



# City of Emeryville

C A L I F O R N I A

## MEMORANDUM

**DATE:** April 21, 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 Amending Chapter 40 Of Title 5 Of The Emeryville Municipal Code "Residential Landlord and Tenant Relations" To Provide A Repayment Plan For Rent In Arrears To Residential Tenants 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-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.

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

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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.

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 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.

### *Impacts from COVID-19*

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. 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 to pay rent due to a dramatic decrease in customer demand resulting from 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."

Subsequently, on March 27, 2020, the Governor of the State of California issued Executive Order N-37-20. The executive order implemented a statewide moratorium on rental evictions. However, Executive Order N-37-20 also provided that "Nothing in this Order shall in any way restrict state or local governmental authority to order any quarantine, isolation, or other public health measure that may compel an individual to remain physically present in a particular residential property", which means that local moratoriums on rental evictions still remain in effect and are not superseded by the Executive Order. On March 31, 2020, the Alameda County Board of Supervisors will consider Ordinance No. O-2020-\_\_\_, "An Urgency Ordinance Amending No. O-2020-14 to Modify the Temporary Moratorium on Evictions Resulting from the Loss of Income, Increased Medical Expenses, or Child Care Needs Related to COVID-19 in the County of Alameda." The proposed Ordinance will apply to incorporated areas of the County, including Emeryville. However, if the County ordinance is adopted in the form proposed by County staff, to the extent that Emeryville's regulations are more protective of residential renters, the City's regulations shall apply.

### *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 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

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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.

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), and introduced the first reading of an ordinance (Ordinance No. 20-004) to establish a moratorium on residential evictions. In adopting these two ordinances, the City Council provided direction to the City Attorney to prepare an ordinance that would require Landlords of Affected Residential Tenants (as those terms are defined in Ordinance Nos. 20-002 and 20-004) to provide Affected Tenants a 12-month period for a repayment plan for the rent in arrears once the declared emergency was over. Affected Residential Tenants may not be able to pay back any rent in arrears immediately upon termination of the emergency because their work hours may still be reduced, they may need to look for a new job, apply for rental assistance grants, or otherwise, need time to pay back the Landlord.

Furthermore, on October 30, 2018, the City Council adopted Resolution No. 18-156, which declared a shelter crisis within the City of Emeryville, and that declared shelter crisis has not been lifted. Displacement of residential tenants for failure to pay rent due to reduction in household income caused by the COVID-19 emergency would further exacerbate the City's declared ongoing shelter crisis, as well as the State's housing crisis. Providing residential stability after the COVID-19 emergency will be necessary to abate the City's declared shelter crisis and to promote economic recovery, which is in the interest of the public health, safety and welfare.

At the April 7, 2020, regular meeting, the City Council considered a proposed ordinance, which would amend Chapter 40 of Title 5 of the Emeryville Municipal Code to require landlords to offer a reasonable repayment plan to tenants impacted by COVID-19 before evicting them for non-payment of rent. At the meeting, the City Council adopted a first reading of the ordinance with modifications to Section Four of the proposed ordinance. The Council's modifications are incorporated into the attached proposed ordinance.

## **DISCUSSION**

The proposed ordinance amends Chapter 40 of Title 5 of the Emeryville Municipal Code ("Chapter 40"), which governs residential landlord and tenant relations. Landlords seeking to terminate a lease with an "Affected Residential Tenant" for failure to pay rent must show that prior to delivering the notice of termination, the Landlord offered the Affected Residential Tenant a reasonable repayment plan to repay the rent owed, but not paid. The offered repayment plan shall span a twelve-month period beginning from when the COVID-19 emergency concluded. An Affected Residential Tenant means a tenant or tenant household, who has, as a result of the COVID-19 pandemic, or declaration of the Alameda County Public Health Officer, or other local, state, or federal authority, been instructed to shelter-in-place in their home<sup>3</sup>.

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<sup>3</sup> The definition of "Affected Residential Tenant" in the proposed ordinance is the same definition used in urgency Ordinance No. 20-002 and pending Ordinance No. 20-004

Staff is recommending that the proposed requirement for the repayment plan be codified as part of Chapter 40 for several reasons. First, the repayment plan obligation extends beyond the COVID-19 emergency. Although the proposed amendment has no sunset date, the nature of the obligation placed on the landlord will sunset after the COVID-19 emergency is over. The urgency ordinance and regular ordinance adopted by the City Council imposing a moratorium on rental evictions expires on May 31, 2020, unless extended by the City Council.<sup>4</sup> Staff would return to the City Council to repeal the repayment plan obligation when it became obsolete. At this point, it is not known when the emergency will be over, and whether the shelter in place restrictions will be lifted at once or gradually.

Second, there are certain landlords that staff recommends excluding from the obligation to offer a repayment plan, consistent with the existing exemptions from the Residential Landlord and Tenant Relations Ordinance. Emeryville Municipal Code section 5-40.02(a) currently exempts: (1) dwelling units in hotels, motels, lodging houses, and group residential units subject to Chapter 25 of Title 5 when the tenancy is less than 30 days; (2) single owner-occupied residence when the owner rents two (2) or fewer bedrooms; (3) dwelling units in nonprofit cooperatives; (4) dwelling units where rent is regulated by federal, state or local government if application of Chapter 40 is preempted by federal or state law; (5) housing accommodations in any nonprofit hospital, convent, monastery, extended care facility, asylum, residential care or adult day health care facility for the elderly operated pursuant to state license, and (6) housing units owned by any government unit.

The proposed ordinance excludes the same entities, from having to offer a repayment plan for the same legal and policy reasons that the City does not regulate a landlord tenant if these entities serve as landlord. With respect to dwelling units where the rent is regulated by a governmental agency and application of Chapter 40 would be preempted; dwelling units owned by a governmental entity; and housing accommodations subject to state licensing (such as a hospital or residential care facility), the City does not regulate these entities because either state or federal law precludes the City from regulating them. With respect to the exclusion for dwelling units in a cooperative and hotels, and similar uses, the exclusion for this type of lodging was made explicit to ensure that Chapter 40 did not apply to lodging uses that the Council did not intend to regulate. With respect to the single owner-occupied residence when the owner rents two or fewer bedrooms, this exclusion ensures that the City is not interfering with family dynamics, such as the adult child who may be living at home, and paying rent, or the couple where one half of the couple owns the residential unit, and the other half pays “rent” to help with household expenses.

Third, under the Emeryville Municipal Code section 5.40.01(b), the City Manager has the ability to promulgate regulations to implement Chapter 40. The City Manager has issued regulations and anticipates having to issue further regulations related to the implementation of the repayment plan obligation. In developing the parameters of “reasonableness” for the repayment plan, staff anticipates having to promulgate

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<sup>4</sup> At the April 7, 2020, regular meeting, the City Council directed staff to return with legislation to extend the period to June 30, 2020.

regulations that address various implementation issues such as: the application of late fees; whether interest can be charged; how partial payments are applied to rent due after the COVID-19 emergency; repayment obligations; and whether the 12 month payments need to be of equal amounts. Staff anticipates that it will also receive questions from the public that will inform the promulgation of regulations. The promulgation of regulations also provides the City with the flexibility necessary to respond to market changes as a result of COVID-19 that may impact repayment plans. At the April 7, 2020, regular meeting, the City Council directed staff to ensure that the regulations would address the following: payment of late fees, the periodicity and amount of payments, a cap on interest charged to the extent legally permissible, and to clarify the timing for performance, such as when a repayment plan had to be presented, when it had to be accepted, and when payments would begin.

Finally, under the Emeryville Municipal Code section 5.40.01(b), the City Manager has the authority to develop regulations to allow for landlords to petition the City for a complete or partial exemption. Staff already has a process in place for landlords to petition the City for a complete or partial exemption from payment of the rental relocation assistance.<sup>5</sup> Staff anticipates preparing similar regulations that would allow the landlord to petition for a complete or partial exemption from having to offer a repayment plan. For example, a small landlord may be able to offer a 6 month repayment plan, but a 12 month repayment plan would constitute an undue financial burden on the landlord to the point where the landlord may risk losing the property due to inability to pay a mortgage.

## **HOUSING COMMITTEE RECOMMENDATION**

At the Housing Committee's meeting on April 1, 2020, the Housing Committee received a summary from staff on the proposed ordinance. The Housing Committee voted unanimously to recommend the proposed ordinance, with the modification that lodging houses be required to comply with offering the tenant a 12-month reasonable repayment plan prior to evicting for failure to pay rent.

## **FISCAL IMPACT**

Existing staff resources will be used to publicize the amendment to Chapter 40. Enforcement of Chapter 40 provides that a landlord's failure to comply with Chapter 40 is an affirmative defense in any eviction proceedings.

## **STAFF COMMUNICATION WITH THE PUBLIC**

City Attorney's Office has not had any communications with the public over the proposed ordinance.

## **CONCLUSION**

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

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<sup>5</sup> Since adoption of Chapter 40, the City has received one request for an exemption, but ultimately, did not have to act upon it because the landlord and tenant came to an agreement to resolve the issue.

**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 Ordinance