



Kate Harrison
Councilmember District 4

REVISED AGENDA MATERIAL for Supplemental Packet 2

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

Revisions

1. Added Councilmember Hahn as cosponsor.
2. Clarified findings that the Shelter in Place Order was extended to May 3, 2020.
3. Clarified that impacted businesses or nonprofits include those that experience a material loss of income.
4. Restored remedies: (1) City administrative fine and (2) Alameda County District Attorney referral.
5. Made other clarifying edits.



Kate Harrison
Councilmember District 4

ACTION CALENDAR
April 21, 2020

To: Honorable Mayor and Members of the City Council
From: Councilmembers Harrison, Davila and Hahn
Subject: Urgency Ordinance: Commercial Rent Increase Restrictions Prevent Constructive Eviction of Commercial Tenants During the COVID-19 Emergency

RECOMMENDATION

1. Adopt an urgency ordinance amending Berkeley Municipal Code 13.110, Title 13, “The COVID-19 Emergency Response Ordinance,” to prevent constructive eviction of commercial tenants resulting from unreasonable exorbitant rent increases, effective through the local COVID-19 state of emergency.
2. Send correspondence to the following:
 - i. The District Attorney of Alameda County Nancy O’Malley asking that the District Attorney 1) investigate and take action pursuant to Business and Professions Code 17200, et seq. against any commercial real property owner or agent of such who seeks a rent increase of more than that permitted by this ordinance, or seeks a rent increase that has the effect of constructively evicting any commercial tenant; and 2) authorize the Berkeley City Attorney to use Business and Professions Code 17200, et seq. to take actions against any violator of this ordinance or who seeks a rent increase that has the effect of constructively evicting any commercial tenant.
 - ii. Governor Gavin Newsom, asking for the Governor to take appropriate action against commercial landlords who seek rent increases that have the effect of constructively evicting commercial tenants during the course of this emergency and for a reasonable time after the end of the emergency.

BACKGROUND

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During a state of emergency cities have extraordinary powers and jurisdiction to create legislation in order to address the effects of the emergency situation on its people and businesses.

On March 17, 2020, the Berkeley City Council amended the Municipal Code and adopted an emergency ordinance prohibiting evictions of residential and commercial tenants unable to pay their rent due to COVID-19. Statewide emergency orders effectuated provisions of Penal Code 396 against price gouging and thus limited residential rent increases to 10% for the duration of the emergency but did not pass similar limitations on commercial rent increases.

Although Penal Code 396 does not provide for commercial rent increase restrictions during state and local emergencies, the Governor's recent emergency orders and related City emergency authorities empower the City to enact restrictions on constructive evictions of commercial tenants by preventing exorbitant rent increases for tenants substantially impacted by COVID-19 crisis.

The Governor, as well as, the Berkeley Health Officer, and other jurisdictions have ordered the closing of businesses, except those deemed as essential. Many businesses, such restaurants, are open only for take-out, pick up or virtual services and face a critical loss of business and use of rented facilities.

The Council has recently been made aware of demands for commercial rent increases in excess of 10% during the period when many businesses are closed or are seeing catastrophic reductions in their business and income. For example, during the COVID-19 crisis multiple doctors occupying 1903-1905 Berkeley Way have reported receiving notification of rent increases of 35% above the rate before the crisis.

At least two of these tenants have informed the District 4 Council Office that the increases have had the effect of constructively evicting them from their offices (see Attachments 1 and 2). As a result of these exorbitant increases, both doctors have provided their landlord with notices to vacate. Though the City of Berkeley deems both doctors as essential businesses providing critical mental health services during the crisis and beyond, exorbitant rent during the COVID-19 crisis have effectively forced them to leave Berkeley. Scores of additional doctors at this location face a similar situation. The same is true for any other business that may have or will receive similar rent increases.

Such rent increases force business owners whose businesses are effectively closed or face significant loss of use, or have substantially reduced revenues face the choice of accepting a significant rent increase beyond the consumer price index and that provided for by Penal Code 396, moving their business at a time when moving a business is virtually impossible, or closing the business altogether. Accepting a rent increase while a business is closed or in a reduced operation means that the business face even more

debt to the landlord when the emergency is over, but also increased rent when the business returns to normal operation, if ever.

Commercial property owners that unreasonably attempt to increase rents on commercial tenants during the COVID-19 emergency are 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 increase tactics appear to contravene the Governor's and Berkeley's commercial tenant eviction moratorium by constituting a constructive eviction in contravention of the eviction moratorium.

These rent increases may affect businesses providing goods and essential services, resulting in increases in those costs of essential goods and services, undermining the intent of anti-price gouging laws established to respond to the emergency. For example, to avoid shopping in crowded food stores and risking becoming infected, some Berkeley residents may choose to obtain prepared take-out food from restaurants; restaurants are limited to take-out only during the emergency and thus are particularly vulnerable businesses and are vital to the Berkeley community during the emergency. New business will be unable to open during this emergency period, further impacting provision of essential services.

Closure of businesses will result in loss of income for the business owners, employment for the employees and revenue to the city, and an increase in homelessness. To reduce the spread of COVID-19, it is essential to avoid unnecessary commercial and human displacement.

Therefore, it is in public interest to enact restrictions on commercial rent increases greater than 10%, consistent with Penal Code 396, statewide emergency orders and BMC 13.110, to prevent the irreparable eviction and loss of businesses, nonprofits and artists to exorbitant rent increases leading to constructive eviction during a state of emergency.

This ordinance prevents property owners whose tenants are substantially impacted by COVID-19, whether through significant loss of normal use of the rental property, or a material loss of business income greater than 25%, from raising rent in amounts greater than 10% throughout the local state of emergency. It also provides the following legal remedies: a private right of action, administrative fine, and a process for referring alleged violations to the Alameda County District Attorney.

Unreasonably raising rents and otherwise preying upon vulnerable businesses during the COVID-19 emergency is also form of unfair business practice that can and should be addressed by Business and Professions Code section 17200, et seq. In many counties, the District Attorney has granted cities the authority to use Business and Professions Code 17200, et seq. to take actions against those engaging in unfair business practices, including Contra Costa County and San Mateo County. This action

calls on the Alameda County District Attorney to give the City of Berkeley that authority. It also calls upon the Governor to enact a limitation on commercial rents for the duration of the emergency and up to six months thereafter.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental impacts associated with this action.

FISCAL IMPACTS OF RECOMMENDATION

None

CONTACT PERSON

Councilmember Kate Harrison
510-981-7140

ATTACHMENTS

1. Email from Doctor Linda Taggart, commercial tenant facing constructive eviction from 1903-1905 Berkeley Way
2. Email from Doctor Stacey Hoffman, commercial tenant facing constructive eviction from 1903-1905 Berkeley Way

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

Landlords of Commercial property owners that unreasonably attempt to increase rents on commercial tenants of commercial property during the COVID-19 emergency are 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 increase 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.

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 ~~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 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 state of ~~and ending not less than six months following the termination or rescission of the Declaration of Local Emergency. This rent increase limitation shall remain in effect until six months after termination of the emergency is declared by the City Council~~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 State of Emergency and any orders or directives promulgated therein, (emergency, or~~
- 2) ~~_____ that is unable to accept customers at its location and is open for take-out or pickup services only, or~~
- 3) ~~_____ who suffered a material loss of income. of the local State of Emergency. Impacted Business does not include a business that has more than 50 employees and has other locations outside the City of Berkeley.~~

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.

Urgency Ordinance: Commercial Rent Increase Restrictions During the COVID-19 Emergency – April 21, 2020 Council Meeting

Linda Taggart <ltaggartmssw@gmail.com>

Fri 4/10/2020 7:07 PM

To: Naso, Christopher <CNaso@cityofberkeley.info>

Dear Chris,

I want to add my voice to that of other office building tenants at 1903-1905 Berkeley Way who are shocked by a hefty rent increase from the new owner(s) of the property. I actually gave notice to vacate because I could not afford to wait and see whether we tenants would have any recourse.

There is no certainty as to when we will be able to use our offices again - to have a rent increase tossed at us is unconscionable.

I hope the Council will consider protections for commercial tenants for the next year until business can resume some semblance of normalcy.

Sincerely,
Linda Taggart

Linda L. Taggart, LCSW
Psychotherapy, Consultation & EMDR
650.469.3617 CA LCSW#27170

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Urgency Ordinance: Commercial Rent Increase Restrictions During the COVID-19 Emergency – April 21, 2020 Council Meeting

Stacey Hoffman <stacey@livingjazz.org>

Sat 4/11/2020 8:58 AM

To: Naso, Christopher <CNaso@cityofberkeley.info>

Dear Chris,

I have been renting a psychotherapy office at 1903-1905 Berkeley Way for over 20 years with periodic rent increases that were always fair. During this COVID-19 crisis, the new landlord notified all tenants that she was dramatically raising rents-

As a result, I have made the decision to leave because I cannot afford the new rent, and have given notice. However, my fellow tenants do not have the luxury of doing that and we need your support to keep this new landlord in line with the legal rules around rent increases as well as the moral and ethical thing to do during this pandemic.

We need the support of the Council to uphold protections for commercial tenants for the next year until all small businesses can return to some semblance of stability.

Sincerely,
Stacey Hoffman

Stacey Hoffman, MA, MFT
510-845-4259