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Title: 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)
Sponsors: Isaac Benton (By Request)
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6/1/2020	1	President	To be heard at the Council Meeting	

CITY of ALBUQUERQUE
TWENTY FOURTH COUNCIL

COUNCIL BILL NO. O-20-19 ENACTMENT NO. _____

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 (Benton and Sena, by request)

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

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

§ 2-9-1-9 SHORT TITLE.

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

§ 2-9-1-10 DEFINITIONS.

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

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

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

CITY ATTORNEY. The City Attorney or their attorney designee.

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

§ 2-9-1-11 PRICE GOUGING PROHIBITED.

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

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

§ 2-9-1-12 EXCEPTIONS.

A price increase otherwise barred by Section 2-9-1-11 is not unlawful if that person can prove by a preponderance of the evidence that the increase in price is no more than 20 percent greater than the total of the cost to such person selling, plus the markup customarily applied by such

person selling that good or service in the usual course of business, immediately prior to the first state of emergency declaration:

- A. And was directly attributable to:
 - 1. Additional costs imposed on it by the supply chain;
 - 2. Additional costs for labor and materials used to provide the services;
 - 3. Another market force over which the person does not exercise control; or
 - 4. Any combination thereof; or
- B. The City Economist or their designee documents their finding that, for reasons of public health, safety, or welfare, it is in the best interests of the City of Albuquerque and its residents to pay the price currently offered by the seller.

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

- A. Whenever the City Attorney believes that any person may be in possession, custody, or control of any document that the City Attorney believes to be relevant to the investigation of a probable violation of the anti-price gouging ordinance, the City Attorney may execute in writing and cause to be served upon the person a civil investigative demand. A “document” includes, but is not limited to, an original or copy of any book, record, recording, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or any other tangible or electronic document or recording.
- B. At the City Attorney’s sole discretion, the City Attorney may serve a civil investigative demand prior to issuance of a warning letter or notice of violation, in conjunction with issuance of a warning letter or notice of violation, or prior to the institution of a civil proceeding.
- C. A civil investigative demand requires the person to produce documentary or electronic material and permit the inspection and copying of the material. The demand of the City Attorney shall not be a matter of public record and shall not be published except by order of the court.
- D. Each demand shall:
 - 1. State the general subject matter of the investigation;
 - 2. Describe the classes of documentary and electronic material to be produced with reasonable certainty;
 - 3. Prescribe the return date within which the documentary and electronic material is

to be produced, which in no case shall be less than ten days after the date of service; and

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

E. No demand shall:

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

F. Service of demand may be made by:

1. Delivering a duly executed copy thereof to the person to be served, or if the person is not a natural person, to the statutory agent for the person or to any officer of the person to be served;
2. Delivering a duly executed copy thereof to the principal place of business in this state of the person to be served; or
3. Mailing by registered or certified mail a duly executed copy of the demand addressed to the person to be served at their principal place of business in this state, or, if the person has no place of business in this state, to their principal office or place of business.

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

H. No documentary or electronic material produced pursuant to a demand, or copies thereof, shall, unless otherwise ordered by the district court in the county in which the person resides or has his principal place of business, or is about to perform or is performing the trade or commerce method, act, or practice that is alleged to be unlawful

under the anti-price gouging ordinance, for good cause shown, be produced for inspection or copying by anyone other than an authorized employee of the City Attorney, nor shall the contents thereof be disclosed to anyone other than an authorized employee of the City Attorney, or in court in an action relating to a violation of the anti-price gouging ordinance.

- I. At any time before the return date of the demand, a petition to set aside the demand, modify the demand, or extend the return date thereon may be filed in the district court in the county in which the person resides or has their principal place of business, or is about to perform or is performing the trade or commerce method, act, or practice that is alleged to be unlawful under the anti-price gouging ordinance, and the court upon a showing of good cause may set aside the demand, modify it, or extend the return date of the demand.
- J. After service of the investigative demand upon them, if any person neglects or refuses to comply with the demand, the City Attorney may invoke the aid of the court in the enforcement of the demand. In appropriate cases, the court shall issue its order requiring the person to appear and produce the documentary and electronic material required in the demand and may upon failure of the person to comply with the order punish the person for contempt.
- K. This section shall not be applicable to criminal prosecutions.

§ 2-9-1-14 ENFORCEMENT

A. *Enforcement.*

1. *Police Powers.* Any person violating the anti-price gouging ordinance is subject to the home rule and police powers of the City to adopt and enforce ordinances necessary to the safety, health, and welfare of the public. Any conflict between the provisions of the anti-price gouging ordinance and any other present or future lawful exercise of the City's police powers shall be resolved in favor of the latter.
2. In addition to issuance of a civil investigative demand, as set forth in Section 2-9-1-13, the City Attorney is authorized to undertake such activities as are reasonable and necessary to enforce the anti-price gouging ordinance. At the option of the City Attorney, the City Attorney may initiate enforcement with a civil investigative demand, Notice of Violation, or in a court of competent jurisdiction.

3. *Compliance Inspections.* The City Attorney shall designate the Enforcement Authority to conduct compliance inspections and related duties pursuant to the anti-price gouging ordinance as follows:

a) *Undisclosed Inspections.*

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

b) *Consensual Inspections.*

i. The Enforcement Authority may conduct an inspectorial search, with the voluntary consent of an occupant or custodian of the building, premises, or vehicle(s) to be inspected, who reasonably appears to the Enforcement Authority to be in control of the of the building, premises, or vehicle(s) to be inspected, or who is otherwise authorized to give such consent.

ii. Before requesting consent for an inspectorial search, the Enforcement Authority shall inform the person to whom the request is directed of the authority under and purposes for which the inspection is to be made and shall, upon demand, exhibit an identification card or official City document evidencing their authority to make such inspections.

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

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

c) *Nonconsensual Inspections.*

- i. Upon sufficient showing that required consent to an inspectorial search has been refused or is otherwise unobtainable within a reasonable period of time, the City Attorney may make application to the applicable district court for an inspection order/search warrant. Such application shall be made to a district court having jurisdiction over the building, premises or vehicle(s) to be searched. Such application shall set forth the following information:
 - A. The particular building, premises, vehicle(s), or portion of a building, premises, or vehicle(s) sought to be 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 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 timely appeal the Notice of Violation makes the Notice effective.
6. *Civil Fines and Business License.*
- a) The City Attorney, in their sole discretion, may impose civil fines, civil penalties, and other remedies.
- b) *Civil Fine.* Any person(s) violating the anti-price gouging ordinance shall be subject the following provisions:

- i. Each sale or offer in violation of the anti-price gouging ordinance is considered a separate offense;
- ii. Any person who violates any provision of the anti-price gouging ordinance shall be subject to a civil fine not exceeding \$500;
- c) *Business Registration, License, and Permit.*
 - i. The City will not grant or renew a business registration, business license, or business permit for a person engaged in trade or commerce in violation of the anti-price gouging ordinance.
 - ii. The City Attorney may revoke the business registration, business license, or business permit of a person the City Attorney, Hearing Officer, or court has previously found to be in violation of the anti-price gouging ordinance and who has failed to comply with such order of the City Attorney, Hearing Officer, or court.
 - iii. EXCEPTION: If a person has come into compliance with the anti-price gouging ordinance, then the City may grant, renew, or restore the requested business registration, business license, or business permit, so long as the person meets all other business registration, business license, and business permit requirements.

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

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

A. *General*

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

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

1. *Compliance.*

- a) *General.* After any order of the City Attorney or Hearing Officer made pursuant to the anti-price gouging ordinance shall have become final, no person to whom an order is directed shall fail, neglect, or refuse to obey such order.
- b) Any person who fails to comply with any such order is subject to a

civil penalty of \$500.

- c) *Failure to Obey Order.* If, after any order of the City Attorney or Hearing Officer made pursuant to the anti-price gouging ordinance has become final, the person to whom such order is directed shall fail, neglect, or refuse to obey such order, the City Attorney may:
- i. File a motion to show cause before the Independent Office of Hearings within 60 calendar days. If the Hearing Officer determines that there is good cause, the Hearing Officer shall notice a show cause hearing and convene all parties. The show cause hearing will be conducted in substantially the same manner as an appeal hearing. If the Hearing Officer determines that there is substantial evidence that the person(s) to whom the order is directed has failed, neglected, or refused to obey such order, then the Hearing Officer shall order that such person must pay a civil penalty not to exceed \$500 plus an additional \$100 for each month after the date of the original order that such person failed, neglected, or refused to obey. The total civil penalty shall be paid to the City of Albuquerque in the manner required by the Hearing Officer.
 - ii. *Remedies in Court.* The City, acting through the City Attorney, may file an action in a court of competent jurisdiction to enforce an order of the City Attorney or Hearing Officer. Remedies may include, but are not limited to:
 - A. Enjoinment of any person violating the provisions of the anti-price gouging ordinance;
 - B. Other temporary or permanent injunctive relief;
 - C. Recovery of civil fines and civil penalties; and
 - D. Restitution on behalf of persons who have been harmed by the price gouging method, act, or practice.

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

- A. Whenever the City Attorney has reasonable belief that any person is using or has used any trade or commerce method, act, or practice that is unlawful under the anti-price gouging ordinance, and that proceedings would be in the public interest, they may bring

an action in the name of the City alleging violations of the anti-price gouging ordinance. The action may be brought in the district court of the county in which the person resides or has their principal place of business or in the district court in any county in which the person is using or has used the trade or commerce method, act, or practice alleged to be unlawful under the anti-price gouging ordinance. The City Attorney acting on behalf of the City of Albuquerque shall not be required to post bond when seeking a temporary or permanent injunction in such action.

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

§ 2-9-1-17 EXCLUSIONS

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

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

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

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