



Susan Wengraf  
Councilmember District 6

ACTION CALENDAR  
November 29, 2022

To: Honorable Mayor and Members of the City Council  
From: Vice Mayor Harrison and Councilmember Wengraf  
Subject: Amendments to BMC Chapter 13.110 COVID-19 EMERGENCY RESPONSE ORDINANCE

RECOMMENDATION

Adopt the first reading of an ordinance to approve the proposed amendments to BMC Chapter 13.110 COVID EMERGENCY RESPONSE ORDINANCE.

FINANCIAL IMPLICATIONS

None

BACKGROUND

The Governor has announced that California's State of Emergency will end on Feb 28, 2023. However, it is not clear at this time if Berkeley's Local State of Emergency will be lifted at the same time and whether or not the prohibition on evictions will be extended.

The City Council passed the eviction moratorium to protect public health during the height of the pandemic. Some tenants continue to suffer COVID-related income loss. However, the Council has heard testimony from a few smaller landlords that have suffered the unfortunate unintended consequences of a few renters in Berkeley who do not have or continue to have COVID-related income losses taking advantage of the situation created by the City's ordinance by not paying rent or refusing to move out. This includes legitimate requests for Owner-Move-In evictions and circumstances where a person is not a bona fide tenant, lodger or sub-tenant.

These proposed narrow amendments to BMC Chapter 13.110 clarify loopholes and address very specific circumstances where evictions would now be permitted. Eviction notices served prior to the effective date of this Ordinance remain invalid. Landlords would be required to issue a new notice for owner move-in or a new notice for nonpayment of rent that comes due after February 1, 2023. The amendments would continue to maintain strong tenant protections outside of these narrow exceptions.

**The proposed amendments**

- Change “resident” to “tenant” to clarify scope of ordinance and avoid application to situations in which there exists no agreement for the payment of rent (13.110.020.A)
- Tenants may be evicted for non-payment of rent if they fail to pay rent beginning February 1, 2023 and cannot demonstrate a Covered Reason for Delayed Payment (13.110.020.A (evictions), 13.110.020.B (eviction notices), 13.110.050.A (applicability))
- Tenants may be evicted for owner move-in (13.110.020.A (evictions), 13.110.020.B (60-day eviction notices allowed after effective date), 13.110.050.A (applicability))
- Tenants are required to provide notice to the landlord of the existence of a Covered Reason for Delayed Payment before January 15, 2023 (13.110.040.C), consistent with provisions in Santa Monica.
- Tenant’s defense is not waived by failure to provide notice of the Covered Reason for Delayed Payment (13.110.040.C, already in effect)

**State law fixes/outdated language**

- Repayment period for rent accrued beginning February 1, 2021 is fixed to July 31, 2023 per state law, or such later date as the State Legislature may adopt. (13.110.040.B.2.; Gov. Code 1179.05(a)(2)(B).
- Section 13.110.020.C (rent increases in commercial tenancies) has expired by operation of its original wording, which said that it would only last as long as Executive Order N-28-20 remains in effect.

**ENVIRONMENTAL SUSTAINABILITY**

No impact

**CONTACT PERSON**

Councilmember Harrison	Council District 4	510-981-7140
Councilmember Wengraf	Council District 6	510-981-7160

**Attachment:**

1: Ordinance Amending BMC Chapter 13.110, The COVID-19 Emergency Response Ordinance, with tracked changes

ORDINANCE NO. X,XXX--N.S.

ORDINANCE AMENDING CHAPTER 13.110 OF THE BERKELEY MUNICIPAL CODE,  
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 and Late Fees**
- 13.110.050 Application**
- 13.110.060 Implementing Regulations**
- 13.110.070 Waiver**
- 13.110.080 Remedies**
- 13.110.090 Severability**
- 13.110.100 Liberal Construction**

**13.110.010 Findings and Purposes**

International, national, state and local health and governmental authorities are responding to an outbreak of respiratory disease caused by a novel coronavirus named "SARS-CoV2." 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 Local Emergency"), which the City Council subsequently ratified on March 10, 2020. On April 21, 2020, June 16, 2020, July 28, 2020, September 22, 2020, November 17, 2020, December 15, 2020, February 9, 2021, March 30, 2021, May 25, 2021, July 20, 2021, September 14, 2021, December 14, 2021, February 8, 2022, March 22, 2022, May 10, 2022, June 28, 2022, and July 26, 2022, the council ratified an extension of the local emergency. 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, 2020 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 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 at least 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 passed the eviction moratorium to protect public health during the height of the pandemic. Some tenants continue to suffer COVID-related income loss. However, the Council has heard testimony from a few landlords that have suffered the unfortunate unintended consequences of a few renters in Berkeley who do not have or continue to have COVID-related income losses taking advantage of the situation created by the City's ordinance by not paying rent or refusing to move out. This includes legitimate requests for Owner-Move-In evictions and circumstances where a person is not a bona fide tenant, lodger or sub-tenant.

These proposed narrow amendments to BMC Chapter 13.110 clarify loopholes and address very specific circumstances where evictions would now be permitted. The amendments would continue to maintain strong tenant protections outside of these narrow exceptions.

~~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.

### **13.110.020 Prohibited Conduct**

A. During the Covered Period, no Landlord or Lender shall evict or attempt to evict a Resident Tenant of real property, or otherwise require a Tenant to vacate, unless necessary to stop an imminent threat to the health and safety of other occupants, or for purposes of a lawful owner move-in eviction under Section 13.76.130.A.9, or: ~~For purposes of this Ordinance, the basis for an exception to this Ordinance cannot be the Resident's COVID19 illness or exposure to COVID-19, whether actual or suspected on the basis of non-payment of rent after February 1, 2023 for which the Tenant cannot demonstrate a Covered Reason for Delayed Payment, as defined below.~~

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 Covered Period, except that after the effective date of this Ordinance, an Landlord may serve a lawful notice pursuant to Section 13.76.130.A.9, and/or after February 1, 2023, a Landlord may serve a notice based on the lawful grounds for eviction in Subsection 13.110.020.A, above, in which case a tenant may establish a complete defense to eviction for nonpayment of rent by proving the existence of a Covered Reason for Delayed Payment, as defined below.

~~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 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.C.~~ For the duration of the Covered Period, 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.

### 13.110.030 Definitions

A. "Covered Period" means the period of time beginning with March 17, 2020 and concluding upon the expiration of the local emergency. However, the City Council may vote by resolution to extend the duration of the Covered Period.

B. "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 occupant(s)'s 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 a reduction in the number of tenants living in the unit (including due to difficulty finding new tenants and/or subtenants willing and able to cover a sufficient share of rent) which reduces the ability of the remaining tenants to pay 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.

C. "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.

D. "Homeowner" means the owner or owners of a Residential Unit subject to a mortgage or similar loan secured by the residential unit. "Homeowner" is limited to owners who reside in the unit and includes the individuals residing in the unit with the homeowner.

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 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.

F. "Landlord" includes owners, lessors, or sublessors of either residential or commercial rental property, and the agent, representative, or successor of any of the foregoing.

G. "Lender" means the mortgagee of a purchase money or similar mortgage, or the holder or beneficiary of a loan secured by one or more units, which person has the right to mortgage or similar payments from the owner as mortgagor, including a loan servicer, and the agent, representative, or successor of any of the foregoing.

H. "Resident" means a Tenant, Homeowner, or their household.

I. "Tenant" includes a tenant, subtenant, lessee, sublessee, lodger or any other person entitled by written or oral rental agreement to use or occupancy of either residential or commercial property.

### **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 as set forth below in subsection 13.110.040.B. 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. The City will develop standards or guidelines for tenants to repay unpaid rent accrued during the Covered Period 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.

1. For rent accrued through January 31, 2021, Tenants shall have until March 31, 2022, or the date adopted by state law, as applicable, 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").

2. For rent accrued beginning February 1, 2021, Tenants shall have until ~~twenty-four (24) months after the conclusion of the Covered~~ April 30 July 31, 2023, or such later date as the State Legislature may adopt to pay rent that was delayed by a Covered Reason for Delayed Payment, or-, as applicable, unless the landlord and tenant come to a mutual repayment agreement ("Delayed Rent Payment Agreement").

3. 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 delayed repayment of rent. However, Tenants who assert the existence of a Covered Reason for Delayed Payment after January 1, 2023 must notify the Landlord no later than January 15, 2023. 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 sections 1161(2) *et seq.* 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 explicitly 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.

### **13.110.050 Application**

A. This Chapter applies to eviction notices and unlawful detainer actions based on notices served, filed, or which expire during the Covered Period. Unlawful detainer actions based on notices served after February 1, 2023, shall be subject to the affirmative defense set forth in Section 13.110.020.A., above, if applicable, where the Tenant can establish the existence and applicability of such Covered Reason for Delayed Payment. It does not apply to 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. Except where expressly required by state law (such as Assembly Bill 3088 or any subsequent statewide COVID-19 relief legislation), a landlord may seek rent accrued during the Covered Period as set forth in 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 during the Covered Period [and prior to February 1, 2023](#). In any action to evict based on alleged nonpayment of rent, it shall be a complete defense to such action if any part of the rent in dispute accrued at any time [between March 17, 2020 and January 31, 2023](#), or if the action otherwise demands any fees or amounts contrary to the provisions of this Chapter. A landlord shall not apply any rent payment towards rent that is delayed by a Covered Reason for Delayed Payment before applying it towards any other Rent owed without the explicit written permission of the Tenant.

C. A Landlord or Lender shall not retaliate against a Resident for exercising their rights under this Ordinance, including but not limited to shutting off any utilities reducing services or amenities, refusing to make or delaying repairs to which the Resident would otherwise be entitled, or taking actions which hurt the Resident's credit rating based on nonpayment of rent [between March 17, 2020 and January 31, 2023](#) as allowed under this ordinance.

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.

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

### **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.

### **13.110.080 Remedies**

A. In the event of a violation of this Ordinance, any person or entity aggrieved by the violation may institute a civil proceeding for injunctive relief, and money actual damages as specified below, and whatever other relief the court deems appropriate.

1. An award of actual damages may include an award for mental and/or emotional distress and/or suffering. The amount of actual damages awarded to a prevailing plaintiff shall be trebled by the Court outside of the presence, and without the knowledge of, the jury, if any, if a defendant acted in knowing violation of, or in reckless disregard for, the provisions of this Chapter.

2. A defendant shall be liable for additional civil penalties of up to five thousand dollars for each violation of this Chapter committed against a person who is disabled within the meaning of California Government Code section 12926, et seq., or aged sixty-five or over.

3. In addition to the above awards of damages in a civil action under this Chapter, a prevailing plaintiff shall be entitled to an award of reasonable attorney's fees. A prevailing defendant in a civil action under this Chapter shall only be entitled to an award of attorney's fees if it is determined by the Court the action was wholly without merit or frivolous.

4. In addition, this Chapter grants a complete defense to eviction in the event that an eviction notice or unlawful detainer action is commenced, filed, or served in violation of this Chapter.

B. The protections provided by this ordinance shall be available to all Residents, regardless of any agreement wherein a Resident waives or purports to waive their rights under this Ordinance, with any such agreement deemed void as contrary to public policy.

C. ~~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 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.

D. Nonexclusive Remedies and Penalties. The remedies provided in this subdivision are not exclusive, and nothing in this Chapter shall preclude any person from seeking any other remedies, penalties or procedures provided by law.

**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.

**13.110.100 Liberal Construction**

The provisions of this Chapter shall be liberally construed so as to fully achieve its purpose and provide the greatest possible protections to tenants.

Section 2. Effective Date

This ordinance shall go into effect thirty days from the time of its final passage.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 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.

~~At a regular meeting of the Council of the City of Berkeley held on September 13, 2022, this Ordinance was passed to print and ordered published by posting by the following vote:~~

~~Ayes: Bartlett, Droste, Hahn, Harrison, Kesarwani, Robinson, Taplin, Wengraf, and Arreguin.~~

~~Noes: None. Absent:~~

~~None.~~