



Office of the City Manager

CONSENT CALENDAR

May 26, 2015

To: Honorable Mayor and Members of the City Council

From:  Christine Daniel, City Manager

Submitted by: Eric Angstadt, Director, Planning and Development Department

Subject: Amending BMC Chapter 12.48 Residential Rental Housing Safety Program to Remove Obsolete Language and Make Clarification of the Process

RECOMMENDATION

Adopt first reading of an Ordinance amending Chapter 12.48, Sections 12.48.050, 12.48.070, 12.48.080, 12.48.110 of the Berkeley Municipal Code (“BMC”) to provide for an informal review by the Building Official of notices issued pursuant to that Chapter, to allow a prevailing party to recover attorneys’ fees in an action brought to enforce the Chapter by the City and to eliminate the outdated references to the “Housing Department” and other obsolete language.

SUMMARY

The ordinance amends Chapter 12.48 *Residential Rental Housing Safety Program* of the BMC to provide for an informal review by the Building Official of notices issued pursuant to that Chapter, to allow a prevailing party to recover attorneys’ fees in an action brought to enforce the Chapter by the City and to eliminate the outdated references to the “Housing Department” and other obsolete language. This chapter was adopted in 2001. This ordinance will make the chapter consistent with state law and potentially avoid time-consuming appeals. The fiscal impact for the City is positive by saving staff time and creating the possibility of collecting attorneys’ fees.

FISCAL IMPACTS OF RECOMMENDATION

There is a potential decrease in staff resources which might have been required to defend an appeal of notices issued pursuant to the Chapter before the Housing Advisory Commission and City Council and the amendment may result in the City collecting attorneys’ fees if it is successful in a civil action filed pursuant to Chapter 12.48.

CURRENT SITUATION AND ITS EFFECTS

Informal Review by Building Official

Chapter 12.48 requires owners of certain residential rental property to annually self-certify that the units meet housing safety standards established by the City or request an inspection in lieu of the self-certification. It also allows periodic inspections by City

staff and, if no violations are found, for issuance of a Certificate of Compliance. If a Certificate of Compliance is issued, BMC Section 12.48.070.B requires that notice of that determination must be provided to the owner, property manager and residents and allows for an appeal of that determination pursuant to BMC Chapter 19.44.

If a violation is found during the inspection by the City, BMC Section 12.48.080.A requires a Notice of Violation to be issued which gives an owner a reasonable amount of time to cure the violation(s). It also allows the inspector's Notice of Violation to be appealed pursuant to BMC Chapter 19.44.

BMC Chapter 19.44 provides for an appeal to the Housing Advisory Commission (HAC) with formal adjudicatory processes including: the right to call and examine witnesses; to have witnesses provide sworn testimony; to introduce documentary and physical evidence; to cross-examine opposing witnesses; to impeach any witness; to rebut the evidence; to be represented by counsel. The HAC also has the right to inspect the property at issue and subpoena witnesses or evidence. The HAC's determination is appealable to the City Council.

Since Chapter 12.48 requires that property owners be given a reasonable amount of time to correct any code violation(s) cited in a Notice of Violation pursuant to Section 12.48.080.A, inspectors have typically been able to informally resolve concerns relating to these Notices at the staff level and no property owner has sought to exercise their right to appeal to the HAC. Likewise, no resident has sought to appeal a Certificate of Compliance to the HAC pursuant to Section 12.48.070.B.

Additionally, if a violation was not corrected after issuance of a Notice of Violation and informal review by the Building Official, staff would likely issue administrative citations to compel compliance pursuant to Chapter 1.28 and each citation is subject to an appeal to a hearing officer under Section 1.28.060. The Building Official may also commence Substandard Notice and Order proceedings under Section 19.40.060, which are also subject to an appeal to the Housing Advisory Commission pursuant to Section 19.40.020 and Chapter 19.44.

Consequently, the Chapter should be amended to allow for an informal review by the Building Official of notices issued pursuant to Sections 12.48.070 and 12.48.080 to codify the current practice and to avoid a potentially time-consuming and unnecessary appeal process for all parties.

Elimination of Redundant and Obsolete Language

On May 1, 2003, City Council adopted Ordinance No. 6,730-N.S., which eliminated the requirement that owners notify the City when there is a change in tenancy. While the contents of Section 12.48.050 was amended at that time, the title of the Section was not amended as it should have been. This ordinance eliminates the obsolete language "required notice of change in tenancy to the City" from the section title.

Additional clarifications to Section 12.48.070.A are also proposed to make the language regarding the three-year validity of a Certificate of Compliance consistent with Section 12.48.050.C.2 and to eliminate redundant language.

Attorneys' Fees to Prevailing Party

Section 12.48.100.B allows the City to bring an action for any violation of the Chapter. If the City inspects a residential rental property pursuant to the Chapter and finds a violation of "applicable laws or ordinances", then it will issue a Notice of Violation pursuant to Section 12.48.080.

Section 12.48.100.C allows a tenant to bring an action against a property owner when the property owner failed to provide the tenant or the City with a copy of the Rental Housing Safety Program Certification Checklist.

Section 12.48.100.D allows both the City and a tenant to recover attorneys' fees for actions brought by the City or a tenant when they are a successful litigant. The provisions do not allow recovery of attorneys' fees by a successful defendant in any such action.

California courts have held that a provision which allows an award of attorneys' fees to only a city in a nuisance action, rather than to either prevailing party, is in conflict with California Government Code Section 38773.5(b) and, thus, attorneys' fees cannot be awarded to a prevailing city pursuant to such a provision. (*Monte Sereno v. Padgett* (2007) 149 C.A.4th 1530.)

Although the right of a tenant to recover attorneys' fees if he or she were a prevailing plaintiff under Section 12.48.110.C would not be in conflict with Gov. Code Section 38773.5(b) because the tenant would not be seeking to abate a nuisance, the City's right to recover attorneys' fees relating to a suit for potential violations of the Housing or Building Code (i.e. "applicable laws or ordinances") could be considered a nuisance abatement proceeding. Therefore, the proposed amendment allows a prevailing tenant to recover attorneys' fees in a suit brought by a tenant, whereas a prevailing party may recover attorneys' fees in a suit brought by the City for violation of the Chapter relating to a code violation that is declared to be a nuisance.

Elimination of "Housing Department" References

When Chapter 12.48 was adopted, the Housing Code Enforcement Division was part of the former Housing Department. That Division is now part of the Planning and Development Department. Thus, there are various references to the "Housing Department" in Sections 12.48.050 and 12.48.110 which are obsolete. The proposed amendment replaces these references with "the City".

BACKGROUND

BMC Chapter 12.48 was adopted in 2001 "to increase the number of rental units in the City that meet housing safety standards established by the City in order to ensure the occupants' health and safety."

BMC Chapter 19.44 was adopted to implement state law and regulations to provide for an administrative appeal of determinations by the Building Official that a property was a Substandard Building pursuant to Health and Safety Code Section 17980. The Substandard Building designation can implicate substantial property rights since the City may order the property vacated or demolished and, if the owner does not comply with the timelines for correction in the Substandard Order, the City can petition the Court to appoint a receiver to abate the code violations and manage the property. Consequently, it is appropriate that the parties subject to a Substandard Order be afforded a formal appeal to the HAC with the processes afforded under Chapter 19.44.

BMC Section 12.48.110 was enacted in 2001. The provision allowed the City to seek recovery of its attorneys' fees, if successful actions were filed pursuant to that Chapter. Government Code Section 33873.5(b) was enacted in 1997. The case law which invalidated a City's attorneys' fee award pursuant to a local provision that allowed only the City to recover such fees was decided in 2007.

ENVIRONMENTAL SUSTAINABILITY

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

RATIONALE FOR RECOMMENDATION

The proposed ordinance would codify the City's current practice to informally resolve disputes relating to notices issued pursuant to this Chapter at the staff level and potentially avoid a time-consuming and unnecessary appeal process for all parties. The proposed ordinance would also make the Chapter consistent with state law and allow for the City's potential recovery of attorneys' fees in actions filed pursuant to it. It would also eliminate obsolete references to the former Housing Department.

ALTERNATIVE ACTIONS CONSIDERED

BMC Sections 12.48.070 and 12.48.080 could remain as currently drafted and it would allow for a more formal appeal process of the notices issued pursuant to this Chapter. However, no alternative actions were considered regarding the proposed amendments to Sections 12.48.050 and 12.48.110 since these are necessary to conform to state law and to remove outdated references.

CONTACT PERSON

Eric Angstadt, Director, Planning and Development, 981-7400
Zach Cowan, City Attorney, 981-6998

Attachments:

1: Ordinance

ORDINANCE NO. #,###

AMENDING SECTIONS 12.48.050, 12.48.070, 12.48.080 AND 12.48.110 OF THE BERKELEY MUNICIPAL CODE TO ALLOW FOR INFORMAL REVIEW BY THE BUILDING OFFICIAL, RECOVERY OF ATTORNEYS' FEES BY THE CITY AND REMOVING REFERENCES TO THE HOUSING DEPARTMENT

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

Section 1. That Section 12.48.050 of the Berkeley Municipal Code is amended to read as follows:

12.48.050 Residential rental housing safety certification--City inspection in lieu of self-certifications--~~Required notice of change in tenancy to the City~~--Exemptions.

A. All owners of single family residences, duplexes, apartment houses, and hotels not otherwise exempt pursuant to subdivision C of this section shall annually certify that their rental units(s) meet housing safety standards established by the City or seek an inspection by the City pursuant to subdivision B of this section. Self-certification shall be made in the manner set forth below:

1. Owners shall inspect each rental unit owned using the housing safety standards checklist form required by the City.
 2. Owners shall provide a copy of the completed Rental Housing Safety Program Certification Checklist to each tenant whose rental unit has been inspected. If the owner is unable to certify compliance with all applicable provisions of the checklist, including by reason of refusal of entry by the tenant, in addition to providing the completed form to the tenant, the owner shall submit a copy of the completed checklist to the ~~Housing Department~~ City by mail or personal delivery. Owners shall provide the copy of the checklist to the tenant and, if applicable, a copy to the ~~Housing Department~~ City within five days of completing the inspection and no later than July 1st of each year beginning with July 1, 2004.
 3. Any tenant may request that the City verify the accuracy of the representations made by the owner in the checklist. Further, all checklists submitted to the ~~Housing Department~~ City shall be considered public information.
- B. An owner or tenant may request that his or her residential rental unit(s) be inspected by the ~~Housing Department~~ City to ascertain compliance with the housing safety standards provided, however, that if the ~~Housing Department~~ City is unable to conduct such inspection, the owner is required to complete and potentially submit a checklist pursuant to subdivision A. Such inspection may also determine compliance with all other applicable requirements relating to building safety.

C. The following residential rental units shall be exempt from the requirements of Section 12.48.050 under the circumstances specified below:

1. Newly constructed residential rental units shall be exempt for a period of five years following issuance of the Certificate of Occupancy for such units.
2. All units that have been the subject of a [Housing Department City](#) inspection where either no violations have been found to exist or where any violations found to exist have been corrected shall be exempt until the earlier of either July 1st of the third year following the date of such inspection or revocation of a Certificate of Compliance pursuant to this chapter. This exemption shall only apply if the inspection occurred on or after January 1, 2001.

D. For those units where the City has determined that the tenant has refused entry to the owner to conduct the inspection necessary for completing the checklist, the City may seek a warrant for entry pursuant to California Code of Civil Procedure Sections 1822.51 and 1822.52.

Section 2. That Section 12.48.070 of the Berkeley Municipal Code is amended to read as follows:

**12.48.070 Periodic inspection of rental dwelling unit--Requirements generally--
Certificate of Compliance issued when.**

A. The City Manager or his or her designee, may periodically inspect every residential rental unit in any single family residence, duplex, hotel and apartment house in the City provided that no residential rental unit shall be subject to an inspection on more than a triennial basis where such unit complies with 12.48.050A unless an inspection is required pursuant to Chapter 19.40 of the Berkeley Municipal Code or the City reasonably believes that the property may be in violation of applicable laws or ordinances. Nothing contained herein affects the ability of the Berkeley Fire Department to conduct annual inspections pursuant to Berkeley Municipal Code Chapter 19.48. Entry for inspection shall be as a result of either consent or execution of a warrant secured pursuant to California Code of Civil Procedure Sections 1822.51 and 1822.52.

B. If, upon the periodic inspection [by the City](#) of a residential rental unit within a single family residence, duplex, hotel or apartment house, no violations of applicable laws or ordinances are determined to exist, a Certificate of Compliance shall be [issued and be valid until the earlier of either July 1st of the third year following the date of such inspection the next July 1st](#) or revocation of such certificate pursuant to this chapter. ~~Whenever any inspection results in a determination that a unit is not in violation of applicable laws or ordinances, the inspector shall promptly give the owner, manager (if any) and affected resident(s), written notice of said determination. Said notice certificate shall be given to the owner, manager (if any) and affected resident(s) and shall state that the determination may be appealed as set forth in Chapter 19.44 of the Berkeley Municipal Code subject to an informal review by the Building Official if any affected party seeks such review within ten (10) days of the date of issuance of the Certificate of~~

~~Compliance. Failure to file a timely appeal of any determination under this section shall constitute a waiver of any objection to said determination and of the right to an administrative hearing and adjudication and the order shall therefore be final and binding.~~

Section 3. That Section 12.48.080 of the Berkeley Municipal Code is amended to read as follows:

12.48.080 Correction of violations required--Revocation of Certificate of Compliance authorized when.

A. Whenever any inspection results in a determination that a unit is in violation of applicable laws or ordinances, the inspector shall promptly give the owner, manager (if any) and affected resident(s), written notice of the violation. Said notice shall specify a reasonable time in which to cure the violation, and shall state that the determination may be subject to an informal review by the Building Official if any affected party seeks such review within ten (10) days of the date of issuance of the notice of violation. ~~appealed as set forth in Chapter 19.44 of the Berkeley Municipal Code. Failure to file a timely appeal of any determination under this section shall constitute a waiver of any objection to said determination and of the right to an administrative hearing and adjudication, and the order shall therefore be final and binding.~~

B. If the violation is cured within the time specified, the owner, manager (if any) and resident(s) shall be so notified in writing, and the Certificate of Compliance shall remain in effect subject to Section 12.48.070.B.

C. In the event that any violation is not cured within the period specified pursuant to subsection A of this section, the Certificate of Compliance shall be deemed revoked, and written notice of such revocation shall be given promptly to the owner, manager (if any) and affected resident(s).

Section 4. That Section 12.48.1100 of the Berkeley Municipal Code is amended to read as follows:

12.48.110 Penalties.

A. Any person violating any provision or failing to comply with any of the requirements of this chapter shall be deemed guilty of an infraction as set forth in Chapter 1.20 of the Berkeley Municipal Code.

B. The City Attorney may bring a civil action to seek redress for a violation(s) under this chapter on behalf of the City. In any such action, the City shall recover civil penalties in an amount not to exceed \$500 for each violation and any other relief the court deems proper.

In any civil action filed pursuant to this subsection where the violation of this chapter is declared to be a public nuisance, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs; provided that, pursuant to Government Section

38773.5, attorneys' fees shall only be available in an action or proceeding in which the City has elected, at the commencement of such action or proceeding, to seek recovery of its own attorneys' fees. In no action or proceeding shall an award of attorneys' fees to a prevailing party exceed the amount of reasonable attorneys' fees incurred by the City in the action or proceeding.

C. Any tenant may bring a civil action to establish that the owner of the property from which the tenant rents a dwelling unit has failed to provide the tenant with a copy of the Rental Housing Safety Program Certification Checklist or submit a copy of the Checklist to the Housing DepartmentCity pursuant to Section 12.48.050A.2. Such action may not be maintained where the City Attorney has commenced or is prosecuting an action against such violation. In any such action, the tenant shall recover civil penalties in an amount not to exceed \$500 for each violation.

In any action brought under this subsection, the court shall award reasonable attorney's fees to any prevailing plaintiff. Any aggrieved person who initiates a civil action under this subsection shall file a copy of his or her complaint against the property owner and a copy of the court's decision with the City.

~~D.—In any action brought under this section, the court shall award reasonable attorney's fees to any prevailing plaintiff, including the City. Any aggrieved person who initiates a civil action under this section shall file a copy of his or her complaint against the property owner and a copy of the court's decision with the City.~~

Section 5. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 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.