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Housing Advisory Commission

ACTION CALENDAR
March 11, 2025

To: Honorable Mayor and Members of the City Council

From: Housing Advisory Commission

Submitted by: Debbie Potter, Chairperson, Housing Advisory Commission

Subject: Adopt an Ordinance to Prohibit the Sale or Use of Algorithmic Devices to Set Rents or Manage Occupancy Levels for Residential Dwelling Units

RECOMMENDATION

Adopt an ordinance amending the Municipal Code adding section 13.63 to prohibit the sale or use of algorithmic devices to set rents or manage occupancy levels for residential dwelling units.

POLICY COMMITTEE RECOMMENDATION

On February 3, 2025 the Land Use, Housing & Economic Development Policy Committee adopted the following action: M/S/C (Lunaparra/Tregub) to forward item to Council with a Qualified Positive Recommendation to Council with a request to forward to the 4x4 Committee to review the effectiveness of the implementation. Vote: All Ayes.

FISCAL IMPACTS OF RECOMMENDATION

There are no fiscal impacts to the City of Berkeley from adopting this ordinance. The ordinance solely prohibits the sale or use of algorithmic devices to set rents or manage occupancy levels for residential dwelling units. The ordinance includes remedies that provide for reasonable attorneys' fees and costs to the City Attorney if the City Attorney is the prevailing party in any civil action to enforce the ordinance.

The ordinance would have a positive financial impact on the city's tenants as there is documented evidence that use of these algorithmic devices has led to year-over-year rent increases of 5%-12% across housing markets. A prohibition on the sale and use of these devices will lead to reduced rents and elimination of artificial scarcity.

CURRENT SITUATION AND ITS EFFECTS

The proposed ordinance is provided as Attachment 1. Attachment 2 is a PowerPoint presentation regarding the proposed ordinance provided to the Housing Advisory Commission (HAC) at its October 10, 2024 meeting. A new type of rental software (often referred to as algorithmic devices) is increasing rents and vacancy rates by allowing large landlords to collude on pricing decisions. Third-party revenue management companies collect and combine proprietary large landlord data and make pricing and occupancy recommendations. These recommendations allow landlords to manipulate the market and the practice amounts to illegal price-fixing. The use of algorithmic devices in setting rents and occupancy levels contributes to double-digit rent increases, increased rates of eviction, and artificial housing scarcity. Lee Hepner, an antitrust attorney at the American Economic Liberties Project, states that "widespread use of price fixing software presents a new front in the housing affordability crisis."

While numerous lawsuits have been filed to prohibit such antitrust activities, these cases may take years to resolve. This ordinance prohibits the sale or use of algorithmic devices for the purpose of setting rents to bring immediate relief to Berkeley tenants, as well as to put landlords who have been using these devices on equal footing with those who are willing to adhere to fair standards for setting rental rates.

Given the widespread use of these algorithmic devices in housing markets throughout the country and their impact on rents and occupancy levels, local and state jurisdictions are taking action to ban the use of these devices to set rents and meter lease-up activity. Local ordinances can respond more quickly to current situations on the ground than law suits which can take years to resolve. Therefore, HAC Chairperson Debbie Potter brought an item to the HAC recommending that it recommend to the City Council that it adopt an ordinance amending the Municipal Code to prohibit the sale or use or algorithmic devices to set rents or manage occupancy levels for residential dwelling units.

Preliminary information provided by the Berkeley Rent Board and shared at the October 10, 2024 HAC meeting noted that six of the named plaintiffs in the various lawsuits own over 1,300 units in the City of Berkeley.

Following a presentation and discussion, the HAC voted unanimously on the following:

Action: M/S/C (Bell/Twu) to recommend that Council adopt the ordinance as set forth in the HAC agenda packet, with the amendment to clarify in which lawsuits local trade associations have been named.

Vote: Ayes: Bell, Braslaw, Haycox, Mendonca, Potter, Shere, Simon-Weisberg, and Twu. Noes: None. Abstain: None. Absent: Ortiz-Cedeño (unexcused).

BACKGROUND

Antitrust lawsuits have been filed against certain third-party revenue management companies, including RealPage, Inc. and Yardi Systems, Inc. The lawsuits allege that these companies are enabling and participating in a scheme of unlawful rent-fixing. In August 2024, The United States Department of Justice (DOJ), alongside the attorneys general of California and seven other states, filed an antitrust lawsuit against RealPage, accusing the company of reducing competition among landlords and taking over the market for such algorithm-based rental software.

A 2022 class action lawsuit filed in the U.S. District Court in the Western District of Washington at Seattle [subsequently transferred to the Middle District Court of Tennessee (one of over 20 private class action lawsuits that have been consolidated into one case)] accuses nearly 50 trade associations - including the East Bay Rental Housing Association and the Berkeley Property Owners Association – of serving as "conduits of the cartel" by providing a venue for RealPage and their property owners to conspire. The lawsuit further alleges that landlords use the software to agree on prices to set for rent, and to stagger their lease renewal dates so as to avoid any oversupplies in rental properties.

The use of these algorithmic devices is widespread in markets throughout the country and has helped fuel the national housing affordability crisis. Local jurisdictions can eliminate this specific contributor to the on-going affordable housing crisis by adopting local ordinances to ban the use and sale of algorithmic devices to set rents and/or manage occupancy levels.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

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

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

There are no identifiable CEQA impacts associated with the subject of this report.

RATIONALE FOR RECOMMENDATION

Fifty-seven percent of the city's population are renters. People of color are three times more likely to rent than to own homes in Berkeley. Sixty percent of renter households are lower income and one-half of all renters are rent burdened. According to an article about the antitrust lawsuits (noted above) in the Mercury News, over the last nine years, rents have increased 19% in the East Bay. The city's Housing Element notes that rents for rent-controlled units have increased dramatically over the last decade, as have rents for market rate units. At the same time, the city's Black population has decline rapidly over the last twenty years, as families are forced out of the community due to rising housing costs. Maintaining and growing an economically, racially, and ethnically diverse city is a top priority.

The City has many initiatives to increase affordable housing and neighborhood diversity, from a priority system for affordable housing units that recognizes residents from historically redlined communities should have access to these units and funding a wide range of housing rehabilitation programs to keep residents in Berkeley, to updating how inclusionary housing fees are calculated and funding hundreds of units of new affordable housing through the Housing Trust Fund.

Given the city's commitment to affordable housing and growing its diverse community, it is appropriate for the City Council to consider adopting an ordinance to prohibit the use and sale of algorithmic devices to set rents and occupancy levels as use of these devices amounts to illegal price-fixing and negatively impacts the rental housing market by artificially inflating rents and creating housing scarcity.

ALTERNATIVE ACTIONS CONSIDERED

No alternative actions were considered.

CITY MANAGER

The City Manager recommends that the report be referred to the Land Use, Housing & Economic Development Policy Committee for further discussion, including of staffing impacts to the City Attorney's Office and the Health, Housing, and Community Services Department.

CONTACT PERSON

Anna Cash, Commission Secretary, HHCS, (510) 981-5403

Attachments:
1: Ordinance
2: PowerPoint Presentation – HAC October 10, 2024 meeting

ORDINANCE NO. -N.S.

ADDING CHAPTER 13.63 TO THE BERKELEY MUNICIPAL CODE PROHIBITING ON THE SALE OR USE OF ALGORITHMIC DEVICES TO SET RENTS OR MANAGE OCCUPANCY LEVELS FOR RESIDENTIAL DWELLING UNITS

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

Section 1. That Berkeley Municipal Code 13.63 is added to read as follows:

Chapter 13.63

PROHIBITION ON THE SALE OR USE OF ALGORITHMIC DEVICES TO SET RENTS OR MANAGE OCCUPANCY LEVELS FOR RESIDENTIAL DWELLING UNITS

Sections:

13.63.010 Findings and purpose.

The Council hereby finds and determines that the adoption of this chapter is necessary to the promotion of the public health, safety, and welfare.

A. In recent years, a number of new software programs, often referred to as "algorithmic devices", have threatened to destabilize rental housing markets in cities nationwide, including the City of Berkeley.

B. These programs enable landlords to indirectly coordinate with one another through the sharing of non-public competitively sensitive data in order to artificially inflate rents and vacancy rates for rental housing. Participating landlords provide vast amounts of proprietary data to the programs, which in turn set or provide recommendations for rent and occupancy levels.

C. More and more landlords in U.S. cities now pool their data and pricing decisions using such software.

D. The software has contributed to double-digit rent increases (over the last nine years, median rents have increased 19% in the East Bay), higher vacancy rates, and higher rates of eviction, and has generally distorted markets so that rents and vacancy rates have increased in tandem.

E. Often used by large corporate landlords, the software fuels the consolidation of corporate and private equity ownership of rental housing, at the expense of landlords large and small who are willing to play by the normal rules. Landlords using these tools are not engaging in appropriate market behavior. And the companies developing and selling these tools to Berkeley landlords are not doing so either, and are contributing to these problems.

F. A 2022 class action lawsuit filed in the U.S. District Court in the Western District of Washington at Seattle (one of over 20 private class action lawsuits that have been consolidated into one case) accuses nearly 50 trade associations - including the East Bay Rental Housing Association and the Berkeley Property Owners Association – of serving as "conduits of the cartel" by providing a venue for RealPage and their property owners to conspire. The lawsuit further alleges that landlords use the software to agree on prices to set for rent, and to stagger their lease renewal dates so as to avoid any oversupplies in rental properties.

G. Numerous antitrust lawsuits have been filed against certain of these companies, including RealPage, Inc. and Yardi Systems, Inc. The lawsuits allege that these companies are enabling and participating in a scheme of unlawful rent-fixing. These include a lawsuit filed by the District of Columbia Attorney General in November 2023, a lawsuit filed by the Arizona Attorney General in February 2024, and more than 20 federal private class action lawsuits filed nationwide that have been consolidated in the federal court in the Middle District of Tennessee. In August 2024, The United States Department of Justice, alongside the attorneys general of California and seven other states, filed an antitrust lawsuit against RealPage, accusing the company of reducing competition among landlords and taking over the market for such algorithm-based rental software.

H. Instead of waiting for court processes which may take years to resolve, this ordinance prohibits the sale or use of algorithmic devices for the purpose of setting rents on residential dwelling units in the city of Berkeley, to bring immediate relief to Berkeley tenants, as well as to put landlords who have been using these devices on equal footing with those who are willing to adhere to fair standards for setting rental rates.

I. This Chapter is not intended to prevent the development or sale of software to help landlords manage their units generally or through the use of public data. Nor does this Chapter regulate the amount of rent that a landlord may charge. This Chapter solely regulates the use and sale of the algorithmic devices that analyze and share non-public data, to prevent the harms described above.

13.63.020 Definitions.

A. "Algorithmic device" means a device such as a software program that uses one or more algorithms to perform calculations of non-public competitor data concerning local or statewide rents or occupancy levels, for the purpose of advising a landlord whether to leave their unit vacant or on the amount of rent that the landlord may obtain from a tenant. "Algorithmic device" includes a product that incorporates an algorithmic device, but does not include (a) any report published by a trade association that receives renter data and publishes it in an aggregated and anonymous manner or (b) a product used for the purpose of establishing rent or income limits in accordance with the affordable housing guidelines of a local government, the state, the federal government, or other political subdivision.

B. “Non-public competitor data” means information that is not available to the general public, including information about actual rent prices, occupancy rates, lease start and end dates, and similar data, regardless whether the information is attributable to a specific competitor or anonymized, and regardless whether it is derived from or otherwise provided by another person that competes in the same market or a related market.

13.63.030 Use and sale of algorithmic devices prohibited.

A. It shall be unlawful to sell, license, or otherwise provide to city of Berkeley landlords any algorithmic device that sets, recommends, or advises on rents or occupancy levels that may be achieved for residential dwelling units in the city of Berkeley.

B. It shall be unlawful for a landlord to use an algorithmic device described in subsection A when setting rents or occupancy levels for residential dwelling units in the city of Berkeley. Each separate month that a violation exists or continues, and each separate residential dwelling unit for which the landlord used the algorithmic device, shall constitute a separate and distinct violation.

13.63.040 Remedies.

A. The City Attorney may file a civil action for violations of section 13.63.030, subsections A and/or B, for damages, injunctive relief, restitution/return of illegal profits, and/or civil penalties of up to $1,000 per violation. The court shall award reasonable attorney’s fees and costs to the city Attorney if the City Attorney is the prevailing party in such a civil action.

B. A tenant may file a civil action for violations of section 13.63.030, subsection B, for injunctive relief, money damages, and/or civil penalties of up to $1,000 per violation. The court shall award reasonable attorney’s fees and costs to the tenant if the tenant is the prevailing party in such a civil action. A lease provision that limits a prevailing tenant from obtaining attorneys’ fees shall not be enforceable against a tenant’s claim for attorneys’ fees that arises under this subsection 13.63.040 B.

13.63.050 Undertaking for the general welfare.

In enacting and implementing this Chapter 13.63, the City is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

13.63.060 Severability.

If any part or provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter, including the application of such part or provision to other persons or circumstances, shall not be affected by such a holding and shall continue in full force and effect. To this end, the provisions of this Chapter are severable.

<u>Section 2.</u> 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.

Ordinance to Prohibit Algorithmic Devices to Set Rents or Manage Occupancy Levels

Housing Advisory Commission
October 10th, 2024

What is “Automated Rent Setting” or “AI Revenue Management”?

- Landlords delegate their rental price and supply decisions to a common decisionmaker
- Landlords, who should be competing with each other as to price, share data with a common decisionmaker, and the common decisionmaker provides “daily pricing and ongoing revenue oversight”
- Rather than function as separate economic entities, participating landlords make key competitive decisions regarding the price and supply of multifamily apartments collectively
- This drives up rents and amounts to illegal price-fixing

What's RealPage?

- RealPage "provides property management software, data analytics, and services to efficiently manage rental properties and real estate"
- For several years, RealPage and its rent-setting software YieldStar has been the subject of controversy, especially due to a 2022 expose by ProPublica titled "Rent Going Up? One Company's Algorithm Could Be Why."
- Aug. 2024 DOJ lawsuit accuses RealPage of being a monopoly, controlling 80% of the property management software market

“Hub and Spoke” Price Fixing

- Centralized company (data broker, trade association, software algorithm) facilitates illegal agreements among competitors
- RealPage is the “hub” and landlords who depend on its recommendations regarding rent levels are the “spokes”
- By agreeing to follow the rent recommendations, using competitively sensitive and/or proprietary data, landlords tacitly agree to fix rents without need to directly compete with each other
- System allows landlords to conspire to limit rental supply and drive up rents, creating a cartel

Legal Actions to Date

- Over 30 class-action lawsuits have been filed against RealPage and landlords who use the software
- A Dec. 2022 class action lawsuit accuses the East Bay Rental Housing Association and the Berkeley Property Owners Association of serving as “conduits of the cartel”*
- The Department of Justice sued RealPage on August 23, 2024, for its unlawful scheme to decrease competition among landlords in apartment pricing and to monopolize the market for commercial revenue management software.”
- Eight Attorneys General (inc. CA AG) joined the DOJ lawsuit

*U.S. District Court Western District of WA at Seattle (transferred to Middle District of TN)

Rationale for Ordinance

- **57% of Berkeley's population are renters:**
  - People of color are 3x more likely to rent than to own homes
  - 60% of tenants are lower income
  - ½ of all renters are rent burdened (pay more than 30% of income to rent)
- **Increasing corporate concentration in housing :**
  - Q1 2024: six largest publicly traded apartment companies saw their combined net incomes climb by nearly $300 million
  - Even in markets that don't have corporate concentration, landlord trade associations facilitate the use of algorithms among small and mid-sized landlords

Rationale for Ordinance (cont.)

- Over the last nine years, rents have increased 19% in the East Bay
- Housing Element notes that rents for rent-controlled and market-rate units have increased dramatically over the last decade
- The city's Black population has declined rapidly over the last 20 years due to rising rents
- Use of algorithmic devices is illegal price fixing and negatively impacts the rental market by artificially inflating rents and creating housing scarcity

Why Take Local Action?

- Numerous lawsuits have been filed that allege harmful practices that could take years to litigate
- Acting locally to ban these practices protects tenants now
- San Francisco is the first local jurisdiction to ban the sale and use of these devices
- San Diego, Oakland, San Jose, Chicago, Miami, Philadelphia, Washington State and Texas are considering similar bans
- Recommend that HAC recommend to City Council adoption of an ordinance banning the sale and use of algorithmic devices to set rents and manage occupancy rates