

ORDINANCE NO. 7,692-N.S.

PROHIBITING CONSIDERATION OF CRIMINAL HISTORIES IN SCREENING APPLICATIONS FOR RENTAL HOUSING

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

Section 1. That Berkeley Municipal Code Chapter 13.106 is hereby added to read as follows:

Chapter 13.106

Prohibiting the Use of Criminal History in Housing Decisions

Sections:

- 13.106.010 Title
- 13.106.020 Findings
- 13.106.030 Definitions
- 13.106.040 Use of Criminal History in Housing Decisions
- 13.106.050 Requirements for Housing Providers
- 13.106.060 Retaliation Prohibited
- 13.106.070 Recordkeeping and Confidentiality
- 13.106.080 Implementation
- 13.106.090 Administrative Complaints
- 13.106.100 Enforcement
- 13.106.110 No Conflict with State or Federal Law
- 13.106.120 Severability

13.106.010 Title

This Chapter shall be known as the “Ronald V. Dellums Fair Chance Access to Housing Ordinance.” and may be shortened to the “Fair Chance Housing Ordinance”.

13.106.020 Findings

- A. Mass incarceration is a national and local crisis and restoring the rights of people affected by mass incarceration is a national priority.
- B. The U.S. Department of Justice has estimated one in every three adults in the United States has either an arrest or conviction record.
- C. Studies have found that private criminal databases pull source information from inadequate records and lack accountability procedures to ensure that the database records provided to Housing Providers are accurate. Housing Providers in conducting criminal background checks are relying on such inaccurate information in evaluating housing applications.
- D. Formerly incarcerated persons face barriers to access to both private rental and publicly subsidized affordable housing.
- E. Homelessness is a critical issue in Berkeley and formerly incarcerated people are disproportionately affected by homelessness, which can prevent a formerly

incarcerated person from getting a job, from visiting with their children, and from fulfilling other needs that are fundamental to reintegrating with the community after incarceration.

- F. The unmet housing needs of formerly incarcerated people in Berkeley are an acute challenge to the dignity, public health and safety, and equal opportunity for this population and the broader community.
- G. Research has found that access to housing reduces recidivism, and the lack of housing can be a significant barrier to successful reintegration after incarceration.
- H. Reliance on criminal history to select tenants impedes formerly incarcerated persons from gaining access to housing in the City of Berkeley, to the detriment of health, welfare, and public safety of the City's residents.

### **13.106.30 Definitions**

- A. "Adverse Action" means to take one of the following actions based on a person's Criminal or Conviction History:
  - 1. Failing or refusing to rent or lease Housing to a person;
  - 2. Failing or refusing to continue to rent or lease Housing to a person;
  - 3. Reducing the amount or term of any person's subsidy for Housing;
  - 4. Treating an Applicant or tenant differently from other applicants or tenants, including but not limited to, taking such actions as requiring higher security deposit or rent;
  - 5. Treating a person as ineligible for a tenant-based rental assistance program, including but not limited to, the Section 8 Housing Choice Voucher Program (42 U.S.C. Section 1437f); or
  - 6. Failing to permit a tenant's Close Family Member to occupy a rental unit while the occupying tenant remains in occupancy.
- B. "Affordable Housing" shall mean any Housing that (1) has received or is receiving City, County, State, or Federal funding, tax credits, or other subsidies connected in whole or in part to developing, rehabilitating, restricting rents, subsidizing ownership, or otherwise providing rental housing for extremely low income, very low income, low income, and moderate income households (collectively, "Public Funding"), with the exception of Housing where the only Public Funding received is in the form of a Local, State or Federal tenant-based voucher, such as through the Section 8 Housing Choice Voucher Program (42 U.S.C. Section 1437f); or (2) is subject to affordability and related requirements pursuant to the City's Below Market-Rate Rental Housing Program, including but not limited to the Affordable Housing Mitigation Fee Ordinance ( Section 22.20.065), the State Density Bonus law

(California Government Code Sections 65915-65918 and Chapter 23C.14), and the Low Income Inclusionary Live/Work Units Ordinance (Section 23E.20.080).

- C. "Affordable Housing Provider" shall mean any Housing Provider that owns, master leases, manages, or develops Affordable Housing in the City. Any agent, such as a property management company, that makes tenancy decisions on behalf of the above-described Housing Providers, and any government agency, including but not limited to the Berkeley Housing Authority, that makes eligibility decisions for tenant-based rental assistance programs, including but not limited to the Section 8 Housing Choice Voucher Program (42 U.S.C. Section 1437f), shall also be considered an "Affordable Housing Provider."
- D. "Aggrieved Person" means an Applicant who believes they were subject to an Adverse Action; a tenant who believes they or their Close Family Member was subject to an Adverse Action based on the application of an Applicant to reside in such family member's rental unit; or a tenant who believes they were subject to an Adverse Action based on the failure or refusal to permit a person to reside in such tenant's rental unit to replace an existing tenant, add a new tenant, or to sublet to a subtenant.
- E. "Applicant" means a person who seeks information about, visits, or applies to rent or lease Housing; who applies for a tenant-based rental assistance program, including but not limited to the Section 8 Housing Choice Voucher Program (42 U.S.C. Section 1437f); who seeks to be added as a household member to an existing lease for Housing; or, with respect to any Criminal History that occurred prior to the beginning of the person's tenancy, who currently rents or has a lease for Housing.
- F. "Arrest" means a record from any jurisdiction that does not result in a Conviction and includes information indicating that a person has been questioned, apprehended, taken into custody or detained, or held for investigation by a law enforcement, police, or prosecutorial agency and/or charged with, indicted, or tried and acquitted for any felony, misdemeanor, or other criminal offense.
- G. "Background Check Report" means any report regarding an Applicant's Criminal History, including but not limited to those produced by the California Department of Justice, the Federal Bureau of Investigation, other law enforcement agencies, courts, or any consumer reporting or tenant screening agency.
- H. "Close Family Member" means a spouse, registered domestic partner, child, sibling, parent, grandparent, or grandchild.
- I. "Conviction" means a record from any jurisdiction that includes information indicating that a person has been convicted of a felony or misdemeanor or other criminal offense and for which the person was placed on probation, fined, imprisoned and/or paroled.
- J. "Criminal History" means information transmitted orally or in writing or by any other means, and obtained from any source, including but not limited to the person to whom the information pertains, a government agency, or a Background Check

Report, regarding one or more Convictions or Arrests; a Conviction that has been sealed, dismissed, vacated, expunged, voided, invalidated, or otherwise rendered inoperative by judicial action or by statute (for example, under California Penal Code Sections 1203.1 or 1203.4); a determination or adjudication in the juvenile justice system; a matter considered in or processed through the juvenile justice system; or participation in or completion of a diversion or a deferral of judgment program.

- K. "Housing" means any residential rental housing, building, or unit in the City of Berkeley, with the exception of the following:
1. Single Family Dwellings where one or more owners occupies the dwelling as their principal residence;
  2. Single Family Dwellings with Accessory Dwelling Units, as defined in Section 23F.04.010, where either the main or an Accessory Dwelling Unit is occupied by one or more owners as their principal residence;
  3. Duplexes or triplexes where one of the units is occupied by one or more owners as their principal residence;
  4. Units rented pursuant to Section 13.76.130 A.10; and
  5. Tenant-occupied units where an occupying tenant seeks to replace an existing co-tenant, add an additional co-tenant, or sublet the unit, provided that the occupying tenant remains in occupancy.
- L. "Housing Provider" shall mean any Person that owns, master leases, manages, or develops Housing in the City. For the purpose of this definition, "Person" includes one or more individuals, partnerships, organizations, trade or professional associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and any political or civil subdivision or agency or instrumentality of the City. In addition, any agent, such as a property management company, that makes tenancy decisions on behalf of the above-described Persons, and any government agency, including but not limited to the Berkeley Housing Authority, that makes eligibility decisions for tenant-based rental assistance programs, including but not limited to the Section 8 Housing Choice Voucher Program (42 U.S.C. Section 1437f), shall also be considered a "Housing Provider".

### **13.106.040 Use of Criminal History in Housing Decisions**

- A. Except as provided in Paragraphs B and C of this Section, a Housing Provider shall not, at any time or by any means, whether direct or indirect, inquire about an Applicant's Criminal History, require an Applicant to disclose their Criminal History, require an Applicant to authorize the release of their Criminal History or, if such information is received, base an Adverse Action in whole or in part on an Applicant's Criminal History.
- B. It shall not be a violation of this Chapter for a Housing Provider to comply with Federal or State laws that require the Housing Provider to automatically exclude tenants based on certain types of criminal history (e.g. Ineligibility of Dangerous Sex Offenders for Admission to Public Housing (42 U.S.C. Section 13663(a); Ineligibility of Individuals Convicted for Manufacturing Methamphetamine on Premises of Federally Assisted Housing for Admission to Public Housing and Housing Choice

Voucher Programs (24 C.F.R. Section 982.553)). However, if such a requirement applies, the Housing Provider shall not inquire about, require disclosure of, or, if such information is received, review an Applicant's Criminal History until the Housing Provider first does the following: (1) informs the Applicant in advance that the Housing Provider will check for certain types of criminal history; (2) requests and obtains written consent, or if the Applicant objects, provides the applicant the opportunity to withdraw their application; (3) complies with the requirements in subsections D and E of this Section.

Any Adverse Action based on Criminal History obtained pursuant to this Paragraph shall be limited to actions required to comply with State or Federal law.

- C. In compliance with state law, in order to protect persons at risk pursuant to Penal Code Section 290.46(j)(1), the Housing Provider may review the State registry of lifetime sex offenders operated by the State of California Department of Justice; provided that (1) the Housing Provider has stated the lifetime sex offender screening requirement in writing in the rental application; and (2) the Housing Provider may not inquire about, require disclosure of, or, if such information is received, review an Applicant's Criminal History until the Housing Provider has first:
1. Determined that the Applicant is qualified to rent the Housing under all of the Housing Provider's criteria for assessing Applicants except for any criteria related to Criminal History;
  2. Provided to the Applicant a conditional rental agreement that commits the Housing to the Applicant as long as the Applicant meets the Housing Provider's Criminal History and other qualifying criteria; and
  3. Informed the Applicant in advance that the Housing Provider will checking the sex offender registry and obtained the written consent of the Applicant to obtain such information.

The Applicant may elect to withhold such consent and withdraw their application. Any use of information obtained by a Housing Provider pursuant to this Paragraph shall comply with California Penal Code Section 290.46(l).

- D. A Housing Provider's request to obtain written consent from the Applicant to obtain information about the Applicant's Criminal History under Paragraphs B or C of this Section shall inform the Applicant that the Housing Provider may be required to share information about the Applicant's Criminal History with the City of Berkeley for purposes of enforcing the requirements of this Chapter.
- E. If any Adverse Action is based in whole or in part on the Applicant's Criminal History, the Housing Provider shall provide a written notice to the Applicant regarding the Adverse Action that includes, at a minimum, the reason(s) for the Adverse Action, instructions on how to file a complaint about the Adverse Action with the City, a list of local legal service providers including contact information, and a copy of any Background Check Report or other information related to the Applicant's Criminal History that served as a basis for the Adverse Action. The Housing Provider shall provide the Applicant an opportunity to respond with rebutting or mitigating

information prior to the denial of the Applicant's housing application. The Housing Provider shall not require reimbursement or payment from the Applicant for the cost of providing any information required under this Paragraph.

**13.106.050 Requirements for Housing Providers**

- A. It shall be unlawful for any Housing Provider subject to the requirements of this Chapter to produce or disseminate any advertisement related to Housing that expresses, directly or indirectly, that any person with Criminal History will not be considered for the rental or lease of real property or may not apply for the rental or lease of real property, except as required by State or Federal law.
- B. The City shall publish and make available to Housing Providers, in English, Spanish, and all languages spoken by more than five percent (5%) of the City's population, a notice that informs Applicants for Housing of their rights under this Chapter. The notice shall contain the following information:
  - 1. A description of the restrictions and requirements of this Chapter;
  - 2. Instructions for submitting a complaint to the City regarding a violation of this Chapter; and
  - 3. Information about community resources available to assist an Applicant in connection with a violation of this Chapter.
- C. Housing Providers subject to the requirements of this Chapter shall prominently display the notice made available pursuant to Section 13.106.50.B. in their application materials, on their websites, and at any rental or leasing offices.
- D. In addition to the requirements in Paragraphs A-C of this Section, Affordable Housing Providers shall:
  - 1. Provide any Applicant subject to an Adverse Action a written notice regarding the Adverse Action that includes, at a minimum, the reason(s) for the Adverse Action; instructions regarding how to file a complaint about the Adverse Action with the City, including the deadlines set forth in Section 13.106.090.A; a list of local legal services providers, including contact information; and a copy of any Background Check Report or other Criminal History obtained by the Affordable Housing Provider; and
  - 2. Submit to the City an annual certificate of compliance with the requirements of this Chapter in the form provided by the City.

**13.106.060 Retaliation Prohibited**

It shall be a violation of this Chapter to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this Chapter, or to take any Adverse Action against any Person because the Person exercised or attempted in good faith to exercise any right protected under this Chapter.

**13.106.070 Recordkeeping and Confidentiality**

- A. Housing Providers shall maintain a record of any Criminal History obtained for any Applicant for Housing for a period of at least three years. To the maximum extent permitted by law, any information obtained regarding an Applicant's Criminal History shall remain confidential.
- B. Nothing in this section shall prohibit a Housing Provider from complying with a request by the City to provide records for purposes of enforcing the requirements of this Chapter.

**13.106.080 Implementation**

- A. The City Manager or their designee shall take all necessary steps to implement this Chapter, including but not limited to the following:
  - 1. Developing any notice required for purposes of implementing the requirements of this Chapter, the annual compliance certification form, and other implementation documents, including written materials for Housing Providers and potential Applicants; and
  - 2. Conducting outreach to and preparing a plan to provide ongoing training about the requirements Chapter for Housing Providers.

The City Manager is authorized to adopt Administrative Regulations necessary to implement the requirements of this Chapter.

- B. The City Manager or their designee shall provide an annual public report to the City Council on the implementation and enforcement of this Chapter. The annual report shall include, at a minimum: (1) a summary of the annual compliance certifications submitted by Affordable Housing Providers; (2) the number of complaints filed with the City regarding violations of this Chapter and the outcomes of such complaints; (3) and the number of notices filed with the City regarding actions brought under Section 13.106.100.C and the outcomes of any such actions.

**13.106.90 Administrative Complaints**

- A. Any Applicant subject to an Adverse Action or their Close Family Member who believes the Adverse Action was based on a violation of this Chapter shall have the right to submit a complaint to the City within one year of the date the Applicant submitted an application to the Housing Provider or the date of the violation, whichever is earlier. The City will schedule an administrative hearing before a hearing officer designated by the City Manager within 90 days of the date of submission of the complaint. The deadlines set forth in this Paragraph may be extended with the consent of all parties.
- B. The parties shall have the following rights at an administrative hearing conducted pursuant to this Section:
  - 1. To have an advocate of their choosing to represent them at the hearing;

2. To present any relevant witnesses and evidence, which will be considered without regard to the admissibility under the Rules of Evidence applicable to a judicial proceeding;
  3. To examine the other party's evidence and to rebut and cross-examine any witnesses;
  4. To have a translator present at the hearing, when translation is reasonably necessary and reasonably available;
  5. To request any reasonable accommodation needed to participate in the hearing process; and
  6. To record the hearing.
- C. Where the City determines that a violation of the Chapter has occurred, the City shall issue a determination and order any appropriate relief under this Chapter.

**13.106.100 Enforcement**

- A. The City may issue an Administrative Citation under Chapter 1.28 to any Person who violates any provision of this Chapter.
- B. The City Attorney may bring an action on behalf of the City seeking injunctive relief to restrain or enjoin any violation of this Chapter.
- C. Any Aggrieved Person who believes that the provisions of this Chapter have been violated shall have a private right of action for injunctive relief, and actual damages or statutory damages up to three times the amount of one month's rent that the Housing Provider charged for the unit in question at the time of the violation. In addition to actual or statutory damages, a court may award punitive damages where it is proven by clear and convincing evidence that a violation of this Chapter has been committed with oppression, fraud, or malice. In any action brought under this Chapter, the court may award reasonable attorneys' fees and cost of action pursuant to Code of Civil Procedure section 1021.5. The right to file an action under this Paragraph is independent of the right to file an administrative complaint under Section 13.106.90 and does not require an Applicant to have filed a prior complaint with the City of Berkeley.
- D. When permitted by law, an award of actual damages under this Chapter 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 if a defendant is found to have acted in knowing violation of, or in reckless disregard of, the provisions of this Chapter.
- E. In an action brought by the City Attorney pursuant to this Section, a court of competent jurisdiction may order that a civil penalty be assessed against the Housing Provider to vindicate the public interest, which penalty shall be payable



to the City of Berkeley. The civil penalty assessed against a Housing Provider shall be at least one thousand dollars (\$1,000) and shall not exceed ten thousand dollars (\$10,000) for each violation of this Chapter. A defendant shall be liable for an additional civil penalty of up to five thousand dollars (\$5,000) 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 is aged sixty-five (65) or over.

- F. An attorney who represents an Applicant in litigation against a Housing Provider brought under this Chapter shall provide notice to the City within ten (10) days of filing court action against the Housing Provider, and inform the City of the outcome of the court action within ten (10) days of any final judgment.

**13.106.110 No Conflict with State or Federal Law**

This Chapter is not intended to conflict with state or federal law. If there is a conflict between the provisions of federal or state law and this Article, federal or state law shall control.

**13.106.120 Severability**

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this title, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional.

Section 2. Effective Date

The provisions of this Chapter shall take effect upon thirty days after final adoption of this ordinance. A Housing Provider shall not be liable for a violation within 180 days after final adoption of this Chapter, unless the Housing Provider has first received a warning letter from the City regarding a violation of the Ordinance.

Section 3. Notice to Housing Providers

The City Manager is directed to cause notice of this Ordinance to be mailed to all residential rental property owners subject to this Chapter within 90 days of final adoption of this Ordinance.

Section 4. Posting

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 March 10, 2020, this Ordinance was passed to print and ordered published by posting by the following vote:

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

Noes: None.

Absent: None.