasonable rent increases have already forced the closure of businesses and will result in closing of additional business causing loss of income for the business owners, loss of employment for the employees and of revenue to the city, and an increase in homelessness. To reduce the spread of COVID-19, it is essential to avoid unnecessary displacement and homelessness. Because of the emergency restrictions, businesses forced out due to increased rents will be unable to move to new locations and new businesses will be unable to open during this emergency period. During a state of emergency cities have extraordinary powers and jurisdiction to create legislation in order to counteract the effects of the emergency situation on its people and businesses. Protecting tenants from excessive rent increases will prevent additional loss of employment and essential services for Berkeley residents. In order to effectively implement an eviction moratorium, the City Council finds it imperative to prevent constructive eviction through unreasonable rent increases.

Accordingly, the City of Berkeley adopts the following amendments to Berkeley Municipal Code Chapter 13.110.

13.110.020 Prohibited Conduct

A. During the ~~Covered Period local State of Emergency~~, no Landlord or ~~Lender other entity~~ shall evict or attempt to evict an ~~Resident occupant~~ of real property, ~~or otherwise require a Tenant to vacate~~, unless necessary ~~to stop an imminent threat to for~~ the health and safety of ~~other occupants residents~~. For purposes of this Ordinance, the basis for an exception to this Ordinance cannot be the Resident's COVID-19 illness or exposure to COVID-19, whether actual or suspected.

B. Residential Eviction Moratorium. It shall be a complete defense to any action for unlawful detainer that the notice upon which the action is based was served or expired, or that the complaint was filed or served, during the ~~Covered Period local State of Emergency~~.

C. No landlord of an Impacted Business or Nonprofit may upon expiration of a lease increase rent for an Impacted Business or Nonprofit in an amount greater than ten (10) percent over the rent in effect at the commencement of the local ~~state of~~ emergency declared by the Director of Emergency Services. For purposes of this section, rent means all consideration for the use and enjoyment of the rented premises, including base rent and any additional rent or other charges for costs such as utilities, maintenance, cleaning, trash removal, repairs and any other charges to the tenant required under the rental agreement. This section 13.110.020 C. shall expire on May 31, 2020, concurrent with Executive Order N-28-20; provided, however, that this section shall be automatically extended if Executive Order N-28-20 is extended or the tenant protections therein are extended pursuant to another Governor's Executive Order.

D. For the duration of the ~~Covered Period local State of Emergency~~, if a tenant has a Covered reason for delayed payment, the tenant may terminate a lease or rental agreement with 30 days' notice without penalty. A tenant may also exercise rights under this subsection if the tenants or roommates of the tenants are or were registered at an educational institution that cancelled or limited in-person classes due to the COVID-19 pandemic

13.110.030 Definitions

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A. "Covered Period" means the period of time beginning with March 17, 2020 and concluding upon the expiration of the local emergency. However, the City Council may vote by resolution to extend the duration of the Covered Period.

~~B. A.~~ "Covered Reason for Delayed Payment" means:

- (1) The basis for the eviction is nonpayment of rent, arising out of a material decrease in household, business, or other rental unit occupant(s)'s income (including, but not limited to, a material decrease in household income caused by layoffs or a reduction in the number of compensable hours of work, or to caregiving responsibilities, or a material decrease in business income caused by a reduction in opening hours or consumer demand), or material out-of-pocket medical expenses, or, ~~in a group living arrangement wherein all tenants are collectively responsible for payment of the rent to the landlord,~~ a reduction in the number of tenants living in the unit (including due to difficulty finding new tenants and/or subtenants willing and able to cover a sufficient share of rent) which reduces the ability of the remaining tenants to pay the rent, or a rent increase that exceeds the Annual General Adjustment for the current year; and
- (2) The decrease in household, business, or other rental unit occupant's income or the expenses or reduction in number of tenants described in subparagraph (1) was caused by the impacts of COVID-19 pandemic, or by any local, state, or federal government response to COVID-19.

~~C. B.~~ "Delayed Rent Payment Agreement" means a mutual agreement between a landlord and tenant regarding the timing and amount of payments for rent that is delayed by a Covered Reason for Delayed Payment.

D. "Homeowner" means the owner or owners of a Residential Unit subject to a mortgage or similar loan secured by the residential unit. "Homeowner" is limited to owners who reside in the unit and includes the individuals residing in the unit with the homeowner.

~~E. C.~~ "Impacted Business or Nonprofit" means a business or nonprofit organization that had a business license in 2019 or 2020 in the City of Berkeley or is a registered nonprofit in either or both of those years and:

1. whose operation has been shut down due to the COVID-19 emergency, or
2. that is unable to accept customers at its location and is open for limited virtual, take-out or pickup services only, or
3. who suffered a material loss of income.

~~F. D.~~ "Landlord" includes owners, lessors, or sublessors of either residential or commercial rental property, and the agent, representative, or successor of any of the foregoing.

G. "Lender" means the mortgagee of a purchase money or similar mortgage, or the holder or beneficiary of a loan secured by one or more units, which person has the right to mortgage or similar payments from the owner as mortgagor, including a loan servicer, and the agent, representative, or successor of any of the foregoing.

H. "Resident" means a Tenant, Homeowner, or their household.

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I. E. "Tenant" includes a tenant, subtenant, lessee, sublessee, lodger or any other person entitled by written or oral rental agreement to use or occupancy of either residential or commercial property.

13.110.040 Collection of Back Rent and Late Fees

A. Nothing in this Chapter shall relieve the tenant of liability for unpaid rent, which the landlord may seek after expiration of the local State of Emergency. Notwithstanding any lease provision to the contrary, a landlord may not charge or collect a late fee, fine, or interest for rent that is delayed by a Covered Reason for Delayed Payment. The City will develop standards or guidelines for tenants to repay unpaid rent accrued during the Covered Period course of the local State of Emergency. Landlords are encouraged to work with local agencies that will be making rental assistance available for qualifying tenants.

B.

1. For rent accrued through January 31, 2021, Tenants shall have until March 31, 2022 up to twelve (12) months to pay rent that was delayed by a Covered Reason for Delayed Payment unless the landlord and tenant come to a mutual repayment agreement ("Delayed Rent Payment Agreement").

2. For rent accrued beginning February 1, 2021, Tenants shall have until twenty-four (24) months after the conclusion of the Covered Period to pay rent that was delayed by a Covered Reason for Delayed Payment unless the landlord and tenant come to a mutual repayment agreement ("Delayed Rent Payment Agreement").

3. Notwithstanding any lease provision to the contrary, a landlord may not charge or collect a late fee, fine, or interest for rent that is delayed by a Covered Reason for Delayed Payment.

C. A Tenant is not required to provide documentation to the Landlord in advance to qualify for the delayed repayment of rent over the 12 months. However, upon the request of a Landlord, a Tenant shall provide such documentation to the Landlord within forty-five (45) days after the request or within thirty (30) days after the Covered Period, whichever is later. A declaration sworn under penalty of perjury shall constitute documentation for the purpose of this requirement. In the case of nonpayment of rent, the failure of a Tenant to notify the landlord in advance of being delinquent in the payment of rent prior to being served with a notice pursuant to Code of Civil Procedure sections 1161(2) et seq. does not waive the Tenant's right to claim this Chapter as a complete defense to nonpayment of rent in an unlawful detainer action.

D. Any medical or financial information provided to the landlord shall be held in confidence, and shall not be disclosed to other entities unless such disclosure is permitted or required by the law, or unless the tenant explicitly authorizes the disclosure of the information in writing.

E. Any relief from the City of Berkeley either directly to a property owner on their own application or as a pass through for City relief payments to the tenant shall directly reduce the amount of any rent that was delayed by a Covered Reason for Delayed Payment. This requirement shall be applied into any Delayed Rent Payment Agreement, regardless of the terms of that agreement.

13.110.050 Application

A. This Chapter applies to eviction notices and unlawful detainer actions based on notices served, filed, or which expire during the Covered Period on or after the effective date of this Chapter through the end of the local State of Emergency. It does not apply to withdrawal of

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accommodations from the rental market pursuant to Government Code 7060 et seq. (“Ellis Act”) or to units ordered by the City to be vacated for the preservation of public health, including where the City deems necessary to control the spread of COVID-19.

B. ~~Except where expressly required by state law (such as Assembly Bill 3088 or any subsequent statewide COVID-19 relief legislation) with respect to delayed payment covered by this Ordinance,~~ a landlord may seek rent accrued during the Covered Period as set forth in ~~after the expiration of the local State of Emergency, pursuant to~~ Section 13.110.040, but may not file an action pursuant to Code of Civil Procedure sections 1161(2) et seq. or otherwise seek to recover possession of a rental unit based on the failure to pay rent that accrued ~~due to a Covered Reason for Delayed Payment~~ during the Covered Period~~local State of Emergency~~. In any action to evict based on alleged nonpayment of rent, it shall be a complete defense to such action if any part of the rent in dispute accrued at any time during the Covered Period, or if the action otherwise demands any fees or amounts contrary to the provisions of this Chapter. A landlord shall not apply any rent payment towards rent that is delayed by a Covered Reason for Delayed Payment before applying it towards any other Rent owed without the explicit written permission of the Tenant.

C. A Landlord or Lender shall not retaliate against a TenantResident for exercising their rights under this Ordinance, including but not limited to shutting off any utilities, ~~or~~ reducing services or amenities, refusing to make or delaying repairs to which the TenantResident would otherwise be entitled.

D. In addition to the affirmative defenses set forth above, in any action to recover possession of a rental unit filed under Berkeley Municipal Code section 13.76.130(A)(1), it shall be a complete defense that the landlord impeded the tenant’s effort to pay rent by refusing to accept rent paid on behalf of the tenant from a third party, or refusing to provide a W-9 form or other necessary documentation for the tenant to receive rental assistance from a government agency, non-profit organization, or other third party. Acceptance of rental payments made on behalf of the tenant by a third party shall not create a tenancy between the landlord and the third party.

13.110.060 Implementing Regulations

The City Manager may promulgate implementing regulations and develop forms to effectuate this Ordinance. This includes the option of requiring Landlords and Lenders to give a notice to TenantsResidents informing them of this Chapter and the right to seek the benefits of this Chapter.

13.110.070 Waiver.

A. By entering into a Delayed Rent Payment Agreement, Tenants do not waive any rights under this Chapter.

B. Any agreement by a Tenant to waive any rights under this ordinance shall be void and contrary to public policy.

13.110.080 Remedies

~~A. In the event of a violation of this Ordinance, any person or entity aggrieved by the violation may institute a civil proceeding for injunctive relief, and money actual damages as specified below, and whatever other relief the court deems appropriate. Money damages shall only be awarded if the trier of fact finds that the landlord acted in knowing violation of or in reckless disregard of this Ordinance. The prevailing party shall be entitled to reasonable attorney’s fees~~

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~~and costs pursuant to order of the court. The remedy available under this section shall be in addition to any other existing remedies which may be available to the tenant under local, state or federal law. In addition, this Ordinance grants a defense to eviction in the event that an unlawful detainer action is commenced in violation of this Ordinance.~~

1. An award of actual damages may include an award for mental and/or emotional distress and/or suffering. The amount of actual damages awarded to a prevailing plaintiff shall be trebled by the Court outside of the presence, and without the knowledge of, the jury, if any, if a defendant acted in knowing violation of, or in reckless disregard for, the provisions of this Chapter.

2. A defendant shall be liable for additional civil penalties of up to five thousand dollars for each violation of this Chapter committed against a person who is disabled within the meaning of California Government Code section 12926, et seq., or aged sixty-five or over.

3. In addition to the above awards of damages in a civil action under this Chapter, a prevailing plaintiff shall be entitled to an award of reasonable attorney's fees. A prevailing defendant in a civil action under this Chapter shall only be entitled to an award of attorney's fees if it is determined by the Court the action was wholly without merit or frivolous.

4. In addition, this Chapter grants a complete defense to eviction in the event that an eviction notice or unlawful detainer action is commenced, filed, or served in violation of this Chapter.

B. The protections provided by this ordinance shall be available to all tenants, regardless of any agreement wherein a tenant waives or purports to waive their rights under this Ordinance, with any such agreement deemed void as contrary to public policy.

C. A. Violations of Section 13.110.020(C) - (Commercial rent restrictions).

1. Violations of Section 13.110.020(C) may be enforced by an administrative fine of up to \$1,000 pursuant to Chapter 1.28. Each day a commercial property landlord demands rent in excess of the amount permitted pursuant to Section 13.110.020(C) is a separate violation. The City may also charge the costs of investigating and issuing any notices of violations, and any hearings or appeals of such notices.

2. The City Attorney may refer those violators of Section 13.110.020(C) to the Alameda County District Attorney for redress as a violation of Business and Professions Code section 17200, et seq. or, if granted permission by the District Attorney, may bring an action pursuant to Business and Professions Code section 17200, et seq.

D. Nonexclusive Remedies and Penalties. The remedies provided in this subdivision are not exclusive, and nothing in this Chapter shall preclude any person from seeking any other remedies, penalties or procedures provided by law.

13.110.090 Severability.

If any section, subsection, sentence, clause, phrase, or word of this Chapter, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of this Chapter. The Council of the City of Berkeley hereby declares that it would have passed this Chapter and each and every section, subsection, sentence, clause,

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phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this Chapter or application thereof would be subsequently declared invalid or unconstitutional.

13.110.100 Liberal Construction

The provisions of this Chapter shall be liberally construed so as to fully achieve its purpose and provide the greatest possible protections to tenants.

Section 2. Effective Date

This ordinance shall go into effect thirty days from the time of its final passage or on February 1, 2021, whichever is later.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.



Cheryl Davila
Councilmember
District 2

REVISED AGENDA MATERIAL

Meeting Date: November 17, 2020

Item: #20

Subject: Urgency Ordinance: Updates to the COVID-19 Emergency Response Ordinance; Resolution: Request UC Berkeley Voluntarily Comply with
Local Ordinances Restricting Evictions, Delaying Rent Payments, and Empowering Tenants to Terminate their Leases Without Penalty

Submitted by: Councilmember Cheryl Davila

Revisions: First, these revisions add an additional sentence to the notice which must be attached to any eviction notice. Second, they make explicit that these protections apply to tenants living in group living accommodations. Third, as requested by the City Attorney's Office, these revisions make it so that the repayment period for rent accrued beginning February 1, 2021 no longer mirror the statutes of limitations in Civ. Proc. §337.2 and Civ. Proc. §339.5. Fourth, they eliminate conflicting language about when landlords may start collecting back rent which accrues before February 1, 2021. Fifth, as requested by legal services providers, they add additional forms of prohibited retaliation. Sixth, they add a resolution directing the City Attorney to take the steps required by the County ordinance for Berkeley's stronger ordinance to take effect. Finally, it fixes typos and updates the findings section in the existing ordinance. It also makes a few other non-substantive amendments to make the ordinance clearer.



Cheryl Davila
Councilmember
District 2

ACTION CALENDAR
November 17, 2020

To: Honorable Mayor and Members of the City Council
From: 4x4 Joint Task Force Committee on Housing
Subject: Updates to the COVID-19 Emergency Response Ordinance

RECOMMENDATION

1. Adopt first reading of an ordinance (effective February 1) amending Berkeley Municipal Code 13.110, Title 13, "The COVID-19 Emergency Response Ordinance," to enhance emergency tenant protections consistent with recently adopted Alameda County laws, action in other jurisdictions, and consultation with community stakeholders representing marginalized groups.
2. [Adopt a resolution, directing the City Manager to promptly issue a written statement, pursuant to Alameda County Municipal Code 6.120.110, affirming or declaring in writing that the City of Berkeley intends to "opt-out" of the County ordinance, enumerating the specific provisions of the County's ordinance from which the City intends to opt out, and including a finding that the City ordinance is stronger.](#)

BACKGROUND

A. Berkeley's COVID-19 Emergency Response Ordinance

On March 17, 2020, the Berkeley City Council adopted an emergency ordinance prohibiting evictions of residential and commercial tenants unable to pay their rent due to COVID-19. Subsequently, on April 21, 2020, the Council further amended the City's ordinance to enhance eviction protections for commercial tenants, namely a prohibition on unreasonable rent increases for impacted businesses and nonprofits. Again on May 26, 2020, the Council further amended the city's ordinance to enhance eviction protections for residential tenants and homeowners, including banning most residential evictions through the end of the local state of emergency. Subsequently, on June 30, 2020 the Council further amended the city's ordinance to clarify and enhance the ability of residential tenants to terminate a lease. Since the enactment of these protections, other jurisdictions in California, including neighboring jurisdictions and the Alameda County Board of Supervisors have enacted a number of additional protections that are either complimentary to, or more stringent than, Berkeley's ordinance. The item updates BMC 13.110 to, among other provisions, include best practices and to align with newly adopted countywide protections.

B. Alameda County's Urgency Ordinances

On March 24, 2020, the Alameda County Board of Supervisors passed an urgency ordinance creating a temporary moratorium on evictions for renters and homeowners in the Unincorporated County (Ordinance No. 2020-14).

On March 31, 2020, the Alameda County Board of Supervisors extended protections to the entire County. Similar to our BMC 13.110, the ordinances applied a moratorium on evictions to tenants, homeowners or mobile homeowners who can provide documentation that they cannot pay their rent or mortgage due to a substantial loss of income, substantial out-of-pocket medical expenses, or extraordinary childcare needs caused by COVID-19.

On April 21, 2020, the Alameda County Board of Supervisors considered and adopted additional amendments,¹ after finding that the pandemic and shelter in place orders created severe new and exacerbated existing socioeconomic impacts. Accordingly, the County deemed any eviction, regardless of cause, a public health threat. Giving cities this option provides baseline protections for residents of cities without moratoria, but allows cities to make determinations in the best interest of their residents. [As currently written, the Alameda County ordinance provides that “If \[a city council\] has enacted an ordinance that has stronger protections for tenants during the COVID-19 emergency, the city may apply its ordinance in lieu of the county ordinance, to the extent its ordinance is stronger, subject to the requirements of this section. The city must duly affirm or declare in writing its intent to opt out of the county ordinance. The writing must enumerate the specific provisions of the county’s ordinance from which the city intends to opt out and must include a finding that the city ordinance is stronger.”](#)

The California Attorney General has opined that when a county has declared a local emergency within its jurisdictional boundaries in an area that includes both unincorporated and incorporated territory, the county may adopt emergency rules and regulations pursuant to Government Code Section 8634 that will be effective in both unincorporated and incorporated areas (62 Ops. Cal. Atty. Gen. 701 (1979)). However, questions have been raised as to whether this power of counties always covers charter cities, such as Berkeley; for example, in early June, many members of the Council questioned whether the county-wide curfew issued by the County Sheriff was legally valid within Berkeley City limits.

C. [Assembly Bill 3088](#)

On August 31, the Governor signed AB 3088, an urgency bill (i.e. one which takes immediate effect). The bill provides, among other things, that “Any ordinance, resolution, regulation, or administrative action adopted by a city, county, or city and county in response to the COVID-19 pandemic to protect tenants from eviction is subject to [the limitation that]... Any extension, expansion, renewal, reenactment, or new adoption of a measure, however delineated, that occurs between August 19, 2020, and January 31, 2021, shall have no effect before February 1, 2021” (Cal. Civ. Proc. Code §1179.05(a)).

As a result, most if not all amendments made to Berkeley’s ordinance in order to further protect tenants could likely not take effect until February 1, 2021 regardless of urgency. However, the City Council can still adopt amendments before then so that they will come into effect on February 1, 2021.

¹ Amend Countywide Temporary Moratorium on Residential Evictions, Alameda County Community Development Agency, April 21, 2020, https://www.acgov.org/board/bos_calendar/documents/DocsAgendaReg_04_21_20/GENERAL%20ADMINISTRATION/Regular%20Calendar/CDA_294956.pdf, Amendments were crafted and presented by the Alameda County’s Community Development Agency and the Housing and Community Development Department (HCD), in coordination with County Counsel, Public Health, all cities countywide, Resources for Community Development, and legal agencies including Bay Area Legal Aid, Centro Legal de la Raza, East Bay Community Law Center, and Housing and Economic Rights Advocates

D. Updates to The Covid-19 Emergency Response Ordinance

Unreasonable evictions are directly at odds with local, state and federal measures to recover from the pandemic.

Housing stability is a prerequisite for flattening the COVID-19 infection curve. Loss of housing presents significant health risks for those directly affected and the population at large, through disruption of shelter in place orders, social distancing measures and increased homelessness. Testing, quarantine, and physical distancing measures are bolstered by housing security.

In recognition of developments at the Alameda County level, action in other jurisdictions, and consultation with community stakeholders, the ordinance makes the following additional amendments to BMC 13.110:

1. *Expansion of Moratorium Scope:*

Consistent with numerous jurisdictions (including the Cities of Los Angeles, Santa Monica, and Inglewood) these amendments would prohibit Ellis Act evictions.² Additionally, minor amendments are made to the exception for health and safety threats to bring it in line with the language of the County ordinance and to reflect a change requested by legal services providers; the former is important to ensure there are no evictions prohibited by the County ordinance but ostensibly allowed under the City ordinance, thereby minimizing the risk of legal confusion.

2. *Council May Extend Protections By Resolution*

Currently, many protections under the Berkeley ordinance lapse either upon the expiration of the local state emergency. This period is not as long as in other jurisdictions. For example, the City of Los Angeles's ordinance protects tenants from Ellis Act evictions for sixty (60) days after the expiration of the local state of emergency, and Alameda County's eviction moratorium currently expires sixty (60) days after the expiration of the countywide state of emergency. These amendments would allow the Council to extend this period by resolution (instead of an ordinance), allowing the Council to swiftly act by majority vote to protect public health and safety and keep residents housed if the local situation necessitates immediate action.

3. *Authorize Tenants To Self-Attest Financial Hardship*

Some tenants may have difficulty providing sufficient documentation that proves their COVID-related financial hardship. In order to ensure that no tenant is left behind, these amendments would authorize tenants to self-attest their COVID-related financial hardship. Given that landlords are ultimately allowed to recover back rent, there would ultimately be no barrier to their ability to ultimately be made financially "whole." Furthermore, this would bring the City ordinance in line with the federal eviction moratorium recently issued by the Centers for Disease Control and Prevention (CDC), which allows tenants to self-declare their inability to pay.

4. *Clarifies Covered Reasons for Delayed Payment*

Due to Berkeley's status as a "college town" and the transition of UC Berkeley (and other local institutions of higher education) to mainly online and/or hybrid-format classes in response to the ongoing COVID pandemic many segments of Berkeley's rental market have seen a significant drop in demand. While this reduced demand may benefit many tenants

² aagla.org/wp-content/uploads/2020/07/7120-Updated-Temporary-Eviction-Moratorium-Chart-002.pdf

entering new rental agreements, continuing tenants are largely not receiving this benefit, and ironically some may be in a worse position even if their own financial situation remains unchanged. Many tenants, especially those who live with students, may have had one or more roommates move-out, and planned to replace them with a new roommate(s) who would pay the same share of the rent. However, many landlords required their tenants to sign lease renewals before the severity of the COVID crisis became clear. As a result, those tenants were not in a position to bargain for a rent reduction, and with reduced demand for housing may be unable to find a replacement roommate willing and able to pay the same share of the rent as an outgoing roommate. The remaining tenants can be left with an unwinnable choice: Delaying taking on a new roommate(s) in the hope of finding someone who can pay the same share of the rent (while having to pay the full share of the rent until they find a replacement), or take on a higher share of the rent in order to immediately have a new roommate. While previous versions of the ordinance were clearly intended to cover this situation, the failure to explicitly mention them creates a perpetual risk that the courts will interpret them otherwise. These amendments make clear that such scenarios are covered reasons for ~~delayed non~~payment, eliminating the risk of judicial misinterpretation.

Additionally, the amendments also remove self-contradicting language referencing group living arrangements; this ensures that all tenants are properly covered by that potential reason for delaying payment.

5. *Extends Additional Protections to Homeowners and Penalties to Lenders*

The County Ordinance extends evictions protections afforded to tenants and related requirements to homeowners; similarly, the county ordinance makes explicit that lenders (e.g. a bank that holds the property's mortgage) and their agents have the same obligations (e.g. providing residents notice of their rights under the ordinance) and penalties for noncompliance as landlords. These amendments extend that tenant-homeowner parity to the City ordinance.

6. *Extends Back Rent Repayment Period Both to Reflect State Law and to Enact Better Policy*

Under the city's existing ordinance, a tenant has a twelve (12) month repayment period, which commences once a rent payment is late, to make that overdue rent payment before their landlord may sue. However, community stakeholders have raised significant concerns that this repayment period is much too short. For instance, if a tenant normally spends 50% or more of their income on rent (an obscene yet common scenario) and is unemployed due to COVID for 12 months, they would be mathematically unable to repay their back rent over 12 months even if they income immediately fully recovered (unlikely) and the the landlord waited until 12 months after the tenant re-gained employment (which is not required of the landlord).

AB 3088 provides that for Rental Debt which accrues through January 31, 2021, "the repayment period [established under an ordinance or other action by a city, county, or city and county] is deemed to begin on March 1, 2021" (Cal. Civ. Proc. Code §1179.05(a)(2)(B)). This ordinance amends city law to reflect that state law has delayed until March 1, 2021 the commencement of the twelve (12) month repayment period for rental debt accrued through January 31, 2021 (i.e. for rental debt accrued through January 31, 2021, a tenant has until March 1, 2021 to repay their landlord before the landlord may take them to court).

For rental debt which accrues starting February 1, 2021, these amendments provide that a tenant shall have ~~24 (twenty-four) months to repay back rent a forty-eight (48) month period to repay back rent (24 hours in the case of oral rental agreements). This repayment period~~

commences on the date on which no tenant may delay new rent payments under Covered Reason for Delayed Payment. This extension significantly increases the ability of a tenant to repay all their back rent. It also draws inspiration from the repayment period for rent accrued through February 1, 2021 that was established by the interaction of AB 3088 with the city's existing ordinance. Under AB 3088, for back rent accrued in March 2020 by Berkeley tenants, they have approximately two years to repay that back rent.

7. *Provides Additional Examples of Prohibited Retaliation*

The ordinance prohibits retaliation against tenants for exercising their rights under it, and explicitly names shutting off utilities and reducing services as examples of prohibited retaliation. These amendments add additional examples of prohibited retaliation.

8. *Improves Civil Remedies for Violations*

These amendments make various changes to civil remedies (including authorizing administrative fines and offering protections for tenants who act in good faith but do not prevail in court). Additionally, it makes clear that the City or another person or entity may sue to enforce the ordinance.

9. *Extends Criminal Penalties to non-Commercial Violations*

Currently, the City ordinance only imposes criminal penalties for violations relating to commercial properties. These amendments extend criminal penalties to any violations by a landlord or lender, using verbatim language from the County ordinance. In addition to providing legal certainty that violations also covered by the County ordinance can be criminally prosecuted, these amendments are necessary to allow criminal prosecution for violating residential property provisions not covered by the County ordinance (e.g. conducting an ostensible Ellis Act eviction).

10. *Clarifies that Residents of Group Living Accommodations are Protected*
To avoid ambiguity, these amendments make explicit that residents of group living accommodations are entitled to all the protections of the City ordinance.

11. *Liberal Construction*

States that the ordinance should be liberally construed so as to fully achieve its purpose and provide the greatest possible protections to tenants.

12. *Amendments Not Effective Before February 1*

In keeping with Cal. Civ. Proc. Code §1179.05(a)(1), i.e. AB 3088, section 2 of the attached ordinance provides that it shall not be effective until February 1 (or 30 days after its second reading, whichever is later).

Consistent with the actions of Alameda County, neighboring jurisdictions, and other jurisdictions throughout California; consultation with community stakeholders representing marginalized groups; Assembly Bill 3088 (2020); and the ongoing shelter-in-place order and associated emergency activities in response to the global pandemic, it is in the public interest to clarify and amend the COVID-19 Emergency Response Ordinance.

FINANCIAL IMPLICATIONS

This item will essentially not have any direct financial implications. However, preventing evictions can result in significant savings to the City in the short, medium, and long-term, by reducing homeless, COVID-19 infections, and social services spending. Additionally, bringing protections for tenants and other residents under Berkeley law to at least those of the County

ordinance could result in savings from potential litigation by landlords or lenders seeking to nullify the County ordinance within Berkeley city limits (especially if such litigation names the City as a real party in interest). Preventing evictions will prevent the spread of COVID 19.

ENVIRONMENTAL SUSTAINABILITY

Protecting our communities during this climate and health crisis is an act of environmental sustainability.

CONTACT PERSONS

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ATTACHMENTS:

1. Ordinance
- [2. Resolution](#)

REFERENCES:

1. Link to AB 3088:
https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3088

ORDINANCE NO. -N.S.

ORDINANCE AMENDING CHAPTER 13.110 OF THE BERKELEY MUNICIPAL CODE, THE COVID-19 EMERGENCY RESPONSE ORDINANCE

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. The Berkeley Municipal Code Chapter 13.110 is amended to read as follows:

**Chapter 13.110
COVID-19 EMERGENCY RESPONSE ORDINANCE**

Sections:

- 13.110.010 Findings and Purpose**
- 13.110.020 Prohibited Conduct**
- 13.110.030 Definitions**
- 13.110.040 Collection of Back Rent and Late Fees**
- 13.110.050 Application**
- 13.110.060 Implementing Regulations**
- 13.110.070 Waiver**
- 13.110.080 Enforcement Remedies**
- 13.110.090 Severability**
- 13.110.100 Liberal Construction**

13.110.010 Findings and Purposes

International, national, state and local health and governmental authorities are responding to an outbreak of respiratory disease caused by a novel coronavirus named "SARS-CoV-2." And the disease it causes has been named "coronavirus disease 2019," abbreviated COVID-19, ("COVID-19"). In response to this emergency, on March 3, 2020, the City Manager acting as the Director of Emergency Services declared a local State of Emergency based on COVID-19 (hereinafter referred to as "the State of Emergency"), which the City Council subsequently ratified on March 10, 2020. On April 21, 2020; [June 16, 2020](#); [July 28, 2020](#); [September 22, 2020](#); and [November 17, 2020](#), the Council ratified an extension of the local state of emergency; [the November 17, 2020 extension lasts through January 16, 2021 through June 21, 2020](#). In addition, on March 4, 2020, the Governor declared a state of emergency in California and the President of the United States declared a national state of emergency on March 13, 2020 regarding the novel coronavirus and COVID-19.

On March 16, 2020, the City of Berkeley Public Health Officer, along with several other neighboring jurisdictions issued a Shelter in Place Order directing all individuals living in the City of Berkeley to shelter at their place of residence except that they may leave to provide or receive certain essential services or engage in certain essential activities, and prohibiting non-essential gatherings and ordering cessation of non-essential travel.

Furthermore, on March 16, 2020, the Governor issued Executive Order N-28-20, specifically authorizing local governments to halt evictions for commercial tenants, residential tenants, and homeowners who have been affected by COVID-19, emphasizing that the economic impacts of COVID-19 have been significant and could threaten to undermine housing security as many

people are experiencing material income loss as a result of business closures, the loss of hours or wages or layoffs related to COVID-19, hindering their ability to keep up with rents, mortgages and utility bills.

The Order also stated that because homelessness can exacerbate vulnerability to COVID-19, Californians must take measures to preserve and increase housing security for Californians to protect public health and specifically stated that local jurisdictions may take measures to promote housing security beyond what the state law would otherwise allow.

On March 31, [2020](#), this Shelter in Place Order was extended to May 3, 2020, and restricted activities further. This Shelter in Place Order was subsequently extended again.

On April 6, 2020, the Judicial Council of California issued emergency rules suspending court proceedings for unlawful detainer and judicial foreclosures until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted. However, the Judicial Council subsequently allowed-revoked this protection to expire, thereby immediately placing tenants not covered by an eviction moratorium at immediate risk.

On April 21, 2020, Alameda County enacted an urgency ordinance prohibiting eviction for any reason other than withdrawal of rental property under the Ellis Act or court-ordered eviction for public safety. Even if the Alameda County ordinance did not have effect within the incorporated area of Berkeley, it would be ~~Although the Alameda County ordinance does not have effect within the incorporated area of Berkeley, it is~~ desirable to ensure that Berkeley residents have at least the same level of protection as the residents of unincorporated Alameda County.

During this State of Emergency (and the months following its expiration), and in the interests of protecting the public health and preventing transmission of the COVID-19, it is essential to avoid unnecessary displacement and homelessness. It is the intent of this Ordinance to fully implement the suspension of the statutory bases for eviction for nonpayment of rent and for default in the payment of a mortgage as authorized by Executive Order N-28-20.

At the same time, the Governor, as well as, the Berkeley Health Officer, and those of other jurisdictions ordered the closure of businesses, except those deemed essential. Many businesses, such as restaurants, are open only for take-out or pick up services and face a critical loss of business.

~~————~~The City Council is aware that some landlords of commercial properties are seeking significant rent increases during the period when many commercial tenants are closed or are experiencing substantial and catastrophic reductions in their business and income. Such rent increases force tenants who are closed or have substantially reduced revenues face the choice of accepting a significant rent increase, moving at a time when it is virtually impossible, or closing altogether. Accepting a rent increase while closed or in a reduced state of operations means that the commercial tenants face even more debt to the landlord when the emergency is over, and may face a substantially increased rent when the tenant returns to normal operations, if ever.

Landlords of commercial property that unreasonably increases rents on tenants of commercial property during the COVID-19 emergency significantly impacts vulnerable small businesses, nonprofits, and artists who form a large part of the backbone of Berkeley's economy, revenue sources, and employment opportunities These rent increases are coming at a time when the commercial rents are likely falling due to business closures and potential loss of businesses at

the end of the emergency. Thus, these rent increases appear as a way of evading the Governor's and Berkeley's commercial tenant eviction moratorium by forcing tenants to agree to rent increases or leave. Such conduct constitutes constructive evictions in contravention of the eviction moratorium. Furthermore, such rent increases may affect businesses providing goods and essential services, resulting in increases in those costs of essential goods and services contravening the intent of anti-price gouging laws.

On expiration of leases when the emergency order is in place, unreasonable rent increases have already forced the closure of businesses and will result in closing of additional business causing loss of income for the business owners, loss of employment for the employees and of revenue to the city, and an increase in homelessness. To reduce the spread of COVID-19, it is essential to avoid unnecessary displacement and homelessness. Because of the emergency restrictions, businesses forced out due to increased rents will be unable to move to new locations and new businesses will be unable to open during this emergency period. During a state of emergency cities have extraordinary powers and jurisdiction to create legislation in order to counteract the effects of the emergency situation on its people and businesses. Protecting tenants from excessive rent increases will prevent additional loss of employment and essential services for Berkeley residents. In order to effectively implement an eviction moratorium, the City Council finds it imperative to prevent constructive eviction through unreasonable rent increases.

Multiple jurisdictions have banned Ellis Act evictions. In Los Angeles County alone, the Cities of Los Angeles, Inglewood, and Santa Monica (and possibly others have banned) Ellis Act evictions. For example, Los Angeles's ordinance bans Ellis Act evictions through 60 days after the expiration of the local state of emergency.

Accordingly, the City of Berkeley adopts the following rules and regulations-amendments to Berkeley Municipal Code Chapter 13.110.

13.110.020 Prohibited Conduct

A. During the Covered Period-local State of Emergency, no landlord or lender-other entity shall evict or attempt to evict an occupant of real property, or otherwise require a Resident to vacate a residential Unit, unless necessary to stop an imminent threat to ~~for~~ the health and safety of other occupants-residents. For purposes of this Ordinance, the basis for an exception to this Ordinance cannot be the Resident's COVID-19 illness or exposure to COVID-19, whether actual or suspected.

B. Notice Requirement. Any eviction notice or notice for an unlawful detainer action that is served, filed, or expires during the Covered Period must include, in at least twelve-point font, a copy of this Chapter (13.110), and the below notice. It shall be a complete defense to any action that this requirement was not strictly complied with.

Notice: The City of Berkeley has adopted a temporary moratorium on evictions, the "COVID-19 Emergency Response Ordinance" (Berkeley Municipal Code Chapter 13.110) during the local emergency declared in response to the COVID-19 pandemic. The ordinance prohibits evictions for most reasons, including eviction for nonpayment of rent due to COVID-19. The Ordinance permits evictions where necessary to stop an imminent threat to the health and safety of other occupants. State law AB 3088 does NOT remove local eviction protections. A copy of the ordinance is attached. You may contact the Berkeley Rent Stabilization Board at (510) 981-7368 for additional information and referrals.

~~C. B.~~ Residential Eviction Moratorium. It shall be a complete defense to any action for unlawful detainer that the notice upon which the action is based was served or expired, or that the complaint was filed or served, during the Covered Period local State of Emergency.

~~D. C.~~ No landlord of an Impacted Business or Nonprofit may upon expiration of a lease increase rent for an Impacted Business or Nonprofit in an amount greater than ten (10) percent over the rent in effect at the commencement of the local state of emergency declared by the Director of Emergency Services. For purposes of this section, rent means all consideration for the use and enjoyment of the rented premises, including base rent and any additional rent or other charges for costs such as utilities, maintenance, cleaning, trash removal, repairs and any other charges to the tenant required under the rental agreement. This section 13.110.020 C. shall expire on May 31, 2020, concurrent with Executive Order N-28-20; provided, however, that this section shall be automatically extended if Executive Order N-28-20 is extended or the tenant protections therein are extended pursuant to another Governor's Executive Order.

~~E. D.~~ For the duration of the Covered Period local State of Emergency, if a tenant has a Covered Reason for Delayed Payment, the tenant may terminate a lease or rental agreement with 30 days' notice without penalty. A tenant may also exercise rights under this subsection if the tenants or roommates of the tenants are or were registered at an educational institution that cancelled or limited in-person classes due to the COVID-19 pandemic

13.110.030 Definitions

A. "Covered Period" means the period of time beginning with March 17, 2020 and concluding upon the expiration of the local emergency. However, the City Council may vote by resolution to extend the duration of the Covered Period.

~~B. A.~~ "Covered Reason for Delayed Payment" means:

- (1) The basis for the eviction is nonpayment of Rent, arising out of a material decrease in household, business, or other rental Unit occupant(s)'s income (including, but not limited to, a material decrease in household income caused by layoffs or a reduction in the number of compensable hours of work, or to caregiving responsibilities, or a material decrease in business income caused by a reduction in opening hours or consumer demand), or material out-of-pocket medical expenses, ~~or, in a group living arrangement wherein all tenants are collectively responsible for payment of the rent to the landlord,~~ a reduction in the number of tenants living in the Unit (including due to difficulty finding new tenants and/or subtenants willing and able to cover a sufficient share of Rent) which reduces the ability of the remaining tenants to pay the Rent, a change in the tenants which reduces the ability of the collective tenants to pay Rent, or a rent increase that exceeds the Annual General Adjustment for the current year; and
- (2) The decrease in household, business, or other rental Unit occupant's income or the expenses or reduction in number of tenants described in subparagraph (1) was caused by the impacts of COVID-19 pandemic, or by any local, state, or federal government response to COVID-19.

~~C. B.~~ "Delayed Rent Payment Agreement" means a mutual agreement between a landlord and tenant regarding the timing and amount of payments for Rent that is delayed by a Covered Reason for Delayed Payment.

~~D. C.~~ "Impacted Business or Nonprofit" means a business or nonprofit organization that had a business license in 2019 or 2020 in the City of Berkeley or is a registered nonprofit in either or both of those years and:

1. whose operation has been shut down due to the COVID-19 emergency, or
2. that is unable to accept customers at its location and is open for limited virtual, take-out or pickup services only, or
3. who suffered a material loss of income.

~~E. D.~~ "Landlord" includes owners, lessors, or sublessors of either residential or commercial rental property, and the agent, representative, or successor of any of the foregoing.

~~F. "Lender" means the mortgagee of a purchase money or similar mortgage, or the holder or beneficiary of a loan secured by one or more Units, which person has the right to mortgage or similar payments from the owner as mortgagor, including a loan servicer, and the agent, representative, or successor of any of the foregoing.~~

~~G. "Rent" includes, but is not limited to, base rent, fees (including late fee(s)), fines, and interest.~~

~~H. E.~~ "Tenant" includes a tenant, subtenant, lessee, sublessee, or any other person entitled by written or oral rental agreement to use or occupancy a renter of either residential or commercial property.

~~I. "Unit" is defined to include a Group Living Accomodation.~~

13.110.040 Collection of Back Rent and Late Fees

A. Nothing in this Chapter shall relieve the tenant of liability for unpaid rent, which the landlord may seek after expiration of the local State of Emergency. Notwithstanding any lease provision to the contrary, a landlord may not charge or collect a late fee, fine, or interest for ~~R~~rent that is delayed by a Covered Reason for Delayed Payment. The City will develop standards or guidelines for tenants to repay unpaid rent accrued during the Covered Period course of the local State of Emergency. Landlords are encouraged to work with local agencies that will be making rental assistance available for qualifying tenants.

B.

~~1. For Rent accrued through January 31, 2021, t~~Tenants shall have ~~until March 1, 2022-a up to twelve (12) months~~ period, which shall commence March 1, 2021, to pay ~~R~~rent that was delayed by a Covered Reason for Delayed Payment unless the landlord and tenant come to a mutual repayment agreement ("Delayed Rent Payment Agreement").

~~2. For Rent accrued beginning February 1, 2021, Tenants shall have until twenty-four (24) months after the conclusion of the Covered Period to pay Rent that was delayed by a Covered Reason for Delayed Payment forty seven (47) months to pay Rent that accrued during the Covered Period, except that in the case of an oral rental agreement this period shall be twenty-three (23) months.~~

~~3. Notwithstanding any lease provision to the contrary, a landlord may not charge or collect a late fee, fine, or interest for ~~R~~rent that is delayed by a Covered Reason for Delayed Payment.~~

C. A Tenant is not required to provide documentation to the Landlord in advance to qualify for the ~~delayed~~ repayment of ~~R~~rent ~~over the 12 months~~. However, upon the request of a Landlord, a Tenant shall provide such documentation to the Landlord within forty-five (45) days after the

request or within thirty (30) days after the local State of Emergency is ended, whichever is later; the tenant may self-attest as a form of documentation. In the case of nonpayment of Rent, the failure of a Tenant to notify the landlord in advance of being delinquent in the payment of Rent prior to being served with a notice pursuant to Code of Civil Procedure sections 1161(2) et seq. does not waive the Tenant's right to claim this Chapter as a complete defense to nonpayment of Rent in an unlawful detainer action.

D. Any medical or financial information provided to the landlord shall be held in confidence, and shall not be disclosed to other entities unless such disclosure is permitted or required by the law, or unless the tenant explicitly authorizes the disclosure of the information in writing.

E. Any relief from the City of Berkeley either directly to a property owner on their own application or as a pass through for City relief payments to the tenant shall directly reduce the amount of any Rent that was delayed by a Covered Reason for Delayed Payment. This requirement shall be applied into any Delayed Rent Payment Agreement, regardless of the terms of that agreement.

13.110.050 Application

A. This Chapter applies to eviction notices and unlawful detainer actions based on notices served, filed, or which expire during the Covered Period on or after the effective date of this Chapter through the end of the local State of Emergency. It does not apply to withdrawal of accommodations from the rental market pursuant to Government Code 7060 et seq. ("Ellis Act") or to Units ordered by the City to be vacated for the preservation of public health, including where the City deems necessary to control the spread of COVID-19.

B. With respect to delayed payment accrued during the Covered Period covered by this Ordinance; a landlord may seek such Rent accrued through January 31, 2021 after March 1, 2021, and a landlord may seek such Rent accrued beginning February 1, 2021 after the Covered Period expiration of the local State of Emergency; pursuant to Section 13.110.040, but may not file an action pursuant to Code of Civil Procedure sections 1161(2) et seq. or otherwise seek to recover possession of a rental Unit based on the failure to pay Rent that accrued during the Covered Period local State of Emergency. In any action to evict based on alleged nonpayment of Rent, it shall be a complete defense to such action if any part of the Rent in dispute accrued at any time during the Covered Period and/or if the action demands any fees or amounts contrary to the provisions of this Chapter. A landlord shall not apply any Rent payment towards Rent that is delayed by a Covered Reason for Delayed Payment before applying it towards any other Rent owed without the explicit written permission of the Tenant.

C. A Landlord or Lender shall not retaliate against a Tenant or other resident for exercising their rights under this Ordinance, including but not limited to shutting off any utilities, or reducing services or amenities, refusing to make or delaying repairs to which the Tenant or other resident would otherwise be entitled, refusing to offer a new rental agreement upon expiration of a prior rental agreement where the new rental agreement contains provisions that are substantially identical to the prior rental agreement, refusing to offer a rental agreement for a different Unit that they would otherwise offer, offering a rental agreement for a different Unit on less favorable terms than they would otherwise offer, or taking action(s) or inaction(s) which hurts the tenant's or other resident's credit rating or causes other landlords to not offer them a rental agreement or to offer them a rental agreement on less favourable terms than they would otherwise offer. Any omission is not intended to exclude such action as a potential form of retaliation protected against by this Chapter.

D. In addition to the affirmative defenses set forth above, in any action to recover possession of a rental ~~U~~unit filed under Berkeley Municipal Code section 13.76.130(A)(1), it shall be a complete defense that the landlord impeded the tenant's effort to pay ~~R~~rent by refusing to accept ~~R~~rent paid on behalf of the tenant from a third party, or refusing to provide a W-9 form or other necessary documentation for the tenant to receive rental assistance from a government agency, non-profit organization, or other third party. Acceptance of rental payments made on behalf of the tenant by a third party shall not create a tenancy between the landlord and the third party.

13.110.060 Implementing Regulations

The City Manager may promulgate implementing regulations and develop forms to effectuate this Ordinance. This includes the option of requiring landlords and lenders to give a notice to Tenants and other residents informing them of this Chapter and the right to seek the benefits of this Chapter.

13.110.080 Enforcement Remedies

~~In the event of a violation of this Ordinance, an aggrieved tenant may institute a civil proceeding for injunctive relief, and money actual damages as specified below, and whatever other relief the court deems appropriate. Money damages shall only be awarded if the trier of fact finds that the landlord acted in knowing violation of or in reckless disregard of this Ordinance. The prevailing party shall be entitled to reasonable attorney's fees and costs pursuant to order of the court. The remedy available under this section shall be in addition to any other existing remedies which may be available to the tenant under local, state or federal law. In addition, this Ordinance grants a defense to eviction in the event that an unlawful detainer action is commenced in violation of this Ordinance.~~

A. Remedies

1. In the event of a violation of this Chapter by a landlord or lender, any person aggrieved by the violation, any person or entity who will fairly and adequately represent the interests of the protected class, and/or the City or the Rent Board may file a civil action to enforce this Chapter.

2. The relief available to a plaintiff or plaintiffs in an action for violation of this Chapter may include an injunction; all actual damages suffered by any aggrieved party; and an award of civil penalties in the sum of between one thousand dollars and ten thousand dollars per incident which is a violation of this Chapter, as assessed by the trier of fact, either jury or the Court, depending on the degree of intentionality and severity of the conduct.

3. An award of actual damages may include an award for mental and/or emotional distress and/or suffering. The amount of actual damages awarded to a prevailing plaintiff shall be trebled by the Court outside of the presence, and without the knowledge of, the jury, if any, if a defendant acted in knowing violation of, or in reckless disregard for, the provisions of this Chapter.

4. A defendant shall be liable for additional civil penalties of up to five thousand dollars for each violation of this Chapter committed against a person who is disabled within the meaning of California Government Code section 12926, et seq., or aged sixty-five or over.

5. In addition to the above awards of damages in a civil action under this Chapter, a prevailing plaintiff shall be entitled to an award of reasonable attorneys' fees. A prevailing defendant in a civil action under this Chapter shall only be entitled to an award of attorneys' fees if it is determined by the Court the action was wholly without merit or frivolous.

6. Nonexclusive Remedies and Penalties. The remedies provided in this subdivision are not exclusive, and nothing in this Chapter shall preclude any person from seeking any other remedies, penalties or procedures provided by law.

7. In addition, this Chapter grants a complete defense to eviction in the event that an eviction notice or unlawful detainer action is commenced, filed, or served in violation of this Chapter.

B. The protections provided by this ordinance shall be available to all tenants, regardless of any agreement wherein a tenant waives or purports to waive their rights under this Ordinance, with any such agreement deemed void as contrary to public policy.

C. A. ~~Violations of Section 13.110.020(C) – (Commercial rent restrictions:)-~~

1. Violations of this Chapter by a landlord or lender ~~Section 13.110.020(C)~~ may be enforced by an administrative fine of up to \$1,000 pursuant to Chapter 1.28. Each day a ~~commercial property~~ landlord or lender violates this chapter demands rent in excess of the amount permitted pursuant to Section 13.110.020(C) is a separate violation. Each and every day of violation includes each day on which a failure to comply with this ordinance continues. The City may also charge the costs of investigating and issuing any notices of violations, and any hearings or appeals of such notices.

2. Any landlord or lender violating any of the provisions of this ordinance is guilty of a misdemeanor. Each person is guilty of a separate offense for each and every day during any portion of which any violation of any provision of this ordinance is committed, continued or allowed in conjunction with the Landlord's or Lender's activities with respect to the Unit and is punishable accordingly. Each and every day of violation includes each day on which a failure to comply with this ordinance continues. The City Attorney may refer those landlords and lenders in violation ~~violators~~ of this Chapter ~~Section 13.110.020(C)~~ to the Alameda County District Attorney for redress as a violation of this Chapter and/or Business and Professions Code section 17200, et seq. or, if granted permission by the District Attorney, may bring an action pursuant to this Chapter and/or Business and Professions Code section 17200, et seq.

D. The remedies provided by this ordinance are cumulative and in addition to any other remedies available at law or in equity.

13.110.100 Liberal Construction

The provisions of this Chapter shall be liberally construed so as to fully achieve its purpose and provide the greatest possible protections to tenants.

Section 2. Effective Date

This ordinance shall go into effect thirty days from the time of its final passage or February 1, 2021, whichever is later.

RESOLUTION NO. XXXX

A RESOLUTION OF THE CITY COUNCIL FOR THE CITY OF BERKELEY DIRECTING THE CITY MANAGER TO PROMPTLY ISSUE A WRITTEN STATEMENT, PURSUANT TO ALAMEDA COUNTY MUNICIPAL CODE 6.120.110, AFFIRMING OR DECLARING IN WRITING THAT THE CITY OF BERKELEY INTENDS TO "OPT-OUT" OF THE COUNTY ORDINANCE, ENUMERATING THE SPECIFIC PROVISIONS OF THE COUNTY'S ORDINANCE FROM WHICH THE CITY INTENDS TO OPT OUT, AND INCLUDING A FINDING THAT THE CITY ORDINANCE IS STRONGER

WHEREAS, Alameda County Municipal Code 6.120 (Temporary Residential Eviction Moratorium for the Incorporated and Unincorporated Areas of the County Due to Covid-19 Ordinance) establishes an eviction moratorium and other protections for tenants and homeowners during COVID throughout both the incorporated and unincorporated parts of Alameda County; and

WHEREAS, Alameda County Municipal Code 6.120.110 provides that "If [a city council] has enacted an ordinance that has stronger protections for tenants during the COVID-19 emergency, the city may apply its ordinance in lieu of the county ordinance, to the extent its ordinance is stronger, subject to the requirements of this section. The city must duly affirm or declare in writing its intent to opt out of the county ordinance. The writing must enumerate the specific provisions of the county's ordinance from which the city intends to opt out and must include a finding that the city ordinance is stronger;" and

WHEREAS, Berkeley Municipal Code 13.110 (COVID-19 Emergency Response Ordinance) provides stronger protections for tenants (and homeowners) than Alameda County Municipal Code 6.120; and

WHEREAS, even if the City of Berkeley decides that the affirmative "opt-out" requirement in Alameda County Municipal Code 6.120.110 is can not be legally applied to charter cities such as Berkeley, following the affirmative "opt-out" procedure would reduce legal uncertainty by making clear that Berkeley's stronger ordinance is in effect;

NOW, THEREFORE, BE IT RESOLVED that the City Council for the City of Berkeley directs the City Manager to promptly issue a written statement, pursuant to Alameda County Municipal Code 6.120.110, affirming or declaring in writing that the City of Berkeley intends to "opt out of the county ordinance," enumerating the specific provisions of the county's ordinance from which the city intends to opt out, and including a finding that the city ordinance is stronger; and

BE IT FURTHER RESOLVED that said statement shall enumerate every single provision of the city ordinance which provides stronger protections for tenants than does the county ordinance; and

BE IT FURTHER RESOLVED that the City Manager shall promptly update said statement whenever the protections afforded to tenants by the city and/or county law changes, or if the City discovers that it has left out a stronger protection of the ordinance; and

BE IT FURTHER RESOLVED that copies of said statement (including any updates thereto) shall be sent to Alameda County Supervisor Keith Carson, the County Counsel of Alameda

County, the District Attorney of Alameda County, the members of the Berkeley City Council, and the Rent Stabilization Board; and

BE IT FURTHER RESOLVED that nothing in this resolution (or the statement issued by the City Manager) should be construed as the City of Berkeley taking a position regarding either whether the County ordinance can have legal effect in charter cities such as Berkeley or whether the County may legally require charter cities such as Berkeley to affirmatively “opt-out” of the county ordinance in order for their own ordinance(s) to be in effect.



Cheryl Davila
Councilmember
District 2

ACTION CALENDAR
November 17, 2020

To: Honorable Mayor and Members of the City Council
From: 4x4 Joint Task Force Committee on Housing
Subject: Updates to the COVID-19 Emergency Response Ordinance

RECOMMENDATION

1. Adopt first reading of an ordinance (effective February 1) amending Berkeley Municipal Code 13.110, Title 13, "The COVID-19 Emergency Response Ordinance," to enhance emergency tenant protections consistent with recently adopted Alameda County laws, action in other jurisdictions, and consultation with community stakeholders representing marginalized groups.
2. Adopt a resolution, directing the City Manager to promptly issue a written statement, pursuant to Alameda County Municipal Code 6.120.110, affirming or declaring in writing that the City of Berkeley intends to "opt-out" of the County ordinance, enumerating the specific provisions of the County's ordinance from which the City intends to opt out, and including a finding that the City ordinance is stronger.

BACKGROUND

A. Berkeley's COVID-19 Emergency Response Ordinance

On March 17, 2020, the Berkeley City Council adopted an emergency ordinance prohibiting evictions of residential and commercial tenants unable to pay their rent due to COVID-19. Subsequently, on April 21, 2020, the Council further amended the City's ordinance to enhance eviction protections for commercial tenants, namely a prohibition on unreasonable rent increases for impacted businesses and nonprofits. Again on May 26, 2020, the Council further amended the city's ordinance to enhance eviction protections for residential tenants and homeowners, including banning most residential evictions through the end of the local state of emergency. Subsequently, on June 30, 2020 the Council further amended the city's ordinance to clarify and enhance the ability of residential tenants to terminate a lease. Since the enactment of these protections, other jurisdictions in California, including neighboring jurisdictions and the Alameda County Board of Supervisors have enacted a number of additional protections that are either complimentary to, or more stringent than, Berkeley's ordinance. The item updates BMC 13.110 to, among other provisions, include best practices and to align with newly adopted countywide protections.

B. Alameda County's Urgency Ordinances

On March 24, 2020, the Alameda County Board of Supervisors passed an urgency ordinance creating a temporary moratorium on evictions for renters and homeowners in the Unincorporated County (Ordinance No. 2020-14).

On March 31, 2020, the Alameda County Board of Supervisors extended protections to the entire County. Similar to our BMC 13.110, the ordinances applied a moratorium on evictions to tenants, homeowners or mobile homeowners who can provide documentation that they cannot pay their rent or mortgage due to a substantial loss of income, substantial out-of-pocket medical expenses, or extraordinary childcare needs caused by COVID-19.

On April 21, 2020, the Alameda County Board of Supervisors considered and adopted additional amendments,³ after finding that the pandemic and shelter in place orders created severe new and exacerbated existing socioeconomic impacts. Accordingly, the County deemed any eviction, regardless of cause, a public health threat. Giving cities this option provides baseline protections for residents of cities without moratoria, but allows cities to make determinations in the best interest of their residents. As currently written, the Alameda County ordinance provides that “If [a city council] has enacted an ordinance that has stronger protections for tenants during the COVID-19 emergency, the city may apply its ordinance in lieu of the county ordinance, to the extent its ordinance is stronger, subject to the requirements of this section. The city must duly affirm or declare in writing its intent to opt out of the county ordinance. The writing must enumerate the specific provisions of the county's ordinance from which the city intends to opt out and must include a finding that the city ordinance is stronger.”

The California Attorney General has opined that when a county has declared a local emergency within its jurisdictional boundaries in an area that includes both unincorporated and incorporated territory, the county may adopt emergency rules and regulations pursuant to Government Code Section 8634 that will be effective in both unincorporated and incorporated areas (62 Ops. Cal. Atty. Gen. 701 (1979)). However, questions have been raised as to whether this power of counties always covers charter cities, such as Berkeley; for example, in early June, many members of the Council questioned whether the county-wide curfew issued by the County Sheriff was legally valid within Berkeley City limits.

C. [Assembly Bill 3088](#)

On August 31, the Governor signed AB 3088, an urgency bill (i.e. one which takes immediate effect). The bill provides, among other things, that “Any ordinance, resolution, regulation, or administrative action adopted by a city, county, or city and county in response to the COVID-19 pandemic to protect tenants from eviction is subject to [the limitation that]... Any extension, expansion, renewal, reenactment, or new adoption of a measure, however delineated, that occurs between August 19, 2020, and January 31, 2021, shall have no effect before February 1, 2021” (Cal. Civ. Proc. Code §1179.05(a)).

As a result, most if not all amendments made to Berkeley’s ordinance in order to further protect tenants could likely not take effect until February 1, 2021 regardless of urgency. However, the City Council can still adopt amendments before then so that they will come into effect on February 1, 2021.

³ Amend Countywide Temporary Moratorium on Residential Evictions, Alameda County Community Development Agency, April 21, 2020, https://www.acgov.org/board/bos_calendar/documents/DocsAgendaReg_04_21_20/GENERAL%20ADMINISTRATION/Regular%20Calendar/CDA_294956.pdf, Amendments were crafted and presented by the Alameda County’s Community Development Agency and the Housing and Community Development Department (HCD), in coordination with County Counsel, Public Health, all cities countywide, Resources for Community Development, and legal agencies including Bay Area Legal Aid, Centro Legal de la Raza, East Bay Community Law Center, and Housing and Economic Rights Advocates

D. Updates to The Covid-19 Emergency Response Ordinance

Unreasonable evictions are directly at odds with local, state and federal measures to recover from the pandemic.

Housing stability is a prerequisite for flattening the COVID-19 infection curve. Loss of housing presents significant health risks for those directly affected and the population at large, through disruption of shelter in place orders, social distancing measures and increased homelessness. Testing, quarantine, and physical distancing measures are bolstered by housing security.

In recognition of developments at the Alameda County level, action in other jurisdictions, and consultation with community stakeholders, the ordinance makes the following additional amendments to BMC 13.110:

1. *Expansion of Moratorium Scope:*

Consistent with numerous jurisdictions (including the Cities of Los Angeles, Santa Monica, and Inglewood) these amendments would prohibit Ellis Act evictions.⁴ Additionally, minor amendments are made to the exception for health and safety threats to bring it in line with the language of the County ordinance and to reflect a change requested by legal services providers; the former is important to ensure there are no evictions prohibited by the County ordinance but ostensibly allowed under the City ordinance, thereby minimizing the risk of legal confusion.

2. *Council May Extend Protections By Resolution*

Currently, many protections under the Berkeley ordinance lapse either upon the expiration of the local state emergency. This period is not as long as in other jurisdictions. For example, the City of Los Angeles's ordinance protects tenants from Ellis Act evictions for sixty (60) days after the expiration of the local state of emergency, and Alameda County's eviction moratorium currently expires sixty (60) days after the expiration of the countywide state of emergency. These amendments would allow the Council to extend this period by resolution (instead of an ordinance), allowing the Council to swiftly act by majority vote to protect public health and safety and keep residents housed if the local situation necessitates immediate action.

3. *Authorize Tenants To Self-Attest Financial Hardship*

Some tenants may have difficulty providing sufficient documentation that proves their COVID-related financial hardship. In order to ensure that no tenant is left behind, these amendments would authorize tenants to self-attest their COVID-related financial hardship. Given that landlords are ultimately allowed to recover back rent, there would ultimately be no barrier to their ability to ultimately be made financially "whole." Furthermore, this would bring the City ordinance in line with the federal eviction moratorium recently issued by the Centers for Disease Control and Prevention (CDC), which allows tenants to self-declare their inability to pay.

4. *Clarifies Covered Reasons for Delayed Payment*

Due to Berkeley's status as a "college town" and the transition of UC Berkeley (and other local institutions of higher education) to mainly online and/or hybrid-format classes in response to the ongoing COVID pandemic many segments of Berkeley's rental market have seen a significant drop in demand. While this reduced demand may benefit many tenants

⁴ aagla.org/wp-content/uploads/2020/07/7120-Updated-Temporary-Eviction-Moratorium-Chart-002.pdf

entering new rental agreements, continuing tenants are largely not receiving this benefit, and ironically some may be in a worse position even if their own financial situation remains unchanged. Many tenants, especially those who live with students, may have had one or more roommates move-out, and planned to replace them with a new roommate(s) who would pay the same share of the rent. However, many landlords required their tenants to sign lease renewals before the severity of the COVID crisis became clear. As a result, those tenants were not in a position to bargain for a rent reduction, and with reduced demand for housing may be unable to find a replacement roommate willing and able to pay the same share of the rent as an outgoing roommate. The remaining tenants can be left with an unwinnable choice: Delaying taking on a new roommate(s) in the hope of finding someone who can pay the same share of the rent (while having to pay the full share of the rent until they find a replacement), or take on a higher share of the rent in order to immediately have a new roommate. While previous versions of the ordinance were clearly intended to cover this situation, the failure to explicitly mention them creates a perpetual risk that the courts will interpret them otherwise. These amendments make clear that such scenarios are covered reasons for ~~delayed non~~payment, eliminating the risk of judicial misinterpretation.

Additionally, the amendments also remove self-contradicting language referencing group living arrangements; this ensures that all tenants are properly covered by that potential reason for delaying payment.

5. *Extends Additional Protections to Homeowners and Penalties to Lenders*

The County Ordinance extends evictions protections afforded to tenants and related requirements to homeowners; similarly, the county ordinance makes explicit that lenders (e.g. a bank that holds the property's mortgage) and their agents have the same obligations (e.g. providing residents notice of their rights under the ordinance) and penalties for noncompliance as landlords. These amendments extend that tenant-homeowner parity to the City ordinance.

6. *Extends Back Rent Repayment Period Both to Reflect State Law and to Enact Better Policy*

Under the city's existing ordinance, a tenant has a twelve (12) month repayment period, which commences once a rent payment is late, to make that overdue rent payment before their landlord may sue. However, community stakeholders have raised significant concerns that this repayment period is much too short. For instance, if a tenant normally spends 50% or more of their income on rent (an obscene yet common scenario) and is unemployed due to COVID for 12 months, they would be mathematically unable to repay their back rent over 12 months even if they income immediately fully recovered (unlikely) and the the landlord waited until 12 months after the tenant re-gained employment (which is not required of the landlord).

AB 3088 provides that for Rental Debt which accrues through January 31, 2021, "the repayment period [established under an ordinance or other action by a city, county, or city and county] is deemed to begin on March 1, 2021" (Cal. Civ. Proc. Code §1179.05(a)(2)(B)). This ordinance amends city law to reflect that state law has delayed until March 1, 2021 the commencement of the twelve (12) month repayment period for rental debt accrued through January 31, 2021 (i.e. for rental debt accrued through January 31, 2021, a tenant has until March 1, 2021 to repay their landlord before the landlord may take them to court).

For rental debt which accrues starting February 1, 2021, these amendments provide that a tenant shall have 24 (twenty-four) months to repay back rent. This extension increases the ability of a tenant to repay all their back rent. It also draws inspiration from the repayment

period for rent accrued through February 1, 2021 that was established by the interaction of AB 3088 with the city's existing ordinance. Under AB 3088, for back rent accrued in March 2020 by Berkeley tenants, they have approximately two years to repay that back rent.

7. *Provides Additional Examples of Prohibited Retaliation*

The ordinance prohibits retaliation against tenants for exercising their rights under it, and explicitly names shutting off utilities and reducing services as examples of prohibited retaliation. These amendments add additional examples of prohibited retaliation.

8. *Improves Civil Remedies for Violations*

These amendments make various changes to civil remedies (including authorizing administrative fines and offering protections for tenants who act in good faith but do not prevail in court). Additionally, it makes clear that the City or another person or entity may sue to enforce the ordinance.

9. *Extends Criminal Penalties to non-Commercial Violations*

Currently, the City ordinance only imposes criminal penalties for violations relating to commercial properties. These amendments extend criminal penalties to any violations by a landlord or lender, using verbatim language from the County ordinance. In addition to providing legal certainty that violations also covered by the County ordinance can be criminally prosecuted, these amendments are necessary to allow criminal prosecution for violating residential property provisions not covered by the County ordinance (e.g. conducting an ostensible Ellis Act eviction).

10. *Clarifies that Residents of Group Living Accommodations are Protected*

To avoid ambiguity, these amendments make explicit that residents of group living accommodations are entitled to all the protections of the City ordinance.

11. *Liberal Construction*

States that the ordinance should be liberally construed so as to fully achieve its purpose and provide the greatest possible protections to tenants.

12. *Amendments Not Effective Before February 1*

In keeping with Cal. Civ. Proc. Code §1179.05(a)(1), i.e. AB 3088, section 2 of the attached ordinance provides that it shall not be effective until February 1 (or 30 days after its second reading, whichever is later).

Consistent with the actions of Alameda County, neighboring jurisdictions, and other jurisdictions throughout California; consultation with community stakeholders representing marginalized groups; Assembly Bill 3088 (2020); and the ongoing shelter-in-place order and associated emergency activities in response to the global pandemic, it is in the public interest to clarify and amend the COVID-19 Emergency Response Ordinance.

FINANCIAL IMPLICATIONS

This item will essentially not have any direct financial implications. However, preventing evictions can result in significant savings to the City in the short, medium, and long-term, by reducing homeless, COVID-19 infections, and social services spending. Additionally, bringing protections for tenants and other residents under Berkeley law to at least those of the County ordinance could result in savings from potential litigation by landlords or lenders seeking to nullify the County ordinance within Berkeley city limits (especially if such litigation names the City as a real party in interest). Preventing evictions will prevent the spread of COVID 19.

ENVIRONMENTAL SUSTAINABILITY

Protecting our communities during this climate and health crisis is an act of environmental sustainability.

CONTACT PERSONS

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ATTACHMENTS:

1. Ordinance
2. Resolution

REFERENCES:

1. Link to AB 3088:
https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3088

ORDINANCE NO. -N.S.

ORDINANCE AMENDING CHAPTER 13.110 OF THE BERKELEY MUNICIPAL CODE, THE COVID-19 EMERGENCY RESPONSE ORDINANCE

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. The Berkeley Municipal Code Chapter 13.110 is amended to read as follows:

**Chapter 13.110
COVID-19 EMERGENCY RESPONSE ORDINANCE**

Sections:

- 13.110.010 Findings and Purpose**
- 13.110.020 Prohibited Conduct**
- 13.110.030 Definitions**
- 13.110.040 Collection of Back Rent and Late Fees**
- 13.110.050 Application**
- 13.110.060 Implementing Regulations**
- 13.110.070 Waiver**
- 13.110.080 Enforcement Remedies**
- 13.110.090 Severability**
- 13.110.100 Liberal Construction**

13.110.010 Findings and Purposes

International, national, state and local health and governmental authorities are responding to an outbreak of respiratory disease caused by a novel coronavirus named "SARS-CoV-2." And the disease it causes has been named "coronavirus disease 2019," abbreviated COVID-19, ("COVID-19"). In response to this emergency, on March 3, 2020, the City Manager acting as the Director of Emergency Services declared a local State of Emergency based on COVID-19 (hereinafter referred to as "the State of Emergency"), which the City Council subsequently ratified on March 10, 2020. On April 21, 2020; June 16, 2020; July 28, 2020; September 22, 2020; and November 17, 2020, the Council ratified an extension of the local state of emergency; the November 17, 2020 extension lasts through January 16, 2021 through June 21, 2020. In addition, on March 4, 2020, the Governor declared a state of emergency in California and the President of the United States declared a national state of emergency on March 13, 2020 regarding the novel coronavirus and COVID-19.

On March 16, 2020, the City of Berkeley Public Health Officer, along with several other neighboring jurisdictions issued a Shelter in Place Order directing all individuals living in the City of Berkeley to shelter at their place of residence except that they may leave to provide or receive certain essential services or engage in certain essential activities, and prohibiting non-essential gatherings and ordering cessation of non-essential travel.

Furthermore, on March 16, 2020, the Governor issued Executive Order N-28-20, specifically authorizing local governments to halt evictions for commercial tenants, residential tenants, and homeowners who have been affected by COVID-19, emphasizing that the economic impacts of COVID-19 have been significant and could threaten to undermine housing security as many

people are experiencing material income loss as a result of business closures, the loss of hours or wages or layoffs related to COVID-19, hindering their ability to keep up with rents, mortgages and utility bills.

The Order also stated that because homelessness can exacerbate vulnerability to COVID-19, Californians must take measures to preserve and increase housing security for Californians to protect public health and specifically stated that local jurisdictions may take measures to promote housing security beyond what the state law would otherwise allow.

On March 31, 2020, this Shelter in Place Order was extended to May 3, 2020, and restricted activities further. This Shelter in Place Order was subsequently extended again.

On April 6, 2020, the Judicial Council of California issued emergency rules suspending court proceedings for unlawful detainer and judicial foreclosures until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted. However, the Judicial Council subsequently allowed this protection to expire, thereby immediately placing tenants not covered by an eviction moratorium at immediate risk.

On April 21, 2020, Alameda County enacted an urgency ordinance prohibiting eviction for any reason other than withdrawal of rental property under the Ellis Act or court-ordered eviction for public safety. Even if the Alameda County ordinance did not have effect within the incorporated area of Berkeley, it would be ~~Although the Alameda County ordinance does not have effect within the incorporated area of Berkeley, it is~~ desirable to ensure that Berkeley residents have at least the same level of protection as the residents of unincorporated Alameda County.

During this State of Emergency (and the months following its expiration), and in the interests of protecting the public health and preventing transmission of the COVID-19, it is essential to avoid unnecessary displacement and homelessness. It is the intent of this Ordinance to fully implement the suspension of the statutory bases for eviction for nonpayment of rent and for default in the payment of a mortgage as authorized by Executive Order N-28-20.

At the same time, the Governor, as well as, the Berkeley Health Officer, and those of other jurisdictions ordered the closure of businesses, except those deemed essential. Many businesses, such as restaurants, are open only for take-out or pick up services and face a critical loss of business.

~~————~~The City Council is aware that some landlords of commercial properties are seeking significant rent increases during the period when many commercial tenants are closed or are experiencing substantial and catastrophic reductions in their business and income. Such rent increases force tenants who are closed or have substantially reduced revenues face the choice of accepting a significant rent increase, moving at a time when it is virtually impossible, or closing altogether. Accepting a rent increase while closed or in a reduced state of operations means that the commercial tenants face even more debt to the landlord when the emergency is over, and may face a substantially increased rent when the tenant returns to normal operations, if ever.

Landlords of commercial property that unreasonably increases rents on tenants of commercial property during the COVID-19 emergency significantly impacts vulnerable small businesses, nonprofits, and artists who form a large part of the backbone of Berkeley's economy, revenue sources, and employment opportunities These rent increases are coming at a time when the commercial rents are likely falling due to business closures and potential loss of businesses at

the end of the emergency. Thus, these rent increases appear as a way of evading the Governor's and Berkeley's commercial tenant eviction moratorium by forcing tenants to agree to rent increases or leave. Such conduct constitutes constructive evictions in contravention of the eviction moratorium. Furthermore, such rent increases may affect businesses providing goods and essential services, resulting in increases in those costs of essential goods and services contravening the intent of anti-price gouging laws.

On expiration of leases when the emergency order is in place, unreasonable rent increases have already forced the closure of businesses and will result in closing of additional business causing loss of income for the business owners, loss of employment for the employees and of revenue to the city, and an increase in homelessness. To reduce the spread of COVID-19, it is essential to avoid unnecessary displacement and homelessness. Because of the emergency restrictions, businesses forced out due to increased rents will be unable to move to new locations and new businesses will be unable to open during this emergency period. During a state of emergency cities have extraordinary powers and jurisdiction to create legislation in order to counteract the effects of the emergency situation on its people and businesses. Protecting tenants from excessive rent increases will prevent additional loss of employment and essential services for Berkeley residents. In order to effectively implement an eviction moratorium, the City Council finds it imperative to prevent constructive eviction through unreasonable rent increases.

Multiple jurisdictions have banned Ellis Act evictions. In Los Angeles County alone, the Cities of Los Angeles, Inglewood, and Santa Monica (and possibly others have banned) Ellis Act evictions. For example, Los Angeles's ordinance bans Ellis Act evictions through 60 days after the expiration of the local state of emergency.

Accordingly, the City of Berkeley adopts the following rules and regulations-amendments to Berkeley Municipal Code Chapter 13.110.

13.110.020 Prohibited Conduct

A. During the Covered Period-local State of Emergency, no landlord or lender-other entity shall evict or attempt to evict an occupant of real property, or otherwise require a Resident to vacate a residential Unit, unless necessary to stop an imminent threat to ~~for~~ the health and safety of other occupants-residents. For purposes of this Ordinance, the basis for an exception to this Ordinance cannot be the Resident's COVID-19 illness or exposure to COVID-19, whether actual or suspected.

B. Notice Requirement. Any eviction notice or notice for an unlawful detainer action that is served, filed, or expires during the Covered Period must include, in at least twelve-point font, a copy of this Chapter (13.110), and the below notice. It shall be a complete defense to any action that this requirement was not strictly complied with.

Notice: The City of Berkeley has adopted a temporary moratorium on evictions, the "COVID-19 Emergency Response Ordinance" (Berkeley Municipal Code Chapter 13.110) during the local emergency declared in response to the COVID-19 pandemic. The ordinance prohibits evictions for most reasons, including eviction for nonpayment of rent due to COVID-19. The Ordinance permits evictions where necessary to stop an imminent threat to the health and safety of other occupants. State law AB 3088 does NOT remove local eviction protections. A copy of the ordinance is attached. You may contact the Berkeley Rent Stabilization Board at (510) 981-7368 for additional information and referrals.

~~C. B.~~ Residential Eviction Moratorium. It shall be a complete defense to any action for unlawful detainer that the notice upon which the action is based was served or expired, or that the complaint was filed or served, during the Covered Period ~~local State of Emergency~~.

~~D. C.~~ No landlord of an Impacted Business or Nonprofit may upon expiration of a lease increase rent for an Impacted Business or Nonprofit in an amount greater than ten (10) percent over the rent in effect at the commencement of the local state of emergency declared by the Director of Emergency Services. For purposes of this section, rent means all consideration for the use and enjoyment of the rented premises, including base rent and any additional rent or other charges for costs such as utilities, maintenance, cleaning, trash removal, repairs and any other charges to the tenant required under the rental agreement. This section 13.110.020 C. shall expire on May 31, 2020, concurrent with Executive Order N-28-20; provided, however, that this section shall be automatically extended if Executive Order N-28-20 is extended or the tenant protections therein are extended pursuant to another Governor's Executive Order.

~~E. D.~~ For the duration of the Covered Period ~~local State of Emergency~~, if a tenant has a Covered Reason for Delayed Payment, the tenant may terminate a lease or rental agreement with 30 days' notice without penalty. A tenant may also exercise rights under this subsection if the tenants or roommates of the tenants are or were registered at an educational institution that cancelled or limited in-person classes due to the COVID-19 pandemic

13.110.030 Definitions

A. "Covered Period" means the period of time beginning with March 17, 2020 and concluding upon the expiration of the local emergency. However, the City Council may vote by resolution to extend the duration of the Covered Period.

~~B. A.~~ "Covered Reason for Delayed Payment" means:

- (1) The basis for the eviction is nonpayment of Rent, arising out of a material decrease in household, business, or other rental Unit occupant(s)'s income (including, but not limited to, a material decrease in household income caused by layoffs or a reduction in the number of compensable hours of work, or to caregiving responsibilities, or a material decrease in business income caused by a reduction in opening hours or consumer demand), or material out-of-pocket medical expenses, ~~or, in a group living arrangement wherein all tenants are collectively responsible for payment of the rent to the landlord,~~ a reduction in the number of tenants living in the Unit (including due to difficulty finding new tenants and/or subtenants willing and able to cover a sufficient share of Rent) which reduces the ability of the remaining tenants to pay the Rent, a change in the tenants which reduces the ability of the collective tenants to pay Rent, or a rent increase that exceeds the Annual General Adjustment for the current year; and
- (2) The decrease in household, business, or other rental Unit occupant's income or the expenses or reduction in number of tenants described in subparagraph (1) was caused by the impacts of COVID-19 pandemic, or by any local, state, or federal government response to COVID-19.

~~C. B.~~ "Delayed Rent Payment Agreement" means a mutual agreement between a landlord and tenant regarding the timing and amount of payments for Rent that is delayed by a Covered Reason for Delayed Payment.

D. C. "Impacted Business or Nonprofit" means a business or nonprofit organization that had a business license in 2019 or 2020 in the City of Berkeley or is a registered nonprofit in either or both of those years and:

4. whose operation has been shut down due to the COVID-19 emergency, or
5. that is unable to accept customers at its location and is open for limited virtual, take-out or pickup services only, or
6. who suffered a material loss of income.

E. D. "Landlord" includes owners, lessors, or sublessors of either residential or commercial rental property, and the agent, representative, or successor of any of the foregoing.

F. "Lender" means the mortgagee of a purchase money or similar mortgage, or the holder or beneficiary of a loan secured by one or more Units, which person has the right to mortgage or similar payments from the owner as mortgagor, including a loan servicer, and the agent, representative, or successor of any of the foregoing.

G. "Rent" includes, but is not limited to, base rent, fees (including late fee(s)), fines, and interest.

H. E. "Tenant" includes a tenant, subtenant, lessee, sublessee, or any other person entitled by written or oral rental agreement to use or occupancy a renter of either residential or commercial property.

I. "Unit" is defined to include a Group Living Accomodation.

13.110.040 Collection of Back Rent and Late Fees

A. Nothing in this Chapter shall relieve the tenant of liability for unpaid rent, which the landlord may seek after expiration of the local State of Emergency. Notwithstanding any lease provision to the contrary, a landlord may not charge or collect a late fee, fine, or interest for Rrent that is delayed by a Covered Reason for Delayed Payment. The City will develop standards or guidelines for tenants to repay unpaid rent accrued during the Covered Period course of the local State of Emergency. Landlords are encouraged to work with local agencies that will be making rental assistance available for qualifying tenants.

B.

1. For Rent accrued through January 31, 2021, tTenants shall have until March 1, 2022 up to twelve (12) months to pay Rrent that was delayed by a Covered Reason for Delayed Payment unless the landlord and tenant come to a mutual repayment agreement ("Delayed Rent Payment Agreement").

2. For Rent accrued beginning February 1, 2021, Tenants shall have until twenty-four (24) months after the conclusion of the Covered Period to pay Rent that was delayed by a Covered Reason for Delayed Payment.

3. Notwithstanding any lease provision to the contrary, a landlord may not charge or collect a late fee, fine, or interest for Rrent that is delayed by a Covered Reason for Delayed Payment.

C. A Tenant is not required to provide documentation to the Landlord in advance to qualify for the delayed repayment of Rrent over the 12 months. However, upon the request of a Landlord, a Tenant shall provide such documentation to the Landlord within forty-five (45) days after the request or within thirty (30) days after the local State of Emergency is ended, whichever is later; the tenant may self-attest as a form of documentation. In the case of nonpayment of Rrent, the

failure of a Tenant to notify the landlord in advance of being delinquent in the payment of Rrent prior to being served with a notice pursuant to Code of Civil Procedure sections 1161(2) et seq. does not waive the Tenant's right to claim this Chapter as a complete defense to nonpayment of Rrent in an unlawful detainer action.

D. Any medical or financial information provided to the landlord shall be held in confidence, and shall not be disclosed to other entities unless such disclosure is permitted or required by the law, or unless the tenant explicitly authorizes the disclosure of the information in writing.

E. Any relief from the City of Berkeley either directly to a property owner on their own application or as a pass through for City relief payments to the tenant shall directly reduce the amount of any Rrent that was delayed by a Covered Reason for Delayed Payment. This requirement shall be applied into any Delayed Rent Payment Agreement, regardless of the terms of that agreement.

13.110.050 Application

A. This Chapter applies to eviction notices and unlawful detainer actions based on notices served, filed, or which expire during the Covered Period on or after the effective date of this Chapter through the end of the local State of Emergency. It does not apply to withdrawal of accommodations from the rental market pursuant to Government Code 7060 et seq. ("Ellis Act") or to Uunits ordered by the City to be vacated for the preservation of public health, including where the City deems necessary to control the spread of COVID-19.

B. With respect to delayed payment accrued during the Covered Period covered by this Ordinance; a landlord may seek such Rent accrued through January 31, 2021 after March 1, 2021, and a landlord may seek such Rrent accrued beginning February 1, 2021 after the Covered Period expiration of the local State of Emergency; pursuant to Section 13.110.040, but may not file an action pursuant to Code of Civil Procedure sections 1161(2) et seq. or otherwise seek to recover possession of a rental Uunit based on the failure to pay Rrent that accrued during the Covered Period local State of Emergency. In any action to evict based on alleged nonpayment of Rrent, it shall be a complete defense to such action if any part of the Rrent in dispute accrued at any time during the Covered Period and/or if the action demands any fees or amounts contrary to the provisions of this Chapter. A landlord shall not apply any Rent payment towards Rent that is delayed by a Covered Reason for Delayed Payment before applying it towards any other Rent owed without the explicit written permission of the Tenant.

C. A Landlord or Lender shall not retaliate against a Tenant or other resident for exercising their rights under this Ordinance, including but not limited to shutting off any utilities, or reducing services or amenities, refusing to make or delaying repairs to which the Tenant or other resident would otherwise be entitled, refusing to offer a new rental agreement upon expiration of a prior rental agreement where the new rental agreement contains provisions that are substantially identical to the prior rental agreement, refusing to offer a rental agreement for a different Unit that they would otherwise offer, offering a rental agreement for a different Unit on less favorable terms than they would otherwise offer, or taking action(s) or inaction(s) which hurts the tenant's or other resident's credit rating or causes other landlords to not offer them a rental agreement or to offer them a rental agreement on less favourable terms than they would otherwise offer. Any omission is not intended to exclude such action as a potential form of retaliation protected against by this Chapter.

D. In addition to the affirmative defenses set forth above, in any action to recover possession of a rental Uunit filed under Berkeley Municipal Code section 13.76.130(A)(1), it shall be a

complete defense that the landlord impeded the tenant's effort to pay Rent by refusing to accept Rent paid on behalf of the tenant from a third party, or refusing to provide a W-9 form or other necessary documentation for the tenant to receive rental assistance from a government agency, non-profit organization, or other third party. Acceptance of rental payments made on behalf of the tenant by a third party shall not create a tenancy between the landlord and the third party.

13.110.060 Implementing Regulations

The City Manager may promulgate implementing regulations and develop forms to effectuate this Ordinance. This includes the option of requiring landlords and lenders to give a notice to Tenants and other residents informing them of this Chapter and the right to seek the benefits of this Chapter.

13.110.080 Enforcement Remedies

~~In the event of a violation of this Ordinance, an aggrieved tenant may institute a civil proceeding for injunctive relief, and money actual damages as specified below, and whatever other relief the court deems appropriate. Money damages shall only be awarded if the trier of fact finds that the landlord acted in knowing violation of or in reckless disregard of this Ordinance. The prevailing party shall be entitled to reasonable attorney's fees and costs pursuant to order of the court. The remedy available under this section shall be in addition to any other existing remedies which may be available to the tenant under local, state or federal law. In addition, this Ordinance grants a defense to eviction in the event that an unlawful detainer action is commenced in violation of this Ordinance.~~

A. Remedies

1. In the event of a violation of this Chapter by a landlord or lender, any person aggrieved by the violation, any person or entity who will fairly and adequately represent the interests of the protected class, and/or the City or the Rent Board may file a civil action to enforce this Chapter.

2. The relief available to a plaintiff or plaintiffs in an action for violation of this Chapter may include an injunction; all actual damages suffered by any aggrieved party; and an award of civil penalties in the sum of between one thousand dollars and ten thousand dollars per incident which is a violation of this Chapter, as assessed by the trier of fact, either jury or the Court, depending on the degree of intentionality and severity of the conduct.

3. An award of actual damages may include an award for mental and/or emotional distress and/or suffering. The amount of actual damages awarded to a prevailing plaintiff shall be trebled by the Court outside of the presence, and without the knowledge of, the jury, if any, if a defendant acted in knowing violation of, or in reckless disregard for, the provisions of this Chapter.

4. A defendant shall be liable for additional civil penalties of up to five thousand dollars for each violation of this Chapter committed against a person who is disabled within the meaning of California Government Code section 12926, et seq., or aged sixty-five or over.

5. In addition to the above awards of damages in a civil action under this Chapter, a prevailing plaintiff shall be entitled to an award of reasonable attorneys' fees. A prevailing defendant in a civil action under this Chapter shall only be entitled to an award of attorneys' fees if it is determined by the Court the action was wholly without merit or frivolous.

6. Nonexclusive Remedies and Penalties. The remedies provided in this subdivision are not exclusive, and nothing in this Chapter shall preclude any person from seeking any other remedies, penalties or procedures provided by law.

7. In addition, this Chapter grants a complete defense to eviction in the event that an eviction notice or unlawful detainer action is commenced, filed, or served in violation of this Chapter.

B. The protections provided by this ordinance shall be available to all tenants, regardless of any agreement wherein a tenant waives or purports to waive their rights under this Ordinance, with any such agreement deemed void as contrary to public policy.

C. A. ~~Violations of Section 13.110.020(C) (Commercial rent restrictions):~~

1. Violations of ~~this Chapter by a landlord or lender Section 13.110.020(C)~~ may be enforced by an administrative fine of up to \$1,000 pursuant to Chapter 1.28. Each day a ~~commercial property landlord or lender violates this chapter demands rent in excess of the amount permitted pursuant to Section 13.110.020(C)~~ is a separate violation. Each and every day of violation includes each day on which a failure to comply with this ordinance continues. The City may also charge the costs of investigating and issuing any notices of violations, and any hearings or appeals of such notices.

2. Any landlord or lender violating any of the provisions of this ordinance is guilty of a misdemeanor. Each person is guilty of a separate offense for each and every day during any portion of which any violation of any provision of this ordinance is committed, continued or allowed in conjunction with the Landlord's or Lender's activities with respect to the Unit and is punishable accordingly. Each and every day of violation includes each day on which a failure to comply with this ordinance continues. The City Attorney may refer those landlords and lenders in violation-violators of this Chapter Section 13.110.020(C) to the Alameda County District Attorney for redress as a violation of this Chapter and/or Business and Professions Code section 17200, et seq. or, if granted permission by the District Attorney, may bring an action pursuant to this Chapter and/or Business and Professions Code section 17200, et seq.

D. The remedies provided by this ordinance are cumulative and in addition to any other remedies available at law or in equity.

13.110.100 Liberal Construction

The provisions of this Chapter shall be liberally construed so as to fully achieve its purpose and provide the greatest possible protections to tenants.

Section 2. Effective Date

This ordinance shall go into effect thirty days from the time of its final passage or February 1, 2021, whichever is later.

RESOLUTION NO. XXXX

A RESOLUTION OF THE CITY COUNCIL FOR THE CITY OF BERKELEY DIRECTING THE CITY MANAGER TO PROMPTLY ISSUE A WRITTEN STATEMENT, PURSUANT TO ALAMEDA COUNTY MUNICIPAL CODE 6.120.110, AFFIRMING OR DECLARING IN WRITING THAT THE CITY OF BERKELEY INTENDS TO "OPT-OUT" OF THE COUNTY ORDINANCE, ENUMERATING THE SPECIFIC PROVISIONS OF THE COUNTY'S ORDINANCE FROM WHICH THE CITY INTENDS TO OPT OUT, AND INCLUDING A FINDING THAT THE CITY ORDINANCE IS STRONGER

WHEREAS, Alameda County Municipal Code 6.120 (Temporary Residential Eviction Moratorium for the Incorporated and Unincorporated Areas of the County Due to Covid-19 Ordinance) establishes an eviction moratorium and other protections for tenants and homeowners during COVID throughout both the incorporated and unincorporated parts of Alameda County; and

WHEREAS, Alameda County Municipal Code 6.120.110 provides that "If [a city council] has enacted an ordinance that has stronger protections for tenants during the COVID-19 emergency, the city may apply its ordinance in lieu of the county ordinance, to the extent its ordinance is stronger, subject to the requirements of this section. The city must duly affirm or declare in writing its intent to opt out of the county ordinance. The writing must enumerate the specific provisions of the county's ordinance from which the city intends to opt out and must include a finding that the city ordinance is stronger;" and

WHEREAS, Berkeley Municipal Code 13.110 (COVID-19 Emergency Response Ordinance) provides stronger protections for tenants (and homeowners) than Alameda County Municipal Code 6.120; and

WHEREAS, even if the City of Berkeley decides that the affirmative "opt-out" requirement in Alameda County Municipal Code 6.120.110 is can not be legally applied to charter cities such as Berkeley, following the affirmative "opt-out" procedure would reduce legal uncertainty by making clear that Berkeley's stronger ordinance is in effect;

NOW, THEREFORE, BE IT RESOLVED that the City Council for the City of Berkeley directs the City Manager to promptly issue a written statement, pursuant to Alameda County Municipal Code 6.120.110. affirming or declaring in writing that the City of Berkeley intends to "opt out of the county ordinance," enumerating the specific provisions of the county's ordinance from which the city intends to opt out, and including a finding that the city ordinance is stronger; and

BE IT FURTHER RESOLVED that said statement shall enumerate every single provision of the city ordinance which provides stronger protections for tenants than does the county ordinance; and

BE IT FURTHER RESOLVED that the City Manager shall promptly update said statement whenever the protections afforded to tenants by the city and/or county law changes, or if the City discovers that it has left out a stronger protection of the ordinance; and

BE IT FURTHER RESOLVED that copies of said statement (including any updates thereto) shall be sent to Alameda County Supervisor Keith Carson, the County Counsel of Alameda

County, the District Attorney of Alameda County, the members of the Berkeley City Council, and the Rent Stabilization Board; and

BE IT FURTHER RESOLVED that nothing in this resolution (or the statement issued by the City Manager) should be construed as the City of Berkeley taking a position regarding either whether the County ordinance can have legal effect in charter cities such as Berkeley or whether the County may legally require charter cities such as Berkeley to affirmatively “opt-out” of the county ordinance in order for their own ordinance(s) to be in effect.



Cheryl Davila
Councilmember
District 2

ACTION CALENDAR
November 17, 2020

To: Honorable Mayor and Members of the City Council

From: 4x4 Joint Task Force Committee on Housing

Subject: Updates to the COVID-19 Emergency Response Ordinance

RECOMMENDATION

Adopt first reading of an ordinance (effective February 1) amending Berkeley Municipal Code 13.110, Title 13, "The COVID-19 Emergency Response Ordinance," to enhance emergency tenant protections consistent with recently adopted Alameda County laws, action in other jurisdictions, and consultation with community stakeholders representing marginalized groups.

BACKGROUND

A. Berkeley's COVID-19 Emergency Response Ordinance

On March 17, 2020, the Berkeley City Council adopted an emergency ordinance prohibiting evictions of residential and commercial tenants unable to pay their rent due to COVID-19. Subsequently, on April 21, 2020, the Council further amended the City's ordinance to enhance eviction protections for commercial tenants, namely a prohibition on unreasonable rent increases for impacted businesses and nonprofits. Again on May 26, 2020, the Council further amended the city's ordinance to enhance eviction protections for residential tenants and homeowners, including banning most residential evictions through the end of the local state of emergency. Subsequently, on June 30, 2020 the Council further amended the city's ordinance to clarify and enhance the ability of residential tenants to terminate a lease. Since the enactment of these protections, other jurisdictions in California, including neighboring jurisdictions and the Alameda County Board of Supervisors have enacted a number of additional protections that are either complimentary to, or more stringent than, Berkeley's ordinance. The item updates BMC 13.110 to, among other provisions, include best practices and to align with newly adopted countywide protections.

B. Alameda County's Urgency Ordinances

On March 24, 2020, the Alameda County Board of Supervisors passed an urgency ordinance creating a temporary moratorium on evictions for renters and homeowners in the Unincorporated County (Ordinance No. 2020-14).

On March 31, 2020, the Alameda County Board of Supervisors extended protections to the entire County. Similar to our BMC 13.110, the ordinances applied a moratorium on evictions to tenants, homeowners or mobile homeowners who can provide documentation that they cannot pay their rent or mortgage due to a substantial loss of income, substantial out-of-pocket medical expenses, or extraordinary childcare needs caused by COVID-19.

On April 21, 2020, the Alameda County Board of Supervisors considered and adopted additional amendments,¹ after finding that the pandemic and shelter in place orders created severe new and exacerbated existing socioeconomic impacts. Accordingly, the County deemed any eviction, regardless of cause, a public health threat. Giving cities this option provides baseline protections for residents of cities without moratoria, but allows cities to make determinations in the best interest of their residents.

The California Attorney General has opined that when a county has declared a local emergency within its jurisdictional boundaries in an area that includes both unincorporated and incorporated territory, the county may adopt emergency rules and regulations pursuant to Government Code Section 8634 that will be effective in both unincorporated and incorporated areas (62 Ops. Cal. Atty. Gen. 701 (1979)). However, questions have been raised as to whether this power of counties always covers charter cities, such as Berkeley; for example, in early June, many members of the Council questioned whether the county-wide curfew issued by the County Sheriff was legally valid within Berkeley City limits.

C. Assembly Bill 3088

On August 31, the Governor signed AB 3088, an urgency bill (i.e. one which takes immediate effect). The bill provides, among other things, that “Any ordinance, resolution, regulation, or administrative action adopted by a city, county, or city and county in response to the COVID-19 pandemic to protect tenants from eviction is subject to [the limitation that]... Any extension, expansion, renewal, reenactment, or new adoption of a measure, however delineated, that occurs between August 19, 2020, and January 31, 2021, shall have no effect before February 1, 2021” (Cal. Civ. Proc. Code §1179.05(a)).

As a result, most if not all amendments made to Berkeley’s ordinance in order to further protect tenants could likely not take effect until February 1, 2021 regardless of urgency. However, the City Council can still adopt amendments before then so that they will come into effect on February 1, 2021.

D. Updates to The Covid-19 Emergency Response Ordinance

Unreasonable evictions are directly at odds with local, state and federal measures to recover from the pandemic.

Housing stability is a prerequisite for flattening the COVID-19 infection curve. Loss of housing presents significant health risks for those directly affected and the population at large, through disruption of shelter in place orders, social distancing measures and increased homelessness. Testing, quarantine, and physical distancing measures are bolstered by housing security.

In recognition of developments at the Alameda County level, action in other jurisdictions, and consultation with community stakeholders, the ordinance makes the following additional amendments to BMC 13.110:

1. *Expansion of Moratorium Scope:*

Consistent with numerous jurisdictions (including the Cities of Los Angeles, Santa Monica,

¹ Amend Countywide Temporary Moratorium on Residential Evictions, Alameda County Community Development Agency, April 21, 2020, https://www.acgov.org/board/bos_calendar/documents/DocsAgendaReg_04_21_20/GENERAL%20ADMINISTRATION/Regular%20Calendar/CDA_294956.pdf, Amendments were crafted and presented by the Alameda County’s Community Development Agency and the Housing and Community Development Department (HCD), in coordination with County Counsel, Public Health, all cities countywide, Resources for Community Development, and legal agencies including Bay Area Legal Aid, Centro Legal de la Raza, East Bay Community Law Center, and Housing and Economic Rights Advocates

and Inglewood) these amendments would prohibit Ellis Act evictions.² Additionally, minor amendments are made to the exception for health and safety threats to bring it in line with the language of the County ordinance and to reflect a change requested by legal services providers; the former is important to ensure there are no evictions prohibited by the County ordinance but ostensibly allowed under the City ordinance, thereby minimizing the risk of legal confusion.

2. *Council May Extend Protections By Resolution*

Currently, many protections under the Berkeley ordinance lapse either upon the expiration of the local state emergency. This period is not as long as in other jurisdictions. For example, the City of Los Angeles's ordinance protects tenants from Ellis Act evictions for sixty (60) days after the expiration of the local state of emergency, and Alameda County's eviction moratorium currently expires sixty (60) days after the expiration of the countywide state of emergency. These amendments would allow the Council to extend this period by resolution (instead of an ordinance), allowing the Council to swiftly act by majority vote to protect public health and safety and keep residents housed if the local situation necessitates immediate action.

3. *Authorize Tenants To Self-Attest Financial Hardship*

Some tenants may have difficulty providing sufficient documentation that proves their COVID-related financial hardship. In order to ensure that no tenant is left behind, these amendments would authorize tenants to self-attest their COVID-related financial hardship. Given that landlords are ultimately allowed to recover back rent, there would ultimately be no barrier to their ability to ultimately be made financially "whole." Furthermore, this would bring the City ordinance in line with the federal eviction moratorium recently issued by the Centers for Disease Control and Prevention (CDC), which allows tenants to self-declare their inability to pay.

4. *Clarifies Covered Reasons for Delayed Payment*

Due to Berkeley's status as a "college town" and the transition of UC Berkeley (and other local institutions of higher education) to mainly online and/or hybrid-format classes in response to the ongoing COVID pandemic many segments of Berkeley's rental market have seen a significant drop in demand. While this reduced demand may benefit many tenants entering new rental agreements, continuing tenants are largely not receiving this benefit, and ironically some may be in a worse position even if their own financial situation remains unchanged. Many tenants, especially those who live with students, may have had one or more roommates move-out, and planned to replace them with a new roommate(s) who would pay the same share of the rent. However, many landlords required their tenants to sign lease renewals before the severity of the COVID crisis became clear. As a result, those tenants were not in a position to bargain for a rent reduction, and with reduced demand for housing may be unable to find a replacement roommate willing and able to pay the same share of the rent as an outgoing roommate. The remaining tenants can be left with an unwinnable choice: Delaying taking on a new roommate(s) in the hope of finding someone who can pay the same share of the rent (while having to pay the full share of the rent until they find a replacement), or take on a higher share of the rent in order to immediately have a new roommate. While previous versions of the ordinance were clearly intended to cover this situation, the failure to explicitly mention them creates a perpetual risk that the courts will interpret them otherwise. These amendments make clear that such scenarios are covered reasons for nonpayment, eliminating the risk of judicial misinterpretation.

² aagla.org/wp-content/uploads/2020/07/7120-Updated-Temporary-Eviction-Moratorium-Chart-002.pdf

Additionally, the amendments also remove self-contradicting language referencing group living arrangements; this ensures that all tenants are properly covered by that potential reason for delaying payment.

5. *Extends Additional Protections to Homeowners and Penalties to Lenders*

The County Ordinance extends evictions protections afforded to tenants and related requirements to homeowners; similarly, the county ordinance makes explicit that lenders (e.g. a bank that holds the property's mortgage) and their agents have the same obligations (e.g. providing residents notice of their rights under the ordinance) and penalties for noncompliance as landlords. These amendments extend that tenant-homeowner parity to the City ordinance.

6. *Extends Back Rent Repayment Period Both to Reflect State Law and to Enact Better Policy*

Under the city's existing ordinance, a tenant has a twelve (12) month repayment period, which commences once a rent payment is late, to make that overdue rent payment before their landlord may sue. However, community stakeholders have raised significant concerns that this repayment period is much too short. For instance, if a tenant normally spends 50% or more of their income on rent (an obscene yet common scenario) and is unemployed due to COVID for 12 months, they would be mathematically unable to repay their back rent over 12 months even if they income immediately fully recovered (unlikely) and the the landlord waited until 12 months after the tenant re-gained employment (which is not required of the landlord).

AB 3088 provides that for Rental Debt which accrues through January 31, 2021, "the repayment period [established under an ordinance or other action by a city, county, or city and county] is deemed to begin on March 1, 2021" (Cal. Civ. Proc. Code §1179.05(a)(2)(B)). This ordinance amends city law to reflect that state law has delayed until March 1, 2021 the commencement of the twelve (12) month repayment period for rental debt accrued through January 31, 2021 (i.e. for rental debt accrued through January 31, 2021, a tenant has until March 1, 2021 to repay their landlord before the landlord may take them to court).

For rental debt which accrues starting February 1, 2021, these amendments provide that a tenant shall have a forty-eight (48) month period to repay back rent (24 hours in the case of oral rental agreements). This repayment period commences on the date on which no tenant may delay new rent payments under Covered Reason for Delayed Payment. This extension significantly increases the ability of a tenant to repay all their back rent.

7. *Provides Additional Examples of Prohibited Retaliation*

The ordinance prohibits retaliation against tenants for exercising their rights under it, and explicitly names shutting off utilities and reducing services as examples of prohibited retaliation. These amendments add additional examples of prohibited retaliation.

8. *Improves Civil Remedies for Violations*

These amendments make various changes to civil remedies (including authorizing administrative fines and offering protections for tenants who act in good faith but do not prevail in court). Additionally, it makes clear that the City or another person or entity may sue to enforce the ordinance.

9. *Extends Criminal Penalties to non-Commercial Violations*

Currently, the City ordinance only imposes criminal penalties for violations relating to

commercial properties. These amendments extend criminal penalties to any violations by a landlord or lender, using verbatim language from the County ordinance. In addition to providing legal certainty that violations also covered by the County ordinance can be criminally prosecuted, these amendments are necessary to allow criminal prosecution for violating residential property provisions not covered by the County ordinance (e.g. conducting an ostensible Ellis Act eviction).

10. *Liberal Construction*

States that the ordinance should be liberally construed so as to fully achieve its purpose and provide the greatest possible protections to tenants.

11. *Amendments Not Effective Before February 1*

In keeping with Cal. Civ. Proc. Code §1179.05(a)(1), i.e. AB 3088, section 2 of the attached ordinance provides that it shall not be effective until February 1 (or 30 days after its second reading, whichever is later).

Consistent with the actions of Alameda County, neighboring jurisdictions, and other jurisdictions throughout California; consultation with community stakeholders representing marginalized groups; Assembly Bill 3088 (2020); and the ongoing shelter-in-place order and associated emergency activities in response to the global pandemic, it is in the public interest to clarify and amend the COVID-19 Emergency Response Ordinance.

FINANCIAL IMPLICATIONS

This item will essentially not have any direct financial implications. However, preventing evictions can result in significant savings to the City in the short, medium, and long-term, by reducing homeless, COVID-19 infections, and social services spending. Additionally, bringing protections for tenants and other residents under Berkeley law to at least those of the County ordinance could result in savings from potential litigation by landlords or lenders seeking to nullify the County ordinance within Berkeley city limits (especially if such litigation names the City as a real party in interest). Preventing evictions will prevent the spread of COVID 19.

ENVIRONMENTAL SUSTAINABILITY

Protecting our communities during this climate and health crisis is an act of environmental sustainability.

CONTACT PERSONS

Cheryl Davila
Councilmember District 2
510.981.7120
cdavila@cityofberkeley.info

ATTACHMENTS:

1. Ordinance

REFERENCES:

1. Link to AB 3088:
https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3088

ORDINANCE NO. -N.S.

ORDINANCE AMENDING CHAPTER 13.110 OF THE BERKELEY MUNICIPAL CODE, THE COVID-19 EMERGENCY RESPONSE ORDINANCE

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. The Berkeley Municipal Code Chapter 13.110 is amended to read as follows:

**Chapter 13.110
COVID-19 EMERGENCY RESPONSE ORDINANCE**

Sections:

- 13.110.010 Findings and Purpose**
- 13.110.020 Prohibited Conduct**
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13.110.010 Findings and Purposes

International, national, state and local health and governmental authorities are responding to an outbreak of respiratory disease caused by a novel coronavirus named "SARS-CoV-2." And the disease it causes has been named "coronavirus disease 2019," abbreviated COVID-19, ("COVID-19"). In response to this emergency, on March 3, 2020, the City Manager acting as the Director of Emergency Services declared a local State of Emergency based on COVID-19 (hereinafter referred to as "the State of Emergency"), which the City Council subsequently ratified on March 10, 2020. On April 21, 2020, the council ratified an extension of the local state of emergency through June 21, 2020. In addition, on March 4, 2020, the Governor declared a state of emergency in California and the President of the United States declared a national state of emergency on March 13, 2020 regarding the novel coronavirus and COVID-19.

On March 16, 2020, the City of Berkeley Public Health Officer, along with several other neighboring jurisdictions issued a Shelter in Place Order directing all individuals living in the City of Berkeley to shelter at their place of residence except that they may leave to provide or receive certain essential services or engage in certain essential activities, and prohibiting non-essential gatherings and ordering cessation of non-essential travel.

Furthermore, on March 16, 2020, the Governor issued Executive Order N-28-20, specifically authorizing local governments to halt evictions for commercial tenants, residential tenants, and homeowners who have been affected by COVID-19, emphasizing that the economic impacts of COVID-19 have been significant and could threaten to undermine housing security as many people are experiencing material income loss as a result of business closures, the loss of hours

or wages or layoffs related to COVID-19, hindering their ability to keep up with rents, mortgages and utility bills.

The Order also stated that because homelessness can exacerbate vulnerability to COVID-19, Californians must take measures to preserve and increase housing security for Californians to protect public health and specifically stated that local jurisdictions may take measures to promote housing security beyond what the state law would otherwise allow.

On March 31, this Shelter in Place Order was extended to May 3, 2020, and restricted activities further. This Shelter in Place Order was subsequently extended again.

On April 6, 2020, the Judicial Council of California issued emergency rules suspending court proceedings for unlawful detainer and judicial foreclosures until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted. However, the Judicial Council subsequently revoked this protection, thereby immediately placing tenants not covered by an eviction moratorium at immediate risk.

On April 21, 2020, Alameda County enacted an urgency ordinance prohibiting eviction for any reason other than withdrawal of rental property under the Ellis Act or court-ordered eviction for public safety. Even if the Alameda County ordinance did not have effect within the incorporated area of Berkeley, it would be ~~Although the Alameda County ordinance does not have effect within the incorporated area of Berkeley, it is desirable to ensure that Berkeley residents have at least~~ the same level of protection as the residents of unincorporated Alameda County.

During this State of Emergency (and the months following its expiration), and in the interests of protecting the public health and preventing transmission of the COVID-19, it is essential to avoid unnecessary displacement and homelessness. It is the intent of this Ordinance to fully implement the suspension of the statutory bases for eviction for nonpayment of rent and for default in the payment of a mortgage as authorized by Executive Order N-28-20.

At the same time, the Governor, as well as, the Berkeley Health Officer, and those of other jurisdictions ordered the closure of businesses, except those deemed essential. Many businesses, such as restaurants, are open only for take-out or pick up services and face a critical loss of business.

-----The City Council is aware that some landlords of commercial properties are seeking significant rent increases during the period when many commercial tenants are closed or are experiencing substantial and catastrophic reductions in their business and income. Such rent increases force tenants who are closed or have substantially reduced revenues face the choice of accepting a significant rent increase, moving at a time when it is virtually impossible, or closing altogether. Accepting a rent increase while closed or in a reduced state of operations means that the commercial tenants face even more debt to the landlord when the emergency is over, and may face a substantially increased rent when the tenant returns to normal operations, if ever.

Landlords of commercial property that unreasonably increases rents on tenants of commercial property during the COVID-19 emergency significantly impacts vulnerable small businesses, nonprofits, and artists who form a large part of the backbone of Berkeley's economy, revenue sources, and employment opportunities. These rent increases are coming at a time when the commercial rents are likely falling due to business closures and potential loss of businesses at the end of the emergency. Thus, these rent increases appear as a way of evading the

Governor's and Berkeley's commercial tenant eviction moratorium by forcing tenants to agree to rent increases or leave. Such conduct constitutes constructive evictions in contravention of the eviction moratorium. Furthermore, such rent increases may affect businesses providing goods and essential services, resulting in increases in those costs of essential goods and services contravening the intent of anti-price gouging laws.

On expiration of leases when the emergency order is in place, unreasonable rent increases have already forced the closure of businesses and will result in closing of additional business causing loss of income for the business owners, loss of employment for the employees and of revenue to the city, and an increase in homelessness. To reduce the spread of COVID-19, it is essential to avoid unnecessary displacement and homelessness. Because of the emergency restrictions, businesses forced out due to increased rents will be unable to move to new locations and new businesses will be unable to open during this emergency period. During a state of emergency cities have extraordinary powers and jurisdiction to create legislation in order to counteract the effects of the emergency situation on its people and businesses. Protecting tenants from excessive rent increases will prevent additional loss of employment and essential services for Berkeley residents. In order to effectively implement an eviction moratorium, the City Council finds it imperative to prevent constructive eviction through unreasonable rent increases.

Multiple jurisdictions have banned Ellis Act evictions. In Los Angeles County alone, the Cities of Los Angeles, Inglewood, and Santa Monica (and possibly others have banned) Ellis Act evictions. For example, Los Angeles's ordinance bans Ellis Act evictions through 60 days after the expiration of the local state of emergency.

Accordingly, the City of Berkeley adopts the following rules and regulations-amendments to Berkeley Municipal Code Chapter 13.110.

13.110.020 Prohibited Conduct

A. During the Covered Period~~local State of Emergency~~, no landlord or ~~lender~~~~other entity~~ shall evict or attempt to evict an occupant of real property, or otherwise require a Resident to vacate a residential unit, unless necessary to stop an imminent threat to for the health and safety of other occupants-residents. For purposes of this Ordinance, the basis for an exception to this Ordinance cannot be the Resident's COVID-19 illness or exposure to COVID-19, whether actual or suspected.

B. Notice Requirement. Any eviction notice or notice for an unlawful detainer action that is served, filed, or expires during the Covered Period must include, in at least twelve-point font, a copy of this Chapter (13.110), and the below notice. It shall be a complete defense to any action that this requirement was not strictly complied with.

Notice: The City of Berkeley has adopted a temporary moratorium on evictions, the "COVID-19 Emergency Response Ordinance" (Berkeley Municipal Code Chapter 13.110) during the local emergency declared in response to the COVID-19 pandemic. The ordinance prohibits evictions for most reasons, including eviction for nonpayment of rent due to COVID-19. The Ordinance permits evictions where necessary to stop an imminent threat to the health and safety of other occupants. A copy of the ordinance is attached. You may contact the Berkeley Rent Stabilization Board at (510) 981-7368 for additional information and referrals.

~~C. B.~~ Residential Eviction Moratorium. It shall be a complete defense to any action for unlawful detainer that the notice upon which the action is based was served or expired, or that the complaint was filed or served, during the Covered Period ~~local State of Emergency~~.

~~D. C.~~ No landlord of an Impacted Business or Nonprofit may upon expiration of a lease increase rent for an Impacted Business or Nonprofit in an amount greater than ten (10) percent over the rent in effect at the commencement of the local state of emergency declared by the Director of Emergency Services. For purposes of this section, rent means all consideration for the use and enjoyment of the rented premises, including base rent and any additional rent or other charges for costs such as utilities, maintenance, cleaning, trash removal, repairs and any other charges to the tenant required under the rental agreement. This section 13.110.020 C. shall expire on May 31, 2020, concurrent with Executive Order N-28-20; provided, however, that this section shall be automatically extended if Executive Order N-28-20 is extended or the tenant protections therein are extended pursuant to another Governor's Executive Order.

~~E. D.~~ For the duration of the Covered Period ~~local State of Emergency~~, if a tenant has a Covered reason for delayed payment the tenant may terminate a lease or rental agreement with 30 days' notice without penalty. A tenant may also exercise rights under this subsection if the tenants or roommates of the tenants are or were registered at an educational institution that cancelled or limited in-person classes due to the COVID-19 pandemic

13.110.030 Definitions

A. "Covered Period" means the period of time beginning with March 17, 2020 and concluding upon the expiration of the local emergency. However, the City Council may vote by resolution to extend the duration of the Covered Period.

B. A.—"Covered Reason for Delayed Payment" means:

- (1) The basis for the eviction is nonpayment of Rrent, arising out of a material decrease in household, business, or other rental unit occupant(s)'s income (including, but not limited to, a material decrease in household income caused by layoffs or a reduction in the number of compensable hours of work, or to caregiving responsibilities, or a material decrease in business income caused by a reduction in opening hours or consumer demand), or material out-of-pocket medical expenses, ~~or, in a group living arrangement wherein all tenants are collectively responsible for payment of the rent to the landlord,~~ a reduction in the number of tenants living in the unit (including due to difficulty finding new tenants and/or subtenants willing and able to cover a sufficient share of Rent) which reduces the ability of the remaining tenants to pay the Rrent, a change in the tenants which reduces the ability of the collective tenants to pay Rrent, or a rent increase that exceeds the Annual General Adjustment for the current year; and
- (2) The decrease in household, business, or other rental unit occupant's income or the expenses or reduction in number of tenants described in subparagraph (1) was caused by the impacts of COVID-19 pandemic, or by any local, state, or federal government response to COVID-19.

~~C. B.~~—"Delayed Rent Payment Agreement" means a mutual agreement between a landlord and tenant regarding the timing and amount of payments for Rrent that is delayed by a Covered Reason for Delayed Payment.

~~D. C.~~—"Impacted Business or Nonprofit" means a business or nonprofit organization that had a business license in 2019 or 2020 in the City of Berkeley or is a registered nonprofit in either or both of those years and:

1. whose operation has been shut down due to the COVID-19 emergency, or

2. that is unable to accept customers at its location and is open for limited virtual, take-out or pickup services only, or
3. who suffered a material loss of income.

E. D.-"Landlord" includes owners, lessors, or sublessors of either residential or commercial rental property, and the agent, representative, or successor of any of the foregoing.

F. "Lender" means the mortgagee of a purchase money or similar mortgage, or the holder or beneficiary of a loan secured by one or more units, which person has the right to mortgage or similar payments from the owner as mortgagor, including a loan servicer, and the agent, representative, or successor of any of the foregoing.

G. "Rent" includes, but is not limited to, base rent, fees (including late fee(s), fines, and interest.

H. E.-"Tenant" includes a tenant, subtenant, lessee, sublessee, or any other person entitled by written or oral rental agreement to use or occupancy a renter of either residential or commercial property.

13.110.040 Collection of Back Rent and Late Fees

A. Nothing in this Chapter shall relieve the tenant of liability for unpaid rent, which the landlord may seek after expiration of the local State of Emergency. Notwithstanding any lease provision to the contrary, a landlord may not charge or collect a late fee, fine, or interest for Rrent that is delayed by a Covered Reason for Delayed Payment. The City will develop standards or guidelines for tenants to repay unpaid rent accrued during the Covered Period course of the local State of Emergency. Landlords are encouraged to work with local agencies that will be making rental assistance available for qualifying tenants.

B.

1. For Rent accrued through January 31, 2021, t~~F~~Tenants shall have a ~~up to~~ twelve (12) months period, which shall commence March 1, 2021, to pay Rrent that was delayed by a Covered Reason for Delayed Payment unless the landlord and tenant come to a mutual repayment agreement ("Delayed Rent Payment Agreement").

2. For Rent accrued beginning February 1, 2021, Tenants shall have forty-seven (47) months to pay Rent that accrued during the Covered Period, except that in the case of an oral rental agreement this period shall be twenty-three (23) months.

3. Notwithstanding any lease provision to the contrary, a landlord may not charge or collect a late fee, fine, or interest for Rrent that is delayed by a Covered Reason for Delayed Payment.

C. A Tenant is not required to provide documentation to the Landlord in advance to qualify for the delayed repayment of Rrent ~~over the 12 months~~. However, upon the request of a Landlord, a Tenant shall provide such documentation to the Landlord within forty-five (45) days after the request or within thirty (30) days after the local State of Emergency is ended, whichever is later; the tenant may self-attest as a form of documentation. In the case of nonpayment of Rrent, the failure of a Tenant to notify the landlord in advance of being delinquent in the payment of Rrent prior to being served with a notice pursuant to Code of Civil Procedure sections 1161(2) et seq. does not waive the Tenant's right to claim this Chapter as a complete defense to nonpayment of Rrent in an unlawful detainer action.

D. Any medical or financial information provided to the landlord shall be held in confidence, and shall not be disclosed to other entities unless such disclosure is permitted or required by the law, or unless the tenant explicitly authorizes the disclosure of the information in writing.

E. Any relief from the City of Berkeley either directly to a property owner on their own application or as a pass through for City relief payments to the tenant shall directly reduce the amount of any Rrent that was delayed by a Covered Reason for Delayed Payment. This requirement shall be applied into any Delayed Rent Payment Agreement, regardless of the terms of that agreement.

13.110.050 Application

A. This Chapter applies to eviction notices and unlawful detainer actions based on notices served, filed, or which expire during the Covered Period ~~on or after the effective date of this Chapter through the end of the local State of Emergency~~. It does not apply ~~to withdrawal of accommodations from the rental market pursuant to Government Code 7060 et seq. ("Ellis Act")~~ or to units ordered by the City to be vacated for the preservation of public health, including where the City deems necessary to control the spread of COVID-19.

B. With respect to delayed payment accrued during the Covered Period ~~covered by this Ordinance~~, a landlord may seek such Rrent after the Covered Period ~~expiration of the local State of Emergency~~, pursuant to Section 13.110.040, but may not file an action pursuant to Code of Civil Procedure sections 1161(2) *et seq.* or otherwise seek to recover possession of a rental unit based on the failure to pay Rrent that accrued during the Covered Period ~~local State of Emergency~~. In any action to evict based on alleged nonpayment of Rrent, it shall be a complete defense to such action if any part of the Rrent in dispute accrued at any time during the Covered Period and/or if the action demands any fees or amounts contrary to the provisions of this Chapter. A landlord shall not apply any Rent payment towards Rent that is delayed by a Covered Reason for Delayed Payment before applying it towards any other Rent owed without the explicit written permission of the Tenant.

C. A Landlord or Lender shall not retaliate against a Tenant or other resident for exercising their rights under this Ordinance, including but not limited to shutting off any utilities, ~~or~~ reducing services or amenities, refusing to make or delaying repairs to which the Tenant or other resident would otherwise be entitled, refusing to offer a new rental agreement upon expiration of a prior rental agreement where the new rental agreement contains provisions that are substantially identical to the prior rental agreement.

D. In addition to the affirmative defenses set forth above, in any action to recover possession of a rental unit filed under Berkeley Municipal Code section 13.76.130(A)(1), it shall be a complete defense that the landlord impeded the tenant's effort to pay Rrent by refusing to accept Rrent paid on behalf of the tenant from a third party, or refusing to provide a W-9 form or other necessary documentation for the tenant to receive rental assistance from a government agency, non-profit organization, or other third party. Acceptance of rental payments made on behalf of the tenant by a third party shall not create a tenancy between the landlord and the third party.

13.110.060 ___ Implementing Regulations

The City Manager may promulgate implementing regulations and develop forms to effectuate this Ordinance. This includes the option of requiring landlords and lenders to give a notice to Tenants and other residents informing them of this Chapter and the right to seek the benefits of this Chapter.

13.110.080 Enforcement Remedies

~~In the event of a violation of this Ordinance, an aggrieved tenant may institute a civil proceeding for injunctive relief, and money actual damages as specified below, and whatever other relief the court deems appropriate. Money damages shall only be awarded if the trier of fact finds that the landlord acted in knowing violation of or in reckless disregard of this Ordinance. The prevailing party shall be entitled to reasonable attorney's fees and costs pursuant to order of the court. The remedy available under this section shall be in addition to any other existing remedies which may be available to the tenant under local, state or federal law. In addition, this Ordinance grants a defense to eviction in the event that an unlawful detainer action is commenced in violation of this Ordinance.~~

A. Remedies

1. In the event of a violation of this Chapter by a landlord or lender, any person aggrieved by the violation, any person or entity who will fairly and adequately represent the interests of the protected class, and/or the City or the Rent Board may file a civil action to enforce this Chapter.

2. The relief available to a plaintiff or plaintiffs in an action for violation of this Chapter may include an injunction; all actual damages suffered by any aggrieved party; and an award of civil penalties in the sum of between one thousand dollars and ten thousand dollars per incident which is a violation of this Chapter, as assessed by the trier of fact, either jury or the Court, depending on the degree of intentionality and severity of the conduct.

3. An award of actual damages may include an award for mental and/or emotional distress and/or suffering. The amount of actual damages awarded to a prevailing plaintiff shall be trebled by the Court outside of the presence, and without the knowledge of, the jury, if any, if a defendant acted in knowing violation of, or in reckless disregard for, the provisions of this Chapter.

4. A defendant shall be liable for additional civil penalties of up to five thousand dollars for each violation of this Chapter committed against a person who is disabled within the meaning of California Government Code section 12926, et seq., or aged sixty-five or over.

5. In addition to the above awards of damages in a civil action under this Chapter, a prevailing plaintiff shall be entitled to an award of reasonable attorneys' fees. A prevailing defendant in a civil action under this Chapter shall only be entitled to an award of attorneys' fees if it is determined by the Court the action was wholly without merit or frivolous.

6. Nonexclusive Remedies and Penalties. The remedies provided in this subdivision are not exclusive, and nothing in this Chapter shall preclude any person from seeking any other remedies, penalties or procedures provided by law.

7. In addition, this Chapter grants a complete defense to eviction in the event that an eviction notice or unlawful detainer action is commenced, filed, or served in violation of this Chapter.

B. The protections provided by this ordinance shall be available to all tenants, regardless of any agreement wherein a tenant waives or purports to waive their rights under this Ordinance, with any such agreement deemed void as contrary to public policy.

C. A. Violations of Section 13.110.020(C) – (Commercial rent restrictions:)-

1. ~~Violations of this Chapter by a landlord or lender Section 13.110.020(C) may be enforced by an administrative fine of up to \$1,000 pursuant to Chapter 1.28. Each day a commercial property landlord or lender violates this chapter demands rent in excess of the amount permitted pursuant to Section 13.110.020(C) is a separate violation. Each and every day of violation includes each day on which a failure to comply with this ordinance continues. The City may also charge the costs of investigating and issuing any notices of violations, and any hearings or appeals of such notices.~~

2. Any landlord or lender violating any of the provisions of this ordinance is guilty of a misdemeanor. Each person is guilty of a separate offense for each and every day during any portion of which any violation of any provision of this ordinance is committed, continued or allowed in conjunction with the Landlord's or Lender's activities with respect to the unit and is punishable accordingly. Each and every day of violation includes each day on which a failure to comply with this ordinance continues. The City Attorney may refer those landlords and lenders in violation-violators of this Chapter Section 13.110.020(C) to the Alameda County District Attorney for redress as a violation of this Chapter and/or Business and Professions Code section 17200, et seq. or, if granted permission by the District Attorney, may bring an action pursuant to this Chapter and/or Business and Professions Code section 17200, et seq.

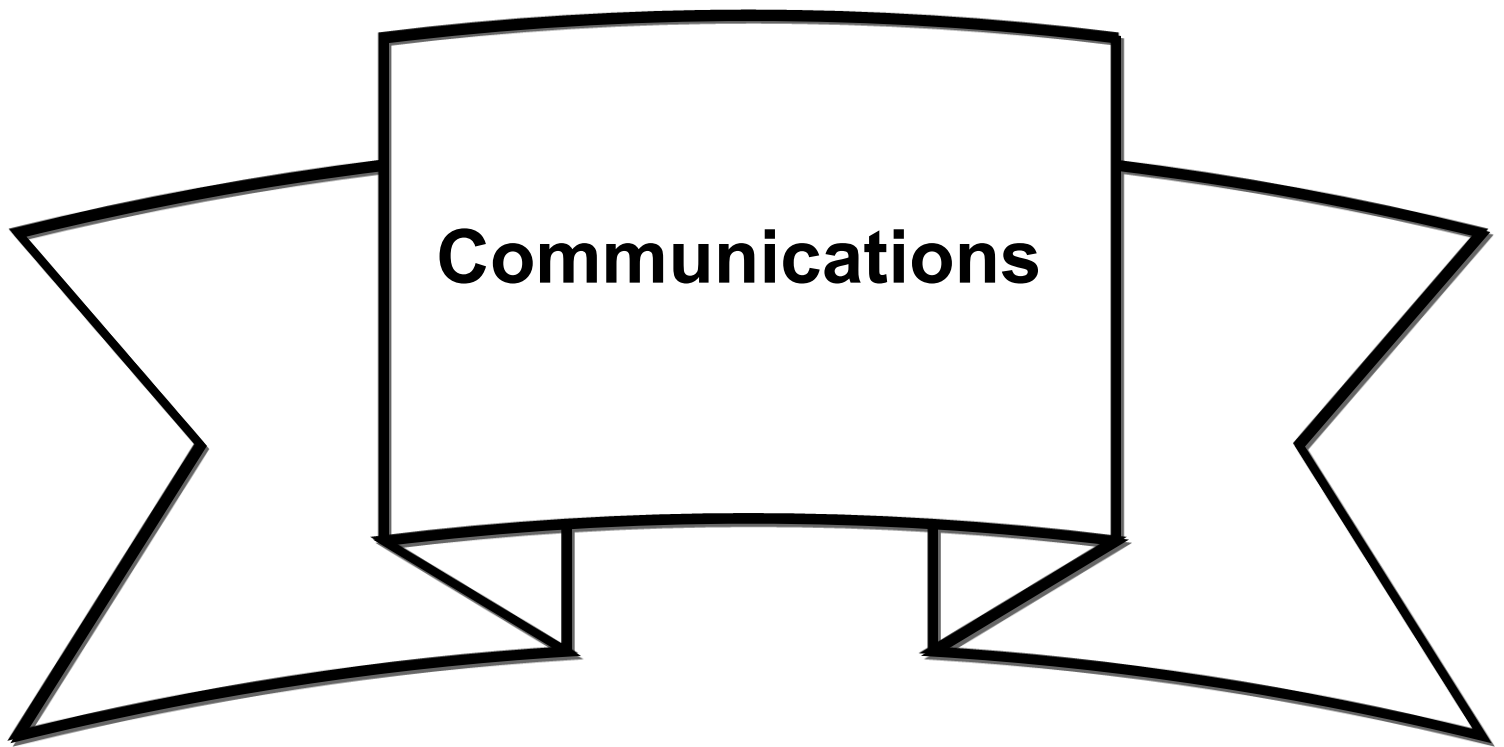
D. The remedies provided by this ordinance are cumulative and in addition to any other remedies available at law or in equity.

13.110.100 Liberal Construction

The provisions of this Chapter shall be liberally construed so as to fully achieve its purpose and provide the greatest possible protections to tenants.

Section 2. Effective Date

This ordinance shall go into effect thirty days from the time of its final passage or February 1, 2021, whichever is later.



All communications submitted to the City Council are public record. Communications are not published directly to the City's website. Copies of individual communications are available for viewing at the City Clerk Department and through Records Online.

City Clerk Department

2180 Milvia Street
Berkeley, CA 94704
(510) 981-6900

Records Online

<http://www.cityofberkeley.info/recordsonline>

To search for communications associated with a particular City Council meeting using Records Online:

1. Select Search Type = “Public – Communication Query (Keywords)”
2. From Date: Enter the date of the Council meeting
3. To Date: Enter the date of the Council meeting (this may match the From Date field)
4. Click the “Search” button
5. Communication packets matching the entered criteria will be returned
6. Click the desired file in the Results column to view the document as a PDF