

CONSENT CALENDAR

May 11, 2021

TO: Members of the City Council

FROM: Mayor Jesse Arreguín

SUBJECT: Amending COVID-19 Emergency Response Ordinance Relating to Commercial Leases

RECOMMENDATION

Adopt an urgency ordinance amending Berkeley Municipal Code Section 13.110.050 (COVID-19 Emergency Response Ordinance) to exempt from the provisions of the ordinance commercial leases where the lease term has expired and the City has issued a permit for the demolition or substantial alternation of the commercial unit. The proposed ordinance change reads as follows:

13.110.050 Application

A. This Chapter applies to eviction notices and unlawful detainer actions based on notices served or filed or which expire 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"), commercial leases where the term has expired and the City has issued a permit for the demolition or substantial alteration of the commercial unit, 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.

BACKGROUND

The City of Berkeley declared a local State of Emergency on March 3, 2020 in response to the COVID-19 pandemic, first detected globally in late December 2019. Shortly thereafter, Council passed BMC 13.110 - the COVID-19 Emergency Response Ordinance - prohibiting most evictions in Berkeley, which has been subsequently updated over the past year. Despite recent data showing a decline in new cases in the Bay Area and progress in the distribution and administration of vaccines, the threat of another wave of infections remains, and cases in other regions continue to rise. There is currently no timeline as to when the local State of Emergency will end, and even when the health crisis is no longer a significant threat to the community, the economic ramifications of COVID-19 will be felt for some time in the future.

The current COVID-19 Emergency Response Ordinance provides a critical lifeline to residential and commercial tenants who have faced financial difficulties as a result of the pandemic. This item makes a very narrow amendment to the ordinance exempting from its provisions a lease termination for a commercial tenant whose lease term has expired and where the City has already approved a permit for demolition or substantial alteration of the unit.

While the City does not want to create an incentive to evict existing commercial tenants. However in limited cases where the lease has already expired and there has been an approved project, the City should enable those housing and mixed-use projects to proceed. Berkeley faces a critical shortage of housing, particularly for low, very-low and extremely-low income households. It was never the intent of the Council to prohibit already entitled projects, where the lease has expired to be stalled due to the commercial eviction moratorium.

This is necessary to move forward with existing approved developments that are needed to address the housing affordability crisis and meet the quota of new units as prescribed in the Regional Housing Needs Allocation (RHNA). Without an end date for when the local State of Emergency will be lifted, clarity in the ordinance language is needed to allow property owners who have already entitled projects to proceed with building needed housing.

CONTACT

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Attachments:

1. Urgency Ordinance

ORDINANCE NO. -N.S.

URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BERKELEY AMENDING THE COVID-19 EMERGENCY RESPONSE ORDINANCE; DECLARING THE URGENCY THEREOF; AND DECLARING THAT THIS ORDINANCE SHALL TAKE EFFECT IMMEDIATELY.

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

Section 1. That Chapter 13.110 of the Berkeley Municipal Code is hereby 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.

13.110.010 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. 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. 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.

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 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.

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. (Ord. 7704-NS § 1 (part), 2020: Ord. 7698-NS § 1 (part), 2020: Ord. 7693-NS § 1 (part), 2020)

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 unless necessary for the health and safety of 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 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 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. (Ord. 7720-NS § 1, 2020: Ord. 7704-NS § 1 (part), 2020: Ord. 7698-NS § 1 (part), 2020: Ord. 7693-NS § 1 (part), 2020)

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, business, or other rental unit occupants' 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 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.

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.

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.

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.

E. "Tenant" includes a tenant, subtenant, lessee, sublessee, or any other person entitled by written or oral rental agreement to use or occupancy of either residential or commercial property. (Ord. 7704-NS § 1 (part), 2020; Ord. 7698-NS § 1 (part), 2020; Ord. 7693-NS § 1 (part), 2020)

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. The City will develop standards or guidelines for tenants to repay unpaid rent accrued during the 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. Tenants shall have 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"). 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 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 local State of Emergency is ended, whichever is later. 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 section 1161(2) 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 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. (Ord. 7704-NS § 1 (part), 2020: Ord. 7698-NS § 1 (part), 2020: Ord. 7693-NS § 1 (part), 2020)

13.110.050 Application.

A. This Chapter applies to eviction notices and unlawful detainer actions based on notices served or filed or which expire 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"), commercial leases where the term has expired and the City has issued a permit for the demolition or substantial alteration of the commercial unit, 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 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. 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 term of the local State of Emergency. In any action to evict based on alleged non-payment of rent, it shall be a complete defense to such action if any part of the rent in dispute accrued at any time from the effective date of this Chapter to the expiration of the local State of Emergency and there exists a Covered Reason for Delayed Payment.

C. A Landlord shall not retaliate against a Tenant for exercising their rights under this Ordinance, including but not limited to shutting off any utilities or reducing services or amenities to which the Tenant 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. (Ord. 7704-NS § 1 (part), 2020: Ord. 7698-NS § 1 (part), 2020: Ord. 7693-NS § 1 (part), 2020)

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. (Ord. 7704-NS § 1 (part), 2020: Ord. 7698-NS § 1 (part), 2020: Ord. 7693-NS § 1 (part), 2020)

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. (Ord. 7704-NS § 1 (part), 2020: Ord. 7698-NS § 1 (part), 2020: Ord. 7693-NS § 1 (part), 2020)

13.110.080 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'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.

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.

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. (Ord. 7704-NS § 1 (part), 2020: Ord. 7698-NS § 1 (part), 2020: Ord. 7693-NS § 1 (part), 2020)

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. (Ord. 7704-NS § 1 (part), 2020: Ord. 7698-NS § 1 (part), 2020: Ord. 7693-NS § 1 (part), 2020)

Section 2. Vote Required, Immediately Effective

Based upon the findings in Section 13.110.010 of this 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.