To: Honorable Members of the City Council
From: Mayor Jesse Arreguin, Councilmembers Rigel Robinson, Councilmember Kate Harrison,
Subject: Urgency Ordinance Adopting BMC Chapter 13.110, the COVID-19 Emergency Response Ordinance

RECOMMENDATION
Adopt an Urgency Ordinance adding Berkeley Municipal Code Chapter 13.110, the COVID-19 Emergency Response Ordinance, to provide protections to residential tenants, commercial tenants and individuals in default of mortgage payments against evictions during the declared state of emergency, to preserve the health and safety of the Berkeley community.

BACKGROUND
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. City of Berkeley Public Health Officer Dr. Lisa Hernandez has issued recommendations including but not limited to social distancing, staying home if sick, canceling or postponing large group events, working from home, and other precautions to protect public health and prevent transmission of COVID-19. As a result of the State of Emergency and the government-recommended precautions by federal, state and local officials, many tenants have experienced sudden income loss, and further income impacts are anticipated, leaving tenants vulnerable to eviction. In addition, tenants who contract COVID-19 are required to self-quarantine which will require time away from work. 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.
In the last week, jurisdictions around the country have introduced similar legislation including San Jose, Oakland, Los Angeles, San Francisco and Philadelphia.

In addition, Governor Newsom declared a State of Emergency and issued Executive Order N-25-20 to prepare for the COVID-19 pandemic. Governor Newsom’s March 4, 2020 proclamation on the State of Emergency\(^1\) makes additional resources available, formalizes emergency actions already underway across multiple state agencies and departments, and helps the state prepare for broader spread of COVID-19. On March 12, 2020 Governor Newsom issued Executive Order N-25-20, “Enhancing State and Local Government’s Ability to Respond to COVID-19 Pandemic”.\(^2\) The Governor’s order:

- Waives the one-week waiting period for people who are unemployed and/or disabled as a result of COVID-19;
- Delays the deadline for state tax filing by 60 days for individuals and businesses unable to file on time based on compliance with public health requirements related to COVID-19 filings;
- Directs residents to follow public health directives and guidance, including to cancel large non-essential gatherings that do not meet state criteria;
- Directs the state to commandeer property for temporary residences and medical facilities for quarantining, isolating or treating individuals;
- Allows local or state legislative bodies to hold meetings via teleconference and to make meetings accessible electronically; and
- Allows local and state emergency administrators to act quickly to protect public health

On March 16, 2020, Governor Newsom 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 substantial 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

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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.

The Urgency Ordinance would prohibit evictions during the declared State of Emergency for non-payment of rent for residential and commercial tenants, and for those in default of mortgage payments. In addition, it would prohibit no-fault evictions, except for those necessary for public safety and permitted under the state Ellis Act, Government Code Section 7060 et seq. These evictions would be prohibited if the occupant demonstrates that the inability to pay is due to COVID-19, the State of Emergency regarding COVID-19, or following government-recommended coronavirus precautions. These circumstances are referred to as “Covered Reason for Delayed Payment”. The ordinance allows the landlord to collect back rent due and also includes a waiver provision if the landlord can demonstrate hardship. The City Manager is permitted to develop implementing regulations and the City will develop standards for what might constitute grounds for a waiver or modification of the requirements of this Chapter.

Under the ordinance, “Covered Reason for Delayed Payment” means:  
(1) the basis for the eviction is nonpayment of rent, or a foreclosure, arising out of a substantial decrease in household or business income (including, but not limited to, a substantial decrease in household income caused by layoffs or a reduction in the number of compensable hours of work, or a substantial decrease in business income caused by a reduction in opening hours or consumer demand), or substantial out-of-pocket medical expenses; and
(2) the decrease in household or business income or the out-of-pocket medical expenses described in subparagraph (i) was caused by the COVID-19 pandemic, or by any local, state, or federal government response to COVID-19, and is documented.

FISCAL IMPACTS OF RECOMMENDATION
None

ENVIRONMENTAL SUSTAINABILITY
There are no identifiable environmental impacts associated with this action.

CONTACT PERSON
Mayor Jesse Arreguín     510-981-7100

Attachments:
1: Urgency Ordinance
2. Governor’s Executive Order N-28-20
ORDINANCE NO. -N.S.

URGENCY ORDINANCE ADDING A NEW 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 added 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.
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 substantial 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. Accordingly, the City of Berkeley is adopting the following.

13.110.020 Prohibited Conduct

A. During the 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 commercial or residential tenant or default in the payment of a mortgage, if the occupant demonstrates that the inability to pay is due to COVID-19, the State of Emergency regarding COVID-19, or following government-recommended coronavirus precautions (collectively referred to and defined below as Covered Reasons for Delayed Payment), or

2. For a No-Fault Eviction of a residential tenant, 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.

13.110.030 Definitions

A. “Covered Reason for Delayed Payment” means:
   (1) the basis for the eviction is nonpayment of rent, or a foreclosure, arising out of a substantial decrease in household or business income (including, but not limited to, a substantial decrease in household income caused by layoffs or a reduction in the number of compensable hours of work, or a substantial decrease in business income caused by a reduction in opening hours or consumer demand), or substantial out-of-pocket medical expenses; and
   (2) the decrease in household or business income or the out-of-pocket medical expenses described in subparagraph (i) was caused by the 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 1161c. “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.

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 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.
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 State of Emergency. With respect to delayed payment covered by this Ordinance, a landlord may seek such rent after the expiration of the State of Emergency, but may not file an action pursuant to Code of Civil Procedure sections 1161(42) et seq. based on the failure to pay rent during the term of the 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 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.

13.110.080 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.

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.
EXECUTIVE ORDER N-28-20

WHEREAS on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS despite sustained efforts, the virus remains a threat, and further efforts to control the spread of the virus to reduce and minimize the risk of infection and otherwise mitigate the effects of COVID-19 are needed; and

WHEREAS the economic impacts of COVID-19 have been significant, and could threaten to undermine Californians’ housing security and the stability of California businesses; and

WHEREAS many Californians are experiencing substantial losses of income 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 their rents, mortgages, and utility bills; and

WHEREAS Californians who are most vulnerable to COVID-19, those 65 years and older, and those with underlying health issues, are advised to self-quarantine, self-isolate, or otherwise remain in their homes to reduce the transmission of COVID-19; and

WHEREAS because homelessness can exacerbate vulnerability to COVID-19, California must take measures to preserve and increase housing security for Californians to protect public health; and

WHEREAS local jurisdictions, based on their particular needs, may therefore determine that additional measures to promote housing security and stability are necessary to protect public health or to mitigate the economic impacts of COVID-19; and

WHEREAS local jurisdictions may also determine, based on their particular needs, that promoting stability amongst commercial tenancies is also conducive to public health, such as by allowing commercial establishments to decide whether and how to remain open based on public health concerns rather than economic pressures, or to mitigate the economic impacts of COVID-19; and

WHEREAS in addition to these public health benefits, state and local policies to promote social distancing, self-quarantine, and self-isolation require that people be able to access basic utilities—including water, gas, electricity, and telecommunications—at their homes, so that Californians can work from home, receive public health information, and otherwise adhere to policies of social distancing, self-quarantine, and self-isolation, if needed; and
WHEREAS many utility providers, public and private, covering electricity, gas, water, and sewer, have voluntarily announced moratoriums on service disconnections and late fees for non-payment in response to COVID-19; and

WHEREAS many telecommunication companies, including internet and cell phone providers, have voluntarily announced moratoriums on service disconnections and late fees for non-payment in response to COVID-19;

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes of the State of California, and in particular, Government Code sections 8567 and 8571, do hereby issue the following order to become effective immediately:

IT IS HEREBY ORDERED THAT:

1) The time limitation set forth in Penal Code section 396, subdivision (f), concerning protections against residential eviction, is hereby waived. Those protections shall be in effect through May 31, 2020.

2) Any provision of state law that would preempt or otherwise restrict a local government's exercise of its police power to impose substantive limitations on residential or commercial evictions as described in subparagraphs (i) and (ii) below—including, but not limited to, any such provision of Civil Code sections 1940 et seq. or 1954.25 et seq.—is hereby suspended to the extent that it would preempt or otherwise restrict such exercise. This paragraph 2 shall only apply to the imposition of limitations on evictions when:

   (i) The basis for the eviction is nonpayment of rent, or a foreclosure, arising out of a substantial decrease in household or business income (including, but not limited to, a substantial decrease in household income caused by layoffs or a reduction in the number of compensable hours of work, or a substantial decrease in business income caused by a reduction in opening hours or consumer demand), or substantial out-of-pocket medical expenses; and

   (ii) The decrease in household or business income or the out-of-pocket medical expenses described in subparagraph (i) was caused by the COVID-19 pandemic, or by any local, state, or federal government response to COVID-19, and is documented.

The statutory cause of action for judicial foreclosure, Code of Civil Procedure section 725a et seq.; the statutory cause of action for unlawful detainer, Code of Civil Procedure section 1161 et seq., and any other statutory cause of action that could be used to evict or otherwise eject a residential or commercial tenant or occupant of residential real property after foreclosure is suspended only as applied to any tenancy, or residential real property and any
occupation thereof, to which a local government has imposed a limitation on eviction pursuant to this paragraph 2, and only to the extent of the limitation imposed by the local government.

Nothing in this Order shall relieve a tenant of the obligation to pay rent, nor restrict a landlord's ability to recover rent due.

The protections in this paragraph 2 shall be in effect through May 31, 2020, unless extended.

3) All public housing authorities are requested to extend deadlines for housing assistance recipients or applicants to deliver records or documents related to their eligibility for programs, to the extent that those deadlines are within the discretion of the housing authority.

4) The Department of Business Oversight, in consultation with the Business, Consumer Services, and Housing Agency, shall engage with financial institutions to identify tools to be used to afford Californians relief from the threat of residential foreclosure and displacement, and to otherwise promote housing security and stability during this state of emergency, in furtherance of the objectives of this Order.

5) Financial institutions holding home or commercial mortgages, including banks, credit unions, government-sponsored enterprises, and institutional investors, are requested to implement an immediate moratorium on foreclosures and related evictions when the foreclosure or foreclosure-related eviction arises out of a substantial decrease in household or business income, or substantial out-of-pocket medical expenses, which were caused by the COVID-19 pandemic, or by any local, state, or federal government response to COVID-19.

6) The California Public Utilities Commission is requested to monitor measures undertaken by public and private utility providers to implement customer service protections for critical utilities, including but not limited to electric, gas, water, internet, landline telephone, and cell phone service, in response to COVID-19, and on a weekly basis publicly report these measures.

Nothing in this Order shall be construed to invalidate any limitation on eviction enacted by a local jurisdiction between March 4, 2020 and this date.

Nothing in this Order shall in any way restrict state or local authority to order any quarantine, isolation, or other public health measure that may compel an individual to remain physically present in a particular residential real property.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.
I FURTHER DIRECT that as soon as hereafter possible, this proclamation be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 16th day of March 2020.

GAVIN NEWSOM
Governor of California

ATTEST:

ALEX PADILLA
Secretary of State