



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: June 16, 2020
TO: Mayor Patz and Members of the City Council
FROM: Michael Guina, City Attorney
SUBJECT: **An Ordinance Of The City Council Of The City Of Emeryville To Require Landlords To Provide A Repayment Plan For Rent In Arrears To Commercial Food Establishments Impacted By COVID-19 Emergency; CEQA Determination: Exempt Pursuant to California Public Resources Code Section 21080(b)(4) and State CEQA Guidelines 15269(c) and 15061(b)(3)**

RECOMMENDATION

Staff recommends that the City Council adopt the second reading of the above-referenced ordinance to mitigate the impacts from the COVID-19 pandemic.

BACKGROUND

COVID-19¹

The United States of America has confirmed cases of individuals who have a severe acute respiratory illness caused by a novel (new) corona virus ("COVID-19" or "the virus") first detected in Wuhan, Hubei Province, People's Republic of China ("China"). The virus was first reported in China on December 31, 2019. As of March 2, 2020, the World Health Organization ("WHO") had reported more than 3,000 deaths stemming from over 100,000 confirmed cases of COVID-19 and the virus is present in 100 countries. The number of confirmed cases has continued to escalate dramatically over a short period of time.

WHO officials now report that sustained human-to-human transmission of the virus is occurring. Transmission from asymptomatic individuals has been documented. Suspected community transmission of the virus is occurring in the United States. Although the majority of individuals infected with COVID-19 recover from the disease without special treatment, there is significant potential for serious infection and death.

On January 30, 2020, WHO declared the COVID-19 outbreak a public health emergency of international concern, and on January 31, 2020, the U.S. Department of Health and Human Services declared a Public Health Emergency for the United States of America. The United States Centers for Disease Control and Prevention (CDC) has determined that the virus presents a serious public health threat, requiring coordination among state and local health departments to ensure readiness for potential health threats associated with the virus. On March 4, 2020, the Governor of California proclaimed a state of

¹ Information presented in this subsection is derived from information made publicly available by the Centers for Disease Control, Alameda County Department of Public Health, and the State of California.

emergency to exist in California as a result of the threat of COVID-19. On March 19, 2020, the Governor issued Executive Order N-33-20, ordering all Californians to stay at home, except to maintain continuity of critical infrastructure. Critical infrastructure includes the Food and Agriculture sector, which includes food service establishments. In addition, Executive Order N-33-20 acknowledges that despite the stay at home order, Californians must also have access to basic necessities such as food.

On March 7, 2020, the California Department of Public Health issued its “Mass Gatherings Guidance on Novel Coronavirus or COVID-19” followed by a March 12, 2020 recommendation that certain gatherings in California be postponed or canceled for the remainder of March. On March 12, 2020, the Governor of the State of California issued Executive Order N-25-20 which, among other things, orders that all California residents are to “. . . heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19”. On March 16, 2016, the California Department of Public Health issued a directive that all individuals who are 65 or older, who have serious chronic medical conditions or who have a compromised immune system should self-isolate during the COVID-19 pandemic as these individuals are particularly at risk of encountering medical complications due to the virus.

On March 16, 2020, based on evidence of increasing occurrence of COVID-19 within Alameda County and throughout the Bay Area, the Alameda County Health Officer, along with Health Officers in five other Bay Area counties, issued an order “directing all individuals living in the County to shelter at their place of residence...directing all businesses and governmental agencies to cease non-essential operations at physical locations in the County; prohibiting all non-essential gatherings of any number of individuals; and ordering cessation of all non-essential travel”. On March 16, 2020 the Alameda County Director of Emergency Services also declared a local emergency based on conditions of extreme peril to the safety of persons and property within the County from the introduction of a novel coronavirus (named COVID-19) in the County. On March 31, 2020, the Alameda County Health Officer issued another shelter in place order to supersede the order issued on March 16, 2020. The order from March 31, 2020, clarified and further limited essential activities from the order issued on March 16, 2020. On April 29, 2020, the Alameda County Health Officer issued another shelter in place order to supersede the order issued on April 31, 2020, and to extend the shelter in place to May 31, 2020. On May 18, 2020, the Alameda County Health Officer issued a revised shelter in place order, which allowed for additional activities outside of an individual's residence but provided the shelter in place order was in place until further notice. As of May 18, 2020, Alameda County has had 2,392 cases of COVID-19, and 83 deaths attributed to COVID-19.

Impacts from COVID-19 and the State of California's Response

With the unprecedented orders and directives from federal, state, and local authorities to practice social distancing measures, which include self-isolation and self-quarantine, Emeryville residents and business owners find themselves isolating in their residences. As a result of the shelter in place orders, the City, the state, and the nation face an

unprecedented economic downturn and uncertainty. In recent weeks, it has become clear that COVID-19 will continue to have a presence in society, and that society must adapt to its presence if there is to be an economic recovery. Accordingly, the State of California has developed a roadmap to ease up on the shelter in place restrictions. The Roadmap provides there are four stages to recovery from the pandemic.² In the first stage, the State is focused on safety and preparedness and only essential business and activities may occur. Emeryville has been in Stage 1 since March 16, 2020. In the fourth stage, the State enters the end of the stay at home order, and business resumes as usual. Stage 4 requires therapeutics to either prevent or completely treat COVID-19. Stage 4 is many months away, if not longer.³ Currently, the State, as well as Alameda County, is transitioning to Stage 2 of the economy, where certain non-essential businesses are allowed to open under restrictions, but residents are still subject to a shelter-in-place order.

On April 24, 2020, Governor Gavin Newsom announced the launch of a state program called “Great Plates Delivered”. The Great Plates Delivered program serves two purposes: 1) “help seniors and other adults at high risk from COVID-19 to stay home and stay healthy by delivering three nutritious meals a day” and 2) “provide essential stimulus to local businesses struggling to stay afloat during the COVID-19 crisis.”⁴ Ensuring that restaurants are able to deliver food to individuals sheltering at home also diversifies food options in a time where COVID-19 is disrupting the food supply chain. Food processing plants have had to temporarily close due COVID-19 outbreaks.⁵ COVID-19 also impacts grocery stores openings by requiring temporary closure if a worker tests positive and limiting hours to ensure adequate cleaning.⁶

Emeryville Action

On March 17, 2020, following the directive of the Alameda County Health Officer, the City of Emeryville closed all City facilities and assigned many employees to work remotely if possible, while maintaining public safety and some public works operations as “Essential Governmental Functions”. On March 17, 2020, in light of actual or threatened conditions of disaster or extreme peril to the safety of persons and property have arisen within the City of Emeryville caused by the introduction COVID-19, as to which there is no known

² Update on California’s Pandemic Roadmap. <https://www.gov.ca.gov/wp-content/uploads/2020/04/Update-on-California-Pandemic-Roadmap.pdf>. Last visited on May 16, 2020.

³ Graff, Amy, et al. “Updates: SF Health Director says scientists expect virus to be with us 18-24 months, San Francisco Chronicle, dated May 19, 2020, at <https://www.sfgate.com/news/editorspicks/article/whats-open-in-Bay-Area-orders-county-15280514.php>. Last visited on May 19, 2020.

⁴ <https://covid19.ca.gov/restaurants-deliver-home-meals-for-seniors/>. Last visited on May 18, 2020.

⁵ Presidential Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19, issued April 28, 2020.

⁶ Guerrero, Susana. “Trader Joe’s briefly closes San Francisco location after crew member tests positive for COVID-19”, San Francisco Chronicle, dated May 4, 2020, at <https://www.sfgate.com/food/article/Trader-Joe-s-San-Francisco-SoMa-closes-COVID-19-15245688.php>. Last visited on May 16, 2020. See also Trader Joe’s Announcements, <https://www.traderjoes.com/announcement/trader-joes-stores-that-are-temporarily-closed-related-to-covid19>. Last visited on May 16, 2020.

natural immunity and for which there is currently no vaccine, which has become a pandemic, and which is contributing to a shortage of essential health care supplies, pursuant to section 4-2.08(a)(1) of the Emeryville Municipal Code, the City Manager declared a local emergency. On March 19, 2020, the City Council adopted Resolution No. 20-23 to ratify the City Manager's proclamation of emergency.

In addition, at the special meeting on March 19, 2020, the City Council adopted an urgency ordinance (Ordinance No. 20-002) to establish a moratorium on residential rental evictions, and commercial evictions due to failure to pay rent for commercial tenants impacted by COVID-19. Subsequently, due to modifications to the residential rental eviction moratorium, the City Council adopted urgency Ordinance No. 20-008 on April 7, 2020, and Ordinance No. 20-007 on April 21, 2020, which repealed and replaced Ordinance No. 20-002. Ordinance Nos. 20-007 and -008 modified the moratorium on residential rental evictions and extended the time period for all moratoriums, but otherwise, did not modify the terms of the moratorium on commercial evictions. Under the aforementioned ordinances, affected commercial tenants are still obligated to repay rent that they have not been able to pay during the current City moratorium on commercial evictions for failure to pay rent.

DISCUSSION

Commercial Repayment Ordinance

The purpose of the proposed ordinance is to preserve economic infrastructure and to ensure continuity in food availability from restaurants to the people of Emeryville, thereby serving public peace, health, safety and public welfare. A further purpose of this ordinance is to further Executive Order N-33-20, which requires Californians to shelter in place but allows persons to access basic necessities such as food; this ordinance also furthers the executive order by supporting the Food and Agriculture sector, an identified critical infrastructure component.

The proposed ordinance requires landlords of certain commercial tenants to offer those tenants a repayment plan to repay rent not collected during the City moratorium on commercial evictions for failure to pay rent. Specifically, Ordinance Nos. 20-002, -007 and -008 prohibited a landlord from terminating a lease with an "Affected Commercial Tenant" impacted by the COVID-19 pandemic. Using the same definition as Ordinance Nos. 20-002, -007 and -008 for Affected Commercial Tenant, the proposed ordinance requires a landlord of an Affected Commercial Tenant, which is also a "Food Establishment", to offer a repayment plan to repay the uncollected Base Rent over a twelve month period. "Base Rent" refers to the minimum amount of rent due under a commercial lease. A "Food Establishment" is defined as a restaurant as that term is defined in the City's Planning Regulations. Staff is recommending a twelve-month period for repayment because it is anticipated that the State will not enter Stage 4 in the recovery from the pandemic for many months, if not longer. Until the economy returns to Stage 4, food establishments are not able to operate in the same manner as they did prior to the first shelter-in-place order. Food establishments will need to reconfigure their operations,

which may mean operating at a reduced capacity, to comply with social distancing requirements.

The proposed ordinance requires the landlord to provide notice of the ordinance to its Food Establishment Tenants within 15 days after adoption of the ordinances, if a Landlord has not provided a copy of the urgency ordinance, which the City Council adopted on June 9, 2020 (discussed in further detail below). Thereafter, the landlord must offer a Food Establishment Tenant, which is an Affected Commercial Tenant, a reasonable repayment plan prior to initiating any action to evict the tenant for nonpayment of Base Rent which has accrued during City's Moratorium Ordinance.

The reasonable repayment plan must have a minimum term of twelve months, which may have increasing monthly installments over the term of the repayment plan. The purpose behind providing a choice is that some parties may prefer to have lower monthly payments in the beginning, which escalate as time goes on. However, the proposed ordinances provide that if the parties agree to differing monthly amounts, the successive monthly installments must increase over time; this requirement prevents a landlord from demanding large payments at the beginning of the term, at a time when businesses may not yet have realized any recovery of consumer demand. In no event may the amount of a monthly installment exceed fifteen percent (15%) of the total amount of unpaid Base Rent due. This provision will ensure that no one monthly payment will be unreasonably large.

The proposed ordinance also prohibits a landlord from seeking to recover rent subject to a repayment plan through other means. During the term of the repayment plan, there is a rebuttable presumption that any increase in Additional Rent, as defined in Section 3 of the proposed ordinance, is an effort to recover the rent subject to the repayment plan. There is an exception for increases in rent, whether Base Rent or Additional Rent, that is due to the terms and conditions of the lease, such as automatic increase in rent related to an increase in consumer price index. In addition, the landlord would be able to rebut the presumption that an increase in Additional rent is due to recovery of the unpaid rent subject to the repayment plan, if the Landlord can show the increase in Additional Rent was due to the pass-through of costs to the Landlord.

Urgency and Non-Urgency Ordinances

Staff had recommended that the City Council adopt the proposed regulations as both an urgency and non-urgency ordinance. The current City moratorium on commercial evictions for failure to pay rent expires on June 30, 2020. Assuming that the Council adopted a second reading of an ordinance at its June 16, 2020, regular City Council meeting, the ordinance would not take effect until after the City moratorium expired. In the time period between the moratorium expiring and the ordinance taking effect, a food establishment tenant impacted by COVID-19 pandemic could be evicted for failure to pay rent during the City moratorium, instead of being given the opportunity to cure such a default. Accordingly, staff had recommended that the City Council adopt the proposed regulations as an urgency ordinance. At its June 9, 2020, special meeting, the City Council adopted the proposed regulations as an urgency ordinance (Ordinance No. 20-

010). At that meeting the City Council also unanimously adopted the first reading of the non-urgency ordinance.

Finally, staff is not recommending that the proposed ordinance be codified. First, the applicability of the proposed ordinance will be for a short duration, in the immediate time period after the City Moratorium expires. Second, the proposed ordinance does not anticipate City enforcement. Rather, tenants will be able to assert their rights under the proposed ordinance in any litigation that a landlord commences to remove a Food Establishment Tenant, which is an Affected Commercial Tenant, from the commercial space. The City would not be able to initiate any code enforcement action against the landlord in a timely manner that would provide benefit to a tenant who was facing an eviction. Third, the proposed ordinance is not tied into any existing City program. The City already regulates the relationship between residential landlords and their tenants, which is why the regulations related to repayment plans between residential landlords and their tenants, were adopted as amendments to Chapter 40 of Title 5 of the Emeryville Municipal Code. As a result, City staff does not anticipate issuing any implementing regulations, although Economic Development and Housing Division may issue a frequently asked questions document to assist the public.

FISCAL IMPACT

Existing staff resources will be used to publicize the proposed ordinance, if adopted, and to prepare any technical assistance, such as a frequently asked questions document.

STAFF COMMUNICATION WITH THE PUBLIC

City Attorney's Office has not had any communications with the public over the proposed ordinance. Economic Development and Housing Division informed the EDAC Committee of the City Council's direction to develop the proposed ordinances.

CONCLUSION

Staff recommends that the City Council adopt the second reading of the proposed ordinance.

PREPARED BY: Andrea Visveshwara, Assistant City Attorney

**APPROVED AND FORWARDED TO THE
CITY COUNCIL OF THE CITY OF EMERYVILLE:**



Michael Guina, City Attorney

ATTACHMENTS

- Draft Ordinance