Office of the City Attorney

<u>CONSENT CALENDAR</u>
November 18, 2025

To: Honorable Members of the City Council

From: Farimah Brown, City Attorney (Author)

Subject: Amendments to Ordinance Prohibiting the Sale or Use of Coordinated Pricing Algorithms (BMC 13.63)

<u>RECOMMENDATION</u>
Adopt Amendments to the Ordinance Prohibiting the Sale or Use of Coordinated Pricing Algorithms (BMC 13.63).

<u>BACKGROUND</u>
On March 25, 2025, the City Council adopted a second reading of an ordinance that prohibits the sale or use of coordinated pricing algorithms to set or recommend rents in Berkeley (BMC 13.63, Ord. No. 7,956-N.S.) Pursuant to City Charter, Article XIV, Section 93, the ordinance originally became effective on April 24, 2025. However, in April 2025, RealPage, Inc. filed a lawsuit seeking to enjoin the ordinance on First Amendment grounds. *See RealPage, Inc. v. City of Berkeley*, 3:25-cv-03004-JSC (N.D. Cal.). To mitigate litigation costs and facilitate a possible amicable resolution of the case, the City Council suspended the effective date of the ordinance until March 1, 2026. (See Ord. No. 7,974-N.S.)

After engaging in discussions with RealPage, the City Attorney's Office is now proposing amendments (Attachment 1) to the ordinance. Based on these discussions, the City Attorney's Office believes that the litigation will be resolved if these amendments are adopted.

<u>RATIONALE FOR RECOMMENDATION</u>
The proposed amendments in Attachment 2 would help facilitate the resolution of the litigation.

<u>FINANCIAL IMPLICATIONS</u>
The action could facilitate a resolution to the above-mentioned litigation, thus reducing the City's litigation costs in this matter.

<u>ENVIRONMENTAL SUSTAINABILITY</u>
There are no identifiable environmental effects from taking this action.

<u>CONTACT PERSON</u>
Farimah Brown   510-981-6998

Amendments to Ordinance Prohibiting the Sale or Use of Coordinated Pricing Algorithms (BMC 13.63)
November 18, 2025

Attachments:

1. Proposed Amendments to Ordinance No. 7,974-N.S., Prohibition on the Sale or Use of Coordinated Pricing Algorithms To Set Rents or Manage Occupancy Levels for Residential Dwelling Units (redline).

ORDINANCE NO. -N.S.

AMENDING CHAPTER 13.63 OF THE BERKELEY MUNICIPAL CODE COORDINATED PRICING ALGORITHMS 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 amended to read as follows:

Chapter 13.63

PROHIBITION ON THE SALE OR USE OF COORDINATED PRICING ALGORITHMS TO SET RENTS OR MANAGE OCCUPANCY LEVELS FOR RESIDENTIAL DWELLING UNITS

Sections:

13.63.010 Findings and Purpose
13.63.020 Definitions
13.63.030 Use and Sale of Coordinated Pricing Algorithms Prohibited
13.63.040 Remedies
13.63.050 Undertaking for the General Welfare
13.63.060 Severability
~~**13.63.070 Effective Date**~~

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~~coordinated pricing algorithms", have ~~threatened to destabilize~~been reported as having an impact on rental housing markets in cities nationwide, including the City of Berkeley.

B.   These programs reportedly enable landlords to indirectly coordinate with one another through the sharing of ~~non-public competitively sensitive~~nonpublic competitor data ~~in order to artificially inflate~~to impact 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.

~~A.~~ C.	More and more landlords in U.S. cities now ~~pool their data and pricing decisions using such software.~~
~~B.	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.~~
~~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~~ use 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.~~programs.
~~C.	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.~~
~~D.	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.~~

D.	Numerous antitrust lawsuits have been filed against certain of these companies. These include lawsuits filed by the U.S. Department of Justice, state Attorneys General, and numerous private plaintiffs.
E.	Instead of waiting for court processes which may take years to resolve, this ordinance prohibits the sale or use of ~~algorithmic devices~~coordinated pricing algorithms 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.~~their competitors.

F. 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~~coordinated pricing algorithms, to prevent the harms described above.

13.63.020 — Definitions.

A. "Coordinated pricing algorithm" means any analytical or computation ~~processes~~process that ~~use data~~uses Competitor Data to calculate and recommend ~~or predict the price of consumer goods or services~~rent prices, fees, occupancy rates or other rental contract terms for future leases in ~~direct or indirect~~ coordination ~~with~~between one ~~or more~~City of Berkeley landlord and one or more of such landlord's competitors, including through a third-party vendor ~~such as a software program that uses one or more algorithms to perform calculations of competitor data concerning local or statewide rents or occupancy levels, for the purpose of advising landlords whether to leave their units vacant or on the amount of rent that landlords may obtain from tenants. "Coordinated pricing algorithm"~~. A "coordinated pricing algorithm" includes a product that incorporates a coordinated pricing algorithm, but does not include (a) a product or process that generates or presents any report ~~published by a trade association that receives renter data and~~, study, or presentation that publishes ~~it~~rental data in an aggregated and anonymous manner ~~or~~but does not recommend rent prices, fees, or occupancy rates or other rental contract terms for future leases; (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; or (c) a product or process that provides or uses, or the provision or use of, information for the purpose of (i) conducting market research for project financing, (ii) conducting an appraisal, or (iii) conducting research, testing, or training for software development. For clarity, "research, testing, or training for software development" includes without limitation the use or processing of Competitor Data in the development, training, or testing of predictive or machine learning models so long as any such data is not used as an input in the operation of the model at the time a recommendation is calculated for publication or provision to a City of Berkeley landlord.

B. "Competitor ~~data~~Data" means information~~, including information about~~ that is not available to the general public concerning 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.~~ regarding a property other than a property that is owned or managed by the landlord who is the recipient or user of the generated recommendation, when such data is less than 90 days old.

13.63.030 — Use and sale of coordinated pricing algorithms prohibited.

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

B.   It shall be unlawful for a landlord to use a coordinated pricing algorithm described in subsection A when setting rents or occupancy levels for residential dwelling units in the ~~city~~City of Berkeley. Each separate month that a violation exists or continues, and each separate residential dwelling unit for which the landlord used the coordinated pricing algorithm, 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~~City Attorney if the City Attorney is the prevailing party in such a civil action.
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B.   An aggrieved 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.

~~13.63.070   Effective Date.~~
~~The provisions of this Chapter shall not take effect until March 1, 2026.~~

Section 2. 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.