
**CITY OF ALBUQUERQUE
CITY COUNCIL**

INTEROFFICE MEMORANDUM

TO: Timothy M. Keller, Mayor

FROM: Stephanie M. Yara, Director of Council Services *my 6/19/20*

SUBJECT: Transmittal of Legislation

Transmitted herewith is Bill No. O-20-19 Amending Chapter 2, Article 9, Part 1 Of The Revised Ordinances Of Albuquerque, "Civil Emergency Powers," To Add New Sections Creating The Albuquerque Emergency Anti-Price Gouging Ordinance (Benton and Sena, by request), which was passed at the Council meeting of June 15, 2020 by a vote of 9 FOR AND 0 AGAINST.

In accordance with the provisions of the City Charter, your action is respectfully requested.

CITY of ALBUQUERQUE
TWENTY FOURTH COUNCIL

COUNCIL BILL NO. 0-20-19

ENACTMENT NO. 0-2020-020

SPONSORED BY: Isaac Benton and Lan Sena, by request

ORDINANCE

AMENDING CHAPTER 2, ARTICLE 9, PART 1 OF THE REVISED ORDINANCES OF ALBUQUERQUE, "CIVIL EMERGENCY POWERS," TO ADD NEW SECTIONS CREATING THE ALBUQUERQUE EMERGENCY ANTI-PRICE GOUGING ORDINANCE.

BE IT ORDAINED BY THE CITY COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:

SECTION 1. Chapter 2 ROA 1994 is amended to renumber and replace Section 2-9-1-8 and add Sections 2-9-1-9 through Section 2-9-1-17, the Albuquerque Emergency Anti-Price Gouging Ordinance, as follows:

§ 2-9-1-8 FINDINGS AND INTENT.

The City Council finds that, pursuant to Chapter 2, Article 9 ROA 1994 et seq., during a declared state of emergency, it is in the public interest to prohibit price gouging in the conduct of any trade or commerce in the City. During times of emergency, some sellers may take unfair advantage of consumers by greatly increasing prices for vital goods and services. The City Council also finds that, during times of emergency, the public health, safety, and welfare are best served when the community unites to protect and serve all Albuquerque residents, including our most vulnerable populations. Price gouging during an emergency must not put vital goods and services, such as food, medicine, and emergency supplies, out of the reach of the Albuquerque residents who need them.

While under ordinary conditions the pricing of consumer goods and services is generally best left to the marketplace, when abnormal disruptions of the market result from a declared state of emergency, the public interest

1 requires that excessive and unjustified increases in the prices of vital goods
2 and services be prohibited, pursuant to Chapter 2, Article 9 ROA 1994 et. seq.

3 The City Council finds that an anti-price gouging ordinance will protect the
4 City of Albuquerque and its residents from excessive and unjustified
5 increases in the prices charged for goods and services that are vital and
6 necessary to the health, safety, or welfare of consumers during or shortly after
7 a declared state of emergency.

8 **§ 2-9-1-9 SHORT TITLE.**

9 These sections shall be referred to as the "Albuquerque Emergency Anti-
10 Price Gouging Ordinance" and may sometimes be referred to herein as "the
11 anti-price gouging ordinance."

12 **§ 2-9-1-10 DEFINITIONS.**

13 For purposes of the anti-price gouging ordinance, the following terms shall
14 have the stated meaning unless the context clearly requires a different
15 meaning:

16 **PERSON.** Any person, agent, firm, partnership, association, corporation,
17 company, organization, or entity of any kind, except a governmental body or
18 entity.

19 **TRADE OR COMMERCE** has the meaning it has under NMSA 1978, § 57-12-
20 2 and as New Mexico regulation or case law has interpreted the term(s) under
21 NMSA 1978, Chapter 57 and includes the advertising, offering for sale or
22 distribution of any services and any property and any other article,
23 commodity, or thing of value, including any trade or commerce directly or
24 indirectly affecting the people of the City of Albuquerque.

25 **CITY ATTORNEY.** The City Attorney or their attorney designee.

26 **ENFORCEMENT AUTHORITY.** A Zoning Enforcement Officer, as defined
27 under Chapter 14, Article 16, Part 6, Section 2(B)(1)(c) ROA 1994, other City
28 Planning Department personnel, including, but not limited to, Building Safety
29 personnel; Environmental Health Department personnel; the Fire Marshal or
30 their authorized personnel; and other City personnel designated by the City
31 Attorney to conduct inspections and related duties pursuant to the anti-price
32 gouging ordinance.

33 **§ 2-9-1-11 PRICE GOUGING PROHIBITED.**

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1 Upon the declaration of a state of emergency by the federal government,
2 the Governor of New Mexico, or the Mayor of the City of Albuquerque, or any
3 extension thereof, and for a period of 30 days following the last date of
4 termination of any such declared state of emergency, it is unlawful for any
5 person to sell or offer to sell any consumer good, or provide any service,
6 including, but not limited to, food items or goods, goods or services used for
7 emergency cleanup, emergency supplies, medicine, medical supplies,
8 sanitation supplies, personal hygiene products, home heating oil, firewood,
9 heating or cooling device or related energy source material, building
10 materials, radios and other communication devices, batteries, generators,
11 housing, transportation, freight, storage services, gasoline, or other motor
12 fuels:

- 13 A. For a price of more than 20 percent greater than the price charged by
14 that person for those goods or services immediately prior to the first
15 declaration of emergency; or
16 B. If the person did not sell such goods or provide such services within
17 the 60-day period immediately preceding the date of the first
18 declaration of emergency, for a price of more than 20 percent greater
19 than the average price in the local Albuquerque market immediately
20 prior to the first declaration of emergency.

21 § 2-9-1-12 EXCEPTIONS.

22 A price increase otherwise barred by Section 2-9-1-11 is not unlawful if that
23 person can prove by a preponderance of the evidence that the increase in
24 price is no more than 20 percent greater than the total of the cost to such
25 person selling, plus the markup customarily applied by such person selling
26 that good or service in the usual course of business, immediately prior to the
27 first state of emergency declaration:

28 A. And was directly attributable to:

- 29 1. Additional costs imposed on it by the supply chain;
30 2. Additional costs for labor and materials used to provide the
31 services;
32 3. Another market force over which the person does not exercise
33 control; or

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- 1 4. Any combination thereof; or
- 2 B. The City Economist or their designee documents their finding that,
- 3 for reasons of public health, safety, or welfare, it is in the best
- 4 interests of the City of Albuquerque and its residents to pay the price
- 5 currently offered by the seller.

6 § 2-9-1-13 CIVIL INVESTIGATIVE DEMAND.

- 7 A. Whenever the City Attorney believes that any person may be in
- 8 possession, custody, or control of any document that the City
- 9 Attorney believes to be relevant to the investigation of a probable
- 10 violation of the anti-price gouging ordinance, the City Attorney may
- 11 execute in writing and cause to be served upon the person a civil
- 12 investigative demand. A “document” includes, but is not limited to,
- 13 an original or copy of any book, record, recording, report,
- 14 memorandum, paper, communication, tabulation, map, chart,
- 15 photograph, mechanical transcription, or any other tangible or
- 16 electronic document or recording.
- 17 B. At the City Attorney’s sole discretion, the City Attorney may serve a
- 18 civil investigative demand prior to issuance of a warning letter or
- 19 notice of violation, in conjunction with issuance of a warning letter or
- 20 notice of violation, or prior to the institution of a civil proceeding.
- 21 C. A civil investigative demand requires the person to produce
- 22 documentary or electronic material and permit the inspection and
- 23 copying of the material. The demand of the City Attorney shall not be
- 24 a matter of public record and shall not be published except by order
- 25 of the court.
- 26 D. Each demand shall:
 - 27 1. State the general subject matter of the investigation;
 - 28 2. Describe the classes of documentary and electronic material
 - 29 to be produced with reasonable certainty;
 - 30 3. Prescribe the return date within which the documentary and
 - 31 electronic material is to be produced, which in no case shall
 - 32 be less than ten days after the date of service; and

- 1 4. Identify the members of the City Attorney's staff to whom such
- 2 documentary and electronic material is to be made available
- 3 for inspection and copying.

4 E. No demand shall:

- 5 1. Contain any requirement that would be unreasonable or
- 6 improper if contained in a subpoena duces tecum issued by a
- 7 court of this state;
- 8 2. Require the disclosure of any documentary or electronic
- 9 material that would be privileged, or that for any other reason
- 10 would not be required by a subpoena duces tecum issued by a
- 11 court of this state; or
- 12 3. Require the removal of any documentary or electronic material
- 13 from the custody of the person upon whom the demand is
- 14 served except in accordance with the provisions of
- 15 Subsection E.

16 F. Service of demand may be made by:

- 17 1. Delivering a duly executed copy thereof to the person to be
- 18 served, or if the person is not a natural person, to the statutory
- 19 agent for the person or to any officer of the person to be
- 20 served;
- 21 2. Delivering a duly executed copy thereof to the principal place
- 22 of business in this state of the person to be served; or
- 23 3. Mailing by registered or certified mail a duly executed copy of
- 24 the demand addressed to the person to be served at their
- 25 principal place of business in this state, or, if the person has
- 26 no place of business in this state, to their principal office or
- 27 place of business.

- 28 G. Documentary and electronic material demanded pursuant to the
- 29 provisions of this Section 2-9-1-13 shall be produced for inspection
- 30 and copying during normal business hours at the principal office or
- 31 place of business of the person served or may be inspected and
- 32 copied at such other times and places as may be agreed upon by the
- 33 person served and the City Attorney.

- 1 H. No documentary or electronic material produced pursuant to a
2 demand, or copies thereof, shall, unless otherwise ordered by the
3 district court in the county in which the person resides or has his
4 principal place of business, or is about to perform or is performing
5 the trade or commerce method, act, or practice that is alleged to be
6 unlawful under the anti-price gouging ordinance, for good cause
7 shown, be produced for inspection or copying by anyone other than
8 an authorized employee of the City Attorney, nor shall the contents
9 thereof be disclosed to anyone other than an authorized employee of
10 the City Attorney, or in court in an action relating to a violation of the
11 anti-price gouging ordinance.
- 12 I. At any time before the return date of the demand, a petition to set
13 aside the demand, modify the demand, or extend the return date
14 thereon may be filed in the district court in the county in which the
15 person resides or has their principal place of business, or is about to
16 perform or is performing the trade or commerce method, act, or
17 practice that is alleged to be unlawful under the anti-price gouging
18 ordinance, and the court upon a showing of good cause may set
19 aside the demand, modify it, or extend the return date of the demand.
- 20 J. After service of the investigative demand upon them, if any person
21 neglects or refuses to comply with the demand, the City Attorney
22 may invoke the aid of the court in the enforcement of the demand. In
23 appropriate cases, the court shall issue its order requiring the
24 person to appear and produce the documentary and electronic
25 material required in the demand and may upon failure of the person
26 to comply with the order punish the person for contempt.
- 27 K. This section shall not be applicable to criminal prosecutions.

28 **§ 2-9-1-14 ENFORCEMENT**

29 **A. *Enforcement.***

- 30 1. ***Police Powers.*** Any person violating the anti-price gouging
31 ordinance is subject to the home rule and police powers of the
32 City to adopt and enforce ordinances necessary to the safety,
33 health, and welfare of the public. Any conflict between the

1 provisions of the anti-price gouging ordinance and any other
2 present or future lawful exercise of the City's police powers
3 shall be resolved in favor of the latter.

- 4 2. In addition to issuance of a civil investigative demand, as set
5 forth in Section 2-9-1-13, the City Attorney is authorized to
6 undertake such activities as are reasonable and necessary to
7 enforce the anti-price gouging ordinance. At the option of the
8 City Attorney, the City Attorney may initiate enforcement with
9 a civil investigative demand, Notice of Violation, or in a court
10 of competent jurisdiction.
- 11 3. *Compliance Inspections.* The City Attorney shall designate the
12 Enforcement Authority to conduct compliance inspections and
13 related duties pursuant to the anti-price gouging ordinance as
14 follows:

15 a) *Undisclosed Inspections.*

- 16 i. The Enforcement Authority may conduct an
17 undisclosed inspectorial search of the public areas
18 of a building, premises, or vehicle(s) at all
19 reasonable times, including during business hours.

20 b) *Consensual Inspections.*

- 21 i. The Enforcement Authority may conduct an
22 inspectorial search, with the voluntary consent of
23 an occupant or custodian of the building, premises,
24 or vehicle(s) to be inspected, who reasonably
25 appears to the Enforcement Authority to be in
26 control of the of the building, premises, or
27 vehicle(s) to be inspected, or who is otherwise
28 authorized to give such consent.
- 29 ii. Before requesting consent for an inspectorial
30 search, the Enforcement Authority shall inform the
31 person to whom the request is directed of the
32 authority under and purposes for which the
33 inspection is to be made and shall, upon demand,

1 exhibit an identification card or official City
2 document evidencing their authority to make such
3 inspections.

4 iii. Inspections undertaken pursuant to this
5 Subsection shall be carried out with due regard for
6 the convenience and privacy of the occupants, and
7 during the daytime unless, because of the nature of
8 the premises, the convenience of the occupants,
9 the nature of the possible violation or other
10 circumstances, there is a reasonable basis for
11 carrying out the inspection at night.

12 iv. Unless advance notice would be likely to cause the
13 suspected violation to be temporarily eliminated so
14 as to frustrate enforcement, notice of the purpose
15 and approximate time of an inspectorial search of
16 an area not open to the general public shall be sent
17 to the occupants or custodians of the building,
18 premises, or vehicle(s).

19 c) *Nonconsensual Inspections.*

20 i. Upon sufficient showing that required consent to
21 an inspectorial search has been refused or is
22 otherwise unobtainable within a reasonable period
23 of time, the City Attorney may make application to
24 the applicable district court for an inspection
25 order/search warrant. Such application shall be
26 made to a district court having jurisdiction over the
27 building, premises or vehicle(s) to be searched.
28 Such application shall set forth the following
29 information:

30 A. The particular building, premises,
31 vehicle(s), or portion of a building,
32 premises, or vehicle(s) sought to be
33 inspected.

- B. That the owner or occupant of the building, premises, or vehicle(s) has refused entry.
 - C. That inspection of the building, premises, or vehicle(s) is necessary to determine whether they comply with the requirements of the anti-price gouging ordinance.
 - D. Any other reason necessitating the inspection, including knowledge or belief that a particular method, act, or practice is occurring in the building or vehicle(s) or on the premises that is a violation of the anti-price gouging ordinance.
 - E. That the Enforcement Authority is authorized by the City to make the inspection.
 - ii. The application shall be granted and the inspection order/search warrant issued upon a sufficient showing that inspection in the area where the building, premises, or vehicle(s) in question are located, or inspection of the particular building, premises, or vehicle(s), is in accordance with reasonable legislative or administrative standards, and that the circumstances of the particular inspection for which application is made are otherwise reasonable. The district court shall make and keep a record of the proceedings on the application and enter thereon its finding in accordance with the requirements of the anti-price gouging ordinance.
 - iii. After execution of the inspection order/search warrant or after unsuccessful efforts, as the case may be, the City Attorney shall return the inspection order/search warrant to the district court

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with a sworn report of the circumstances of
execution or failure to execute.

d) ***Disclaimer.*** The anti-price gouging ordinance shall not
be construed to hold the City or its authorized
representatives responsible for any damage to
persons or property by reason of the inspection or
reinspection authorized hereunder, or failure to
inspect or reinspect, or the issuance of any
registration, license, or permit, or other adopted City
instructions, rules, or regulations.

4. ***Warning Letter.*** In the interests of efficiency, prompt
compliance, and settlement, in the sole discretion of the City
Attorney, if the City Attorney has reason to believe any person
has violated or is violating any provision of the anti-price
gouging ordinance, the City Attorney may issue a Warning
Letter to such person(s). No person is entitled to a Warning
Letter, and Warning Letters are not subject to appeal.

5. ***Notice of Violation.*** The City Attorney may issue a Notice of
Violation to any person who violates any provision of the anti-
price gouging ordinance. The person may be given an
opportunity to respond to the Notice and correct the violation
within ten (10) days, or in a reasonable amount of time, as
determined by the City Attorney.

a) Any person having any title or legal interest in the
person the City Attorney found violated the anti-price
gouging ordinance may appeal from the Notice of
Violation, or any action of the City Attorney or
Enforcement Authority, other than a Warning Letter, to
the Independent Office of Hearings, pursuant to
Chapter 2, Article 7, Part 8 ROA 1994 et seq., provided
that the appeal is made in writing and filed within (10)
ten days of service of the Notice of Violation. Failure to

1 timely appeal the Notice of Violation makes the Notice
2 effective.

3 **6. *Civil Fines and Business License.***

4 a) The City Attorney, in their sole discretion, may impose
5 civil fines, civil penalties, and other remedies.

6 b) *Civil Fine.* Any person(s) violating the anti-price
7 gouging ordinance shall be subject the following
8 provisions:

9 i. Each sale or offer in violation of the anti-price
10 gouging ordinance is considered a separate
11 offense;

12 ii. Any person who violates any provision of the anti-
13 price gouging ordinance shall be subject to a civil
14 fine not exceeding \$500;

15 c) *Business Registration, License, and Permit.*

16 i. The City will not grant or renew a business
17 registration, business license, or business permit
18 for a person engaged in trade or commerce in
19 violation of the anti-price gouging ordinance.

20 ii. The City Attorney may revoke the business
21 registration, business license, or business permit
22 of a person the City Attorney, Hearing Officer, or
23 court has previously found to be in violation of the
24 anti-price gouging ordinance and who has failed to
25 comply with such order of the City Attorney,
26 Hearing Officer, or court.

27 iii. EXCEPTION: If a person has come into compliance
28 with the anti-price gouging ordinance, then the City
29 may grant, renew, or restore the requested
30 business registration, business license, or
31 business permit, so long as the person meets all
32 other business registration, business license, and
33 business permit requirements.

1 7. *Civil Proceeding.* Violation of anti-price gouging ordinance will
2 not result in criminal prosecution.

3 § 2-9-1-15 APPEAL / ADMINISTRATIVE HEARING PROCEDURE

4 A. *General*

5 1. Any person seeking an appeal under the anti-price gouging
6 ordinance shall do so by adhering to the procedures
7 established for the Independent Office of Hearings at Chapter
8 2, Article 7, Part 8 ROA 1994 et seq.

9 B. *Enforcement of the Order of the City Attorney or the Hearing Officer.*

10 1. *Compliance.*

11 a) *General.* After any order of the City Attorney or
12 Hearing Officer made pursuant to the anti-price
13 gouging ordinance shall have become final, no person
14 to whom an order is directed shall fail, neglect, or
15 refuse to obey such order.

16 b) Any person who fails to comply with any such order is
17 subject to a civil penalty of \$500.

18 c) *Failure to Obey Order.* If, after any order of the City
19 Attorney or Hearing Officer made pursuant to the anti-
20 price gouging ordinance has become final, the person
21 to whom such order is directed shall fail, neglect, or
22 refuse to obey such order, the City Attorney may:

23 i. File a motion to show cause before the Independent
24 Office of Hearings within 60 calendar days. If the
25 Hearing Officer determines that there is good
26 cause, the Hearing Officer shall notice a show
27 cause hearing and convene all parties. The show
28 cause hearing will be conducted in substantially
29 the same manner as an appeal hearing. If the
30 Hearing Officer determines that there is substantial
31 evidence that the person(s) to whom the order is
32 directed has failed, neglected, or refused to obey
33 such order, then the Hearing Officer shall order that

1 such person must pay a civil penalty not to exceed
2 \$500 plus an additional \$100 for each month after
3 the date of the original order that such person
4 failed, neglected, or refused to obey. The total civil
5 penalty shall be paid to the City of Albuquerque in
6 the manner required by the Hearing Officer.

7 ii. *Remedies in Court.* The City, acting through the
8 City Attorney, may file an action in a court of
9 competent jurisdiction to enforce an order of the
10 City Attorney or Hearing Officer. Remedies may
11 include, but are not limited to:

- 12 A. Enjoinment of any person violating the
13 provisions of the anti-price gouging
14 ordinance;
15 B. Other temporary or permanent injunctive
16 relief;
17 C. Recovery of civil fines and civil penalties;
18 and
19 D. Restitution on behalf of persons who have
20 been harmed by the price gouging method,
21 act, or practice.

22 **§ 2-9-1-16 RESTRAINT OF PROHIBITED ACTS; REMEDIES FOR VIOLATIONS.**

23 A. Whenever the City Attorney has reasonable belief that any person is
24 using or has used any trade or commerce method, act, or practice
25 that is unlawful under the anti-price gouging ordinance, and that
26 proceedings would be in the public interest, they may bring an action
27 in the name of the City alleging violations of the anti-price gouging
28 ordinance. The action may be brought in the district court of the
29 county in which the person resides or has their principal place of
30 business or in the district court in any county in which the person is
31 using or has used the trade or commerce method, act, or practice
32 alleged to be unlawful under the anti-price gouging ordinance. The
33 City Attorney acting on behalf of the City of Albuquerque shall not be

1 required to post bond when seeking a temporary or permanent
2 injunction in such action.

- 3 B. In any action filed pursuant to the anti-price gouging ordinance, the
4 City Attorney may petition the district court for temporary or
5 permanent injunctive relief, civil fines, civil penalties, restitution, and
6 all other remedies provided by law or equity.

7 § 2-9-1-17 EXCLUSIONS

- 8 A. *No Private Right of Action or Interference.* Nothing in the anti-price
9 gouging ordinance shall be construed to create a private right of
10 action or preempt, otherwise limit, or affect a private right of action
11 not arising from the anti-price gouging ordinance. Nothing in the
12 anti-price gouging ordinance shall be construed to preempt,
13 otherwise limit, or affect the applicability of any other law, regulation,
14 rule, requirement, policy, or standard.
- 15 B. *Non-Limitation of Authority.* The remedies provided under the anti-
16 price gouging ordinance are not exclusive but are supplemental to
17 all other remedies provided by law or equity.
- 18 C. *Severability Clause.* If any section, paragraph, sentence, clause,
19 word, or phrase of the anti-price gouging ordinance is for any reason
20 held to be invalid or unenforceable by any court of competent
21 jurisdiction, such decision shall not affect the validity of the
22 remaining provisions of the anti-price gouging ordinance. The
23 Council hereby declares that it would have passed this ordinance
24 and each section, paragraph, sentence, clause, word, or phrase
25 thereof irrespective of any provision being declared unconstitutional
26 or otherwise invalid.
- 27 D. *Compilation.* This ordinance shall amend, be incorporated in and
28 compiled as part of the Revised Ordinances of Albuquerque, New
29 Mexico, 1994.
- 30 E. *Effective Date.* This ordinance shall take effect seven (7) days after
31 publication by title and general summary.

32 § 2-9-1-18 NON LIMITATION OR INTERFERENCE WITH OTHER AUTHORITY

1 Nothing herein is intended to limit the power or authority of the Mayor with
2 respect to the control and management of the City resources and facilities that
3 generally exists even outside the existence of an emergency. However,
4 notwithstanding the emergency powers authorized herein, closures or
5 limitations for any office or place of gathering or meeting necessary for
6 carrying out the business of the City Council may occur only by order of the
7 City Council.

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1 PASSED AND ADOPTED THIS 15th DAY OF June, 2020
2 BY A VOTE OF: 9 FOR 0 AGAINST.

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10 Patrick Davis, President
11 City Council
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14 APPROVED THIS 26 DAY OF June, 2020
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17 Bill No. O-20-19

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23 Timothy M. Keller, Mayor
24 City of Albuquerque
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28 ATTEST:

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31 Ethan Watson, City Clerk
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