



# City of Emeryville

CALIFORNIA

## MEMORANDUM

**DATE:** March 19, 2020

**TO:** Mayor Patz and Members of the City Council

**FROM:** Michael Guina, City Attorney

**SUBJECT:** **An Urgency Ordinance Of The City Council Of The City Of Emeryville Enacting A Temporary Moratorium On Residential and Commercial Evictions Due to Nonpayment Of Rent And Residential Foreclosures Initiated by Homeowner's Associations Where The Failure To Pay Rent Or Assessments Results From Income Loss Due To The Novel Coronavirus (COVID-19) Pandemic; CEQA Determination: Exempt Pursuant to California Public Resources Code Section 21080(b)(4) and State CEQA Guidelines 15269(c) and 15061(b)(3)**

**An Ordinance Of The City Council Of The City Of Emeryville Enacting A Temporary Moratorium On Residential and Commercial Evictions Due to Nonpayment Of Rent And Residential Foreclosures Initiated by Homeowner's Associations Where The Failure To Pay Rent Or Assessments Results From Income Loss Due To The Novel Coronavirus (COVID-19) Pandemic; 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 above-referenced ordinances to mitigate the impacts from the COVID-19 pandemic (as discussed below). The Urgency Ordinance will be effectively immediately upon adoption by a 4/5 vote of the entire City Council. The companion, non-Urgency Ordinance requires the normal first and second reading and is presented here as a first reading.

### BACKGROUND

#### *COVID-19*<sup>1</sup>

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") has 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.

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<sup>1</sup> 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.

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 emergency to exist in California as a result of the threat of COVID-19.

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 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 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. The City Council will consider ratifying the emergency declaration at its special meeting scheduled for March 19, 2020.

### *Impacts from COVID-19*

With the unprecedented orders and directives from federal, state, and local authorities to practice socially distancing measures, which includes self-isolation and self-quarantine, Emeryville residents and business owners find themselves isolating in their residence. Furthermore, almost all schools are closed, leaving parents having to care for their children at home and thus unable to work if their workplaces are open. While some individuals may be able to work remotely, or are workers and businesses that are considered essential, many individuals and businesses are facing a reduction in household or business income due to closure of businesses deemed non-essential. Even businesses that are deemed essential by the Alameda County Health Department and remain open for business may face substantially reduced revenue due to reduced consumer demand. With reduced income, residents may not be able to afford rent or homeowner association assessments. Commercial businesses may not be able to afford their rent due to dramatic decrease in customer demand due to the shelter in place order and/or because of the non-essential nature of their business, requiring closure to comply with the orders.

### *Governmental Regulation of Residential and Commercial Displacement Due to COVID-19*

Penal Code section 396(f) provides that it is unlawful for any landlord to evict a residential tenant during a government-declared emergency or for 30 days following the conclusion of the emergency. Typically, local governments are constrained in adopting ordinances that regulate the eviction process<sup>2</sup> or foreclosure. However, on March 16, 2020, the Governor of the State of California issued Executive Order N-28-20 suspending any state law that would preempt a local government's authority to impose a moratorium on residential or commercial evictions for those households or businesses whose basis for eviction is nonpayment of rent "arising out of a substantial decrease in household or business income (including, but not limited to, a substantial decrease in household income caused by layoffs or a reduction in the number of compensable hours of work, or a substantial decrease in business income caused by a reduction in opening hours or consumer demand), or substantial out-of-pocket medical expenses" and such decrease is "caused by the COVID-19 pandemic, or by any local, state, or federal government response to COVID-19, and is documented." This also applies to foreclosures.

## **DISCUSSION**

The proposed ordinances are intended to mitigate the impacts from COVID-19 by placing a moratorium on residential evictions and foreclosures on residential units by homeowners' association. The two ordinances are identical, but are adopted by different

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<sup>2</sup> Chapter 40 of Title 5 of the Emeryville Municipal Code regulates the landlord tenant relationship, not the eviction process.

methods. The first ordinance is an urgency ordinance, which will take effect immediately and must be adopted by a 4/5 vote of the entire Council. The second ordinance is introduced by the regular method that will require two readings, and will not take effect until 30 days after adoption. Both ordinances provide that the term of the ordinance can be extended by resolution of the City Council. The ordinances are set to expire on May 31, 2020, which coincides with the time period for the suspension of state laws as set forth in the Governor of the State of California Executive Order N-28-20.

The ordinances offer three types of moratoriums to mitigate the impacts of COVID-19. First, the ordinances provide that there is a moratorium on residential rental evictions during the term. It is important to note that the moratorium is on *all* residential rental evictions, not just those that may also be covered by Chapter 40 of Title 5 of the Emeryville Municipal Code. Landlords may serve a notice of termination, but if a tenant notifies the landlord that the tenant is an “Affected Residential Tenant” as defined in the ordinances, then there is a moratorium on the eviction. The ordinance explicitly states that this provision applies to notices of terminations that were served prior to the Effective Date of the proposed ordinances, but where the notice period has not expired. For residential rentals, the notice period can be as short as thirty days, or as long as ninety days, which means that this Ordinance would impact notices of termination that were served since the Governor declared a state of emergency on March 4, 2020. The tenant is not relieved of the obligation to pay rent. Consistent with the City’s current practice, if the landlord and the Affected Residential Tenant cannot negotiate a repayment plan for the missed rent payments, the City would refer the parties to ECHO for mediation.

Second, the ordinances provide that there is a moratorium on commercial rental evictions during the term. This section also explicitly states that this provision applies to notices of terminations that were served prior to the Effective Date of the proposed ordinances, but where the notice period has not expired. Three options are presented for defining the businesses protected by the moratorium, based on the amount of Gross Receipts<sup>3</sup> of the business. Option A would protect businesses with less than \$25,000,000 in gross receipts and is patterned after the City of San Francisco’s moratorium on commercial evictions. Option B would protect businesses with less than \$7,500,000 in gross receipts, because the Small Business Administration uses this receipts threshold for many industries and these businesses are generally recognized as “small businesses” for purposes of federal programs. Option C would protect businesses with less than \$5,000,000 in gross receipts, with this threshold selected because it would result in protection of approximately 90% of the total licensed businesses in the City of Emeryville. The table below depicts the number of businesses protected under each of the aforementioned options.

Option	Annual Gross Receipts Threshold	# of businesses covered	% of businesses covered
A	Less than \$25,000,000	1,339	98%
B	Less than \$7,500,000	1,276	93%
C	Less than \$5,000,000	1,236	90%

<sup>3</sup> “Gross Receipts” for purposes of the ordinances shall have the same meaning as defined in Emeryville Municipal Code section 3-1.02(d) regarding business licenses.

Note that the above figures are based on 2019 business license data, which indicates a total of approximately 1,372 businesses are licensed in Emeryville (excluding home occupations and residential landlords).

The purpose of the commercial moratorium includes ensuring that businesses stay open, and perhaps have the opportunity to transition to alternate, more sustainable business models if those opportunities arise. Also, for businesses that have had to close due to the Shelter in Place Order, they have sufficient time to recover once they are able to re-open. Once the social distancing requirements are reduced or eliminated, it will be critical to have economic infrastructure in place to allow for immediate economic activity. That economic activity supports workers and their families, as well as governmental entities who rely on tax revenue for operations. If the City Council wishes to enact a moratorium for commercial evictions, staff requests the City Council choose Option A, B, or C.

Third, the ordinances provide that there is a moratorium on foreclosures on residential units by homeowner's associations (HOAs) for an owner's failure to pay a HOA assessment. Prior to HOA taking action on a residential unit, the HOA and the owner must engage in a dispute resolution process where the parties try to reach a repayment plan.<sup>4</sup> Only if that dispute resolution process fails, may a HOA board vote to initiate foreclosure on a residential unit for failure to pay assessments. The ordinances provide that HOAs cannot vote to initiate the foreclosure action during the term of the ordinances.

## **ENVIRONMENTAL REVIEW**

Adoption of the two proposed ordinances is exempt from the California Environmental Quality Act (CEQA) (Public Resources, § 21000). Actions taken to mitigate the impacts of a declared emergency, such as the COVID-19 pandemic, are exempt under California Public Resources Code Section 21080(b)(4) and State CEQA Guidelines 15269(c). Additionally, since adoption of these two proposed ordinances is designed to preserve existing conditions, adoption of the proposed ordinances is exempt under CEQA Guideline 15061(b)(3).

## **FISCAL IMPACT**

Existing staff resources will be used to publicize the moratorium. Enforcement of the ordinances is set up to provide affected residents and commercial tenants with an affirmative defense in any related evictions or foreclosures.

## **STAFF COMMUNICATION WITH THE PUBLIC**

After media accounts regarding the City of San Francisco's commercial eviction moratorium, Staff has received inquiries from businesses asking whether the City of Emeryville plans to adopt a similar policy.

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<sup>4</sup> See Civil Code § 5705.

## **CONCLUSION**

For the urgency ordinance, staff recommends that the City Council:

1. Introduce the proposed ordinance by title only.
2. Take public comment on the proposed ordinance.
3. Adopt the proposed ordinance by 4/5 vote.

For each the regular ordinance, staff recommends that the City Council:

1. Introduce the proposed ordinance by title only.
2. Take public comment on the proposed ordinance.
3. Adopt the first reading of the proposed ordinance.

**PREPARED BY:** Andrea Visveshwara, Assistant City Attorney

**REVIEWED BY:** Chadrick Smalley, Economic Development and Housing Manager

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



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Michael Guina, City Attorney

## **ATTACHMENTS**

- Draft Urgency Ordinance
- Draft Ordinance