

CITY OF OAKLAND

OFFICE OF THE CITY ATTORNEY

Frequently Asked Questions (FAQs)

Regarding Non-Conforming Residential Units in Light of the
December 2, 2016 Warehouse Fire (1315 – 31st Avenue)

Issued: March 29, 2017

Revised:

Issued by: Barbara J. Parker, Oakland City Attorney



I. INTRODUCTION

This memorandum answers frequently asked questions arising from the December 2, 2017 warehouse fire at 1315 31st Avenue regarding the rights and protections of people who may be living in non-conforming residential units. **Like other FAQs our Office has issued, this memorandum provides general information and does not constitute legal advice or legal conclusions or analysis.** These FAQ's are intended to be general in nature and do not cover all issues or circumstances that might apply to a particular fact situation.

For more information please refer to the Oakland Municipal Code and any applicable City regulations. You also may contact the Housing Assistance Center Rent Adjustment Program or an attorney. The Housing Assistance Center is located at 250 Frank H. Ogawa Plaza, 6th Floor, Oakland, 94612. The telephone number is (510) 238-6182 and email address is housingassistance@oaklandnet.com. The Rent Adjustment Program's website is rapwp.oaklandnet.com; the office is located at, 250 Frank H. Ogawa Plaza, 5th Floor, Oakland, 94612 and the telephone number is (510) 238-3721.

II. NON-CONFORMING, UNPERMITTED OR "ILLEGAL" RESIDENTIAL UNITS

1. **What is a non-conforming residential unit?**

Answer: In general, a non-conforming, unpermitted or "illegal" residential unit is a unit that is not allowed by the zoning, or that was created without obtaining proper building permits. Examples of non-conforming units include: live-work or other residential units created in commercial spaces without permits, garages converted to units, basement units that lack proper ceiling height, ventilation or exits, secondary units built without permits.

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2. Can non-conforming live-work units be considered “dwelling” or “residential” units for purposes of Oakland’s relocation, rent adjustment, tenant protection, and just cause for eviction ordinances?

Answer: Yes, subject to some limitations. Whether a non-conforming unit is covered under these various ordinances is a question of fact concerning when and how the unit was created or became residential, as explained in more detail below. Each of these ordinances has different requirements for overage.

3. When is a non-conforming live-work unit considered to be residential?

Answer: A non-conforming live-work unit may be considered residential in certain circumstances, including:

- If the property owner offers the unit for rent or rents it as live-work.
- If the property owner rents the space for commercial purposes, but tenant creates the live-work unit with the permission of the property owner or the property owner knows the tenant is using the space as live-work and takes no contrary action.
- If the property owner rents the space for commercial purposes, but the tenant creates the space without the property owner’s permission, the unit may be considered commercial and not be covered under the relocation ordinance, unless:
 - the property owner acquiesces to the live-work by failing to demand or take action to have the tenant cease the live-work use as soon as the owner becomes aware of such use; or
 - the property owner fails to reasonably inspect the premises to determine the actual use by the tenant.

4. What if the rental agreement specifically prohibits residential use?

Answer: If a property owner fails to immediately take action after knowledge of the residential use by demanding the tenant cease the residential use, that failure could be considered a waiver of the no residential use term of the rental agreement. If the property owner

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continues to accept rent after he or she has knowledge of the residential use or reasonably should have had such knowledge the property owner may be deemed to have established/created the residential use of the space.

III. PROPERTY OWNER'S RESPONSIBILITIES REGARDING COMMERCIALLY RENTED PROPERTY; PROPERTY OWNER'S RESPONSIBILITIES REGARDING INSPECTIONS

1. When must a property owner inspect the premises to determine the tenant's actual use of the property?

Answer: A responsible property owner should inspect rented property periodically to examine the condition of the property and to see if it is being used in accord with the lease terms and not illegally. While management practices may differ, a good rule of thumb is to inspect property annually. Failure to inspect and discover residential use can create a residential tenancy under Oakland's laws.

IV. UNITS THAT MAY BE COVERED UNDER OAKLAND'S ORDINANCES (LAWS)

1. Can a live-work unit be covered by Oakland's code enforcement relocation ordinance?

Answer: Yes, if the unit is considered residential, as discussed above, it could be covered by the relocation ordinance, provided the additional requirements of the relocation ordinance are met.

V. ELIGIBILITY FOR RELOCATION BENEFITS

1. Other than residential use, what are the other requirements of the code enforcement relocation ordinance for the tenant to qualify for relocation benefits from the property owner?

Answer: Some of the important requirements for a tenant to be eligible for relocation benefits are:

- There are building or fire code violations that exist at the property that the city requires to be corrected or that the owner wishes to correct. There need not be a code inspection or city notice for the violations, only that the property owner needs to evict the tenant to correct items

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that could have been determined to be violations if the property had been inspected. This is the case even if the property owner is also doing non-code compliance renovations or repairs to the property.

- The tenant did not create the conditions that caused the violations. However, if the property owner knew or should have known of the unpermitted conditions, took no action, and continued to collect rent, then the property owner may be deemed to have created the conditions.
- The condition was caused by, contributed to, or exacerbated by the property owner's negligence or a pre-existing code violation (e.g., a fire that was caused by or exacerbated by pre-existing violations may require payment of relocation benefits, but a circumstance beyond the owner's control such as an earthquake or accidental fire, would not trigger a property owner's obligation for relocation payments).

2. What benefits can I receive under the Code Enforcement Relocation Ordinance?

Answer: There are two types of relocation payments—permanent and temporary. A relocation of more than sixty (60) days is considered permanent and the property owner must pay the full amount of the relocation in within ten (10) days prior to the termination of the tenancy. For a temporary relocation, the tenant must submit documentation for the costs of the relocation and the property owner must reimburse the tenant up to the amount required for a permanent relocation.

The amount the property owner must pay a tenant household under the relocation ordinance varies by the size of the unit. The payment amounts are listed below and are annually adjusted for inflation on July 1. A household that includes lower income, elderly or disabled tenants, and/or minor children can receive an additional \$2,500 per unit from the property owner.

Studio or one bedroom	\$6,875.58
Two bedrooms	\$8,462.26
Three or more bedrooms	\$10,445.60

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3. Does the City pay relocation payments for the tenant?

Answer: Property owners are responsible for making relocation payments to tenants. The City generally does not pay the tenant relocation payments, but sometimes does in very limited circumstances, provided the City has not exhausted the funds available for relocation. The City has limited funds available for relocation and limits its use of these funds to extreme circumstances. If the City gives the tenant relocation assistance, the property owner is still responsible for this payment and the City may penalize the property owner or take other action to collect it.

Generally, if funds are available, the City makes payments to the tenant under the following circumstances:

- The City has ordered immediate vacation of the property as an imminent safety hazard; and
- The tenant has contacted the property owner and asked for relocation payments and the property owner refused the payments or did not respond to the request;

4. Where can I get more information about relocation payments?

Answer: The City of Oakland has a Housing Assistance Center located at 250 Frank H. Ogawa Plaza, 6th Floor, Oakland, 94612. The telephone number is (510) 238-6182 and the email address is housingassistance@oaklandnet.com.

VI. COVERAGE OF NON-CONFORMING UNITS UNDER THE CITY'S RENT ORDINANCE

1. Can a non-conforming residential or live-work unit be covered under Oakland's Rent Adjustment Ordinance (O.M.C.8.22.200, et seq.)?

Answer: Yes, if it is considered residential, as discussed above, it is generally covered under the Rent Ordinance if:

- The unit received a certificate of occupancy issued before January 1, 1983;
- The unit received a certificate of occupancy issued after January 1, 1983, but was used for residential purposes before January 1, 1983; or

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- The unit does not have a certificate of occupancy or the equivalent (such as passing final inspection), but the unit is currently occupied for residential use.

2. How do I find out if the property I reside in was ever used residentially prior to January 1, 1983?

Answer: These are some of the things tenants have done to establish a timeline for residential use of a property.

- Check with other tenants at the property;
- Check with neighbors;
- Look at the City's permit records in the Planning and Building Department;
- Go to the library to see if the address shows up in old residential telephone directories;
- Some tenants have found old news articles about a property discussing residential use.

3. What are the general benefits under the Rent Adjustment Ordinance?

Answer: For residential rental units covered under the Rent Adjustment Ordinance, rent increases are restricted:

- Property owners cannot increase rents annually more than a Consumer Price Index based percentage and for any past CPI rent increases that the property owner did not take, without first filing a petition and receiving approval from the Rent Program for the rent increase;
- Rent increases are limited to one per year with a cap of ten (10) percent annually, and thirty (30) percent over five (5) years;
- Tenants can file petitions contesting unjustified rent increases or for decreased housing services.

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4. Where can I get more information about the Rent Adjustment Program and evictions?

Answer: At the Rent Adjustment Program website on rapwp.oaklandnet.com, at the Rent Adjustment Program offices, 250 Frank H. Ogawa Plaza, 5th Floor, Oakland, California 94612, or by telephone at (510) 238-3721. You can also get information and assistance at the Housing Assistance Center located at 250 Frank H. Ogawa Plaza, 6th Floor, Oakland, 94612. The Housing Assistance Office telephone number is (510) 238-6182 and the email address is housingassistance@oaklandnet.com.

VII. COVERAGE OF NON-CONFORMING UNITS UNDER THE CITY'S JUST CAUSE FOR EVICTION ORDINANCE

1. Can a non-conforming residential or live-work unit be covered under Oakland's Just Cause for Eviction Ordinance (O.M.C. 8.22.300, et seq.)?

Answer: Yes, if it is considered residential, as discussed above, it is generally covered under the Just Cause for Eviction Ordinance if:

- The unit was newly constructed—built from the ground up, and has a certificate of occupancy issued on or before December 31, 1995; or
- The unit received a certificate of occupancy issued after December 31, 1995, but the unit was created as the result of rehabilitation, improvement or conversion of commercial space or other residential rental space.

2. Can tenants covered under Just Cause be evicted from non-conforming residential or live-work units?

Answer: Yes. In addition to other grounds for eviction (for example, non-payment of rent, breach of the rental agreement), tenants can be evicted from non-conforming units if the eviction is necessary in order to make required repairs, or in order to cease renting the units residentially. But specific requirements apply and some protections and benefits may apply as described below. If the Just Cause for Eviction ordinance applies to the units, tenants can be evicted if the property owner intends to cease the non-conforming use. O.M.C. 8.22.360A.10 of the Just Cause Ordinance

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and the regulations for this section set out the requirements for such evictions. The essential requirements are:

- If the property owner is evicting to make repairs, the property owner has a limited amount of time to make the repairs (90 days, subject to an extension from the Rent Program) and the tenant has a right to return to the unit at the same rent plus any allowance the property owner has for a rent increase for capital improvements.
- If the property owner intends to permanently remove the units as residential units, then the following apply:
 - If less than all the residential units on the property are being removed from the residential market, a notice pursuant to Cal. Civil Code 1946.1 (30 or 60 days depending on the length of the tenancy), with the tenant having a right to return if the unit is ever put back on the residential market.
 - If all the residential units are being permanently removed, the property owner must use the Ellis Act Ordinance (O.M.C. section 8.22.400, et seq.) to evict the tenants. The Ellis Act generally requires that:
 - All the residential rental units on the property must be taken off the market;
 - The tenants are given 120 day notices to vacate, one year for seniors or disabled tenants;
 - The property owner makes required filings with the Rent Program;
 - If the units are put back on the residential market, evicted tenants have rights to return and tenants evicted through the Ellis Act Ordinance may have other recourse against the property owner, such as damages for the eviction;
 - Under either scenario, the property owner cannot set the rent to market rates for new residential rentals (within 10 years for the Ellis Act).

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- 3. Can tenants who are in units not covered under Just Cause be evicted from non-conforming residential or live-work units?**

Answer: Yes. Property owners who evict tenants from units that are not covered by Just Cause may use whatever procedures are available under state law.

VIII. COVERAGE OF NON-CONFORMING UNITS UNDER THE CITY'S TENANT PROTECTION ORDINANCE

- 1. Can a non-conforming residential or live-work unit be covered under Oakland's Tenant Protection Ordinance (O.M.C.8.22.600, et seq.)?**

Answer: Yes, if the unit was created before the adoption of the Tenant Protection Ordinance on November 5, 2014.

IX. MORATORIUMS, RED-TAGGING, VACATION OF BUILDINGS

- 1. Can the City place a moratorium on evictions from non-conforming units?**

Answer: No.

- 2. Can the City place a moratorium on "red-tagging" properties?**

Answer: No.

- 3. Does the City always order immediate vacation of all units that are non-conforming?**

Answer: No. The City's Building Official assesses the seriousness of life safety issues at the property and decides on a course of action. If the condition of the property represents an imminent hazard to the safety of persons at the property or the surrounding properties; the Building Official can red tag- the property and order the property vacated generally within 72 hours, but in some cases can order immediate vacation. If the hazards are cured, the red-tag is lifted and the property can be reoccupied.

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4. What happens if the property is not an immediate hazard to safety, but still has serious code or other violations?

Answer: If the property is not an immediate hazard to safety, the Building Official typically orders the property owner to cure the violations through a compliance plan in accordance with the Mayor's Executive Order 2017-1 regarding non-permitted spaces. Some of these violations may be building code violations, work performed without permits, zoning violations (use not allowed without proper zoning permits or not allowed by the zoning at all). The property owner must enter into the compliance plan within sixty (60) days of the order.

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