



Kate Harrison  
Councilmember District 4

## **REVISED AGENDA MATERIAL for Supplemental Packet 3**

**Meeting Date:** April 21, 2020

**Item Number:** 8

**Item Description:** Urgency Ordinance: Prevent Constructive Eviction of Commercial Tenants During the COVID-19 Emergency

**Submitted by:** Councilmember Harrison

### **Good of the City Analysis:**

The clarifying changes to the ordinance (as highlighted) help to clarify Council's intent about the scope of tenant protections. These supplemental edits will facilitate effective implementation of the ordinance, and outweigh the lack of time for citizen review or City Councilmember evaluation of the material.

### **Revisions**

1. Clarified language in findings.
2. Clarified that rent increase restrictions are effective upon lease expiration.
3. Clarified that impacted businesses or nonprofits include those unable to accept customers at their location and only open for limited virtual services.

ORDINANCE NO. -N.S.

URGENCY ORDINANCE AMENDING CHAPTER 13.110 TO THE BERKELEY  
MUNICIPAL CODE TITLE 13, 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**
- 13.110.050 Application**
- 13. 110.060 Implementing Regulations**
- 13.110.070 Waiver**
- 13.110.080 Remedies**
- 13.110.090 Severability**

**13.110.010 Findings and Purpose**

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. 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, 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 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.

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 faces 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 attempt to increase rents on tenants of commercial property during the COVID-19 emergency are significantly impacts unconscionably preying upon 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 tactics 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, sSuch 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, uUnreasonable 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 ~~is adopting~~adopts the following amendments to Berkeley Municipal Code Chapter 13.110.

### **13.110.020 Prohibited Conduct**

A. During the local State of Emergency, no landlord or other entity shall evict or attempt to evict an occupant of real property in either of the following situations:

1. For nonpayment of rent by a tenant of a commercial property or residential property, if the tenant demonstrates that the inability to pay is due to a Covered Reason for Delayed Payment as defined in Section 13.110.030(A), or

2. For a No-Fault Eviction of a tenant of a commercial or residential property, unless necessary for the health and safety of tenants, neighbors, or the landlord.

B. A landlord who becomes aware that a tenant cannot pay some or all of the rent temporarily due to a Covered Reason for Delayed Payment, shall not serve a notice pursuant to Code of Civil Procedure section 1161(2), file or prosecute an unlawful detainer action based on a three-day pay or quit notice, or otherwise seek to evict the tenant for nonpayment of rent. A landlord becomes aware of the tenant's inability to pay rent within the meaning of this Chapter if the tenant notifies the landlord in writing of their

lost income and inability to pay their rent or any portion thereof, and provides documentation to support the existence of a Covered Reason for Delayed Payment. For purposes of this section, “in writing” includes email or text communications to a landlord or the landlord’s representative with whom the tenant has previously corresponded by email or text. If the tenant has not notified the landlord in advance of being delinquent in the payment of rent, the landlord must serve the tenant with a pre-notice of the rent delinquency and its amount and give the tenant at least three days, excluding weekends and holidays to provide the landlord with a notice and documentation of a basis for an inability to pay rent under this Chapter, if the tenant has such basis, prior serving a notice pursuant to Code of Civil Procedure section 1161(2). The failure of a Tenant to notify the landlord in advance of being served with a notice pursuant to Code of Civil Procedure section 1161(2) does not waive the Tenants right to claim this Chapter as a defense to non-payment of rent in an unlawful detainer action. 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 authorizes the disclosure of the information in writing.

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.

### **13.110.030 Definitions**

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 or business 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; and

(2) the decrease in household or business income or the out-of-pocket medical expenses 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, and is documented.

B. “No-Fault Eviction” refers to any eviction for which the notice to terminate tenancy is not based on alleged fault by the tenant, including but not limited to eviction notices served pursuant to Code of Civil Procedure sections 1161(1), 1161(5), or 1161**be**. “No-Fault Eviction” does not include withdrawal of accommodations from the rental market as provided in Government Code 7060 et seq. (Ellis Act).

C. “Landlord” includes owners of either residential or commercial rental property.

D. “Tenant” includes a renter of either residential or commercial property.

E. “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 non-profit 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.

#### **13.110.040 Collection of Back Rent**

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. A landlord may not charge or collect a late fee for rent that is delayed for the reasons stated in this Chapter. The City will develop standards or guidelines for tenants to repay unpaid rent accrued during the course of the local State of Emergency.

#### **13.110.050 Application**

This Chapter applies to eviction notices and unlawful detainer actions based on notices served or filed on or after the effective date of this Chapter through the end of the local State of Emergency. With respect to delayed payment covered by this Ordinance, a landlord may seek such rent 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.* based on the failure to pay rent during the term of the local State of Emergency for a Covered Reason for Delayed Payment.

#### **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 to give a notice to Tenants informing them of this Chapter and the right to seek the benefits of this Chapter.

#### **13.110.070 Waiver**

A. A landlord may request that the requirements of this Chapter be waived or modified, by the City Manager or their designee, based on a showing that applying the requirements would constitute a hardship to the landlord or other tenants, or would constitute an unconstitutional taking of property or otherwise have an unconstitutional application to the landlord's property.

B. The landlord shall bear the burden of presenting evidence to support the request for a waiver or modification of the requirements of this Chapter and shall set forth in detail the factual and legal basis for the claim, including all supporting documentation.

C. The City will develop standards for what might constitute grounds for a waiver or modification of the requirements of this Chapter.

### **13.110.80 Remedies**

In the event of a violation of this Ordinance, an aggrieved tenant may institute a civil proceeding for injunctive relief, and money 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. 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 in 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.

### **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, 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.

Section 2. Vote Required, Immediately Effective

Based on the findings and evidence in Section 13.110.010 of this Urgency Ordinance, the Council determines that this Ordinance is necessary for the immediate preservation of the public health, peace and safety in accordance with Article XIV Section 93 of the Charter of the City of Berkeley and must therefore go into effect immediately. This Ordinance shall go into effect immediately upon a seven-ninths vote of the City Council, in satisfaction of the Charter of the City of Berkeley.