

ORDINANCE NO. 20-_____

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)

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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"; and

WHEREAS, 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; and

WHEREAS, 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”; and

WHEREAS, on March 16, 2020, the Alameda County Director of Emergency Services 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; and

WHEREAS, on March 16, 2020, the Governor of the State of California issued Executive Order N-28-20 to suspend any state law that would preempt a local government’s authority to impose a moratorium on residential evictions; and

WHEREAS, 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”; and

WHEREAS, 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 an emergency; and

WHEREAS, 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; and

WHEREAS, on March 19, 2020, the City Council for the City of Emeryville adopted Resolution 20-23, ratifying the City Manager's said declaration of an emergency, which continues to exist today; and

WHEREAS, on March 19, 2020, the City Council for the City of Emeryville adopted Ordinance No. 20-002, an urgency ordinance that imposed a moratorium on all commercial evictions for failure to pay rent for commercial tenants impacted by COVID-19 pandemic; and

WHEREAS, on March 27, 2020, the Governor of the State of California issued Executive Order N-37-20, which implemented a statewide moratorium on rental evictions, but provided for local moratoriums that provided more protection to residential renters; and

WHEREAS, on March 31, 2020, based on evidence of continuing and 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", which clarifies and supersedes the order from March 16, 2020; and

WHEREAS, on April 7, 2020, and on April 21, 2020, the City Council for the City of Emeryville adopted an urgency ordinance (Ordinance No. 20-008), and a non-urgency ordinance (Ordinance No. 20-007) to repeal and replace Ordinance No. 20-002, and to continue to impose a moratorium on commercial evictions for tenants who were impacted by Covid-19; and

WHEREAS, on April 24, 2020, Governor Gavin Newsom announced the launch of the "Great Plates Delivered" program, a meal delivery service for older adults, which has the purpose of assisting seniors and other individuals at high risk of COVID-19 complications to stay home while receiving nutritious meal delivery, and to provide essential economic stimulus to local businesses to preserve economic infrastructure; and

WHEREAS, on April 29, 2020, based on evidence of continuing and increasing occurrence of COVID-19 within Alameda County and throughout the Bay Area, the Alameda County Health Officer, issued an order directing all individuals living within the County to shelter at their place of residence, leaving only for Essential Activities, Outdoor Activities, Essential Governmental Functions, Essential Travel or to work for Essential Businesses, which supersedes the order from March 31, 2020; and

WHEREAS, certain segments of the food supply chain have experienced disruption due to COVID-19 forcing the temporary closure of food processing plants and grocery stores; and

WHEREAS, due to the COVID-19 pandemic, the City, as well as the state and the nation, are facing unprecedented economic uncertainty, which has required government at all levels to offer assistance to its constituents to ensure the public health, safety and welfare of society; and

WHEREAS, the State of California has identified six criteria for modifying the stay at home order, and four stages of recovery from the pandemic, and has recently allowed for counties to transition into “Stage 2” of recovery from the pandemic, which allows for lower risk businesses to open while still complying with social distancing requirements; and

WHEREAS, the State of California will not move into Stage 4 until either “herd immunity” is achieved or treatment exists for COVID-19, which is months, if not potentially years away; and

WHEREAS, on May 18, 2020, based on evidence of continuing and increasing occurrence of COVID-19 within Alameda County and throughout the Bay Area, but at a stable rate, the Alameda County Health Officer, issued an order directing all individuals living within the County to shelter at their place of residence, leaving only for Essential Activities, Outdoor Activities, Essential Governmental Functions, Essential Travel or to work for Essential Businesses, and allowed Other Activities, which supersedes the order from April 29, 2020, and which is in effect until further notice; and

WHEREAS, the City Council of the City of Emeryville desires to ensure that all residents can comply with federal, local and state directives to practice social distancing which is the interest of the public peace, health, safety and welfare, to ensure residents sheltering in place have reliable access to food delivery, and to ensure that businesses creating jobs are able to survive the transition to Stage 4 of recovery; and

WHEREAS, the Ordinances 20-002, 20-007 and 20-008 do not relieve Affected Commercial Tenants, as that term is defined in the aforementioned Ordinances from their legal obligation to pay rent; but the City Council of the City of Emeryville finds that Affected Commercial Tenants may not be able to immediately repay rent owed because it may take time to replace revenue lost due to the shelter in place during the COVID-19 emergency and due to the restrictions imposed on businesses as the economy transitions to Stage 4; and

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF EMERYVILLE DOES HEREBY ORDAIN AS FOLLOWS:

SECTION ONE. TITLE

This Ordinance shall be known as the “COVID-19 Rental Repayment Ordinance for Food Establishments.”

SECTION TWO. POLICY AND PURPOSES DECLARATION

The purpose of this 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.

SECTION THREE. DEFINITIONS

- A. “Additional Rent” refers to other rent due under a lease that is exclusive of Base Rent.
- B. “Affected Commercial Tenant” shall mean a Food Establishment Tenant, who has a valid City of Emeryville business license, as required by Emeryville Municipal Code section 3-1.101, and with annual Gross Receipts below \$7,500,000, who has experienced a substantial decrease in Gross Receipts, which includes, but is not limited to, a substantial decrease in Gross Receipts caused by a reduction in opening hours and/or consumer demand; and the Food Establishment Tenant claims the substantial decrease in Gross Receipts is caused by the COVID-19 pandemic or by any local, state or federal government response to COVID-19.
- C. “Base Rent” refers to the minimum amount of rent due each month under a lease. Base Rent excludes Additional Rent, such as payment of property taxes, utility costs, common area maintenance charges, or other rent that is owed based upon one or more factors, such as a percentage of sales.

D. “City Moratorium” refers to the moratorium on commercial evictions imposed by Ordinance No. 20-002, as later repealed and replaced by Ordinance No. 20-007 and Ordinance No. 20-008.

E. “Commercial Unit” means a structure or part of a structure that is used as a place of business, and which the Food Establishment Tenant pays rent for the use and occupancy for periods in excess of 29 days.

F. “Food Establishment Tenant” means a restaurant, as defined in Emeryville Municipal Code section 9-2.319(b), which is entitled by written or oral agreement, or by sufferance, to use or occupy a Commercial Unit.

G. “Gross Receipts” shall have the same meaning as defined in Emeryville Municipal Code section 3-1.02(d).

H. “Landlord” means an owner, lessor, or sublessor who receives or is entitled to receive rent for the use and occupancy of a Commercial Unit.

I. “Notice of Termination” refers to the written notice that is required to be delivered by the Landlord to the Food Establishment Tenant under any lease or law to terminate a lease between the parties.

SECTION FOUR: NOTIFICATION TO FOOD ESTABLISHMENT TENANTS

Within fifteen days of the Effective Date of this Ordinance, Landlord shall provide a copy of this Ordinance to each of its Food Establishment Tenants. The Landlord may deliver a copy of the Ordinance via electronic communications if the Landlord and the Food Establishment Tenant previously utilized electronic communications, and a copy of the notice is delivered through the previously utilized electronic communications. The Landlord shall retain a copy of the communication to the Food Establishment Tenant as required by this Section for at least three years after the expiration of the City Moratorium. If a Landlord has provided a copy of urgency Ordinance No. 20-010 prior to the Effective Date of this Ordinance to its Food Establishment Tenant, Landlord is deemed to have provided notice to its Food Establishment Tenant.

SECTION FIVE. REPAYMENT PLAN

If a Food Establishment Tenant notifies Landlord that the Food Establishment Tenant qualifies as an Affected Commercial Tenant prior to the delivery of a Notice of Termination or prior to the time period expiring in any Notice of Termination for failure to pay rent, then prior to delivering any written notice required by Civil Procedure Code section 1161 or initiating other action to evict the Food Establishment Tenant, the Landlord shall provide

the Food Establishment Tenant an opportunity to repay the uncollected Base Rent by offering a reasonable repayment plan . A reasonable repayment plan shall allow the Food Establishment Tenant to repay unpaid Base Rent accrued during the City Moratorium in a minimum of twelve regular monthly installments of equal amounts. A reasonable repayment plan may include other terms and conditions as agreed to by the Landlord and Food Establishment Tenant, but may not include a term of repayment of less than twelve months. Under a reasonable repayment plan, a Landlord and Food Establishment Tenant may agree to monthly installments of differing amounts to repay the uncollected Base Rent, provided that the amount of each successive monthly installment increases over the prior month, and in no event, may the amount of a monthly installment exceed fifteen percent (15%) of the total amount of unpaid Base Rent due.

SECTION SIX. PROHIBITED LANDLORD CONDUCT

To ensure that the policy and purpose objectives of this Ordinance are met, during the term of a reasonable repayment plan entered pursuant to Section Five of this Ordinance, a Landlord of an Affected Commercial Tenant is prohibited from increasing Additional Rent due under the lease, or increasing any Base Rent or Additional Rent in a renewal lease with the Affected Commercial Tenant, in an effort to recover the unpaid Base Rent subject to the reasonable repayment plan. There is a rebuttable presumption that any increase in Base Rent or Additional Rent during the term of the repayment plan violates this Section, unless the increase in rent is based on objective criteria set forth in the terms and conditions of a written lease.

SECTION SEVEN. ENFORCEMENT

Landlord's failure to comply with this Ordinance may be asserted as an affirmative defense by an Affected Commercial Tenant in any unlawful detainer or other eviction action, or any other civil action seeking restitution for nonpayment of rent.

SECTION EIGHT. CEQA DETERMINATION

The City Council finds that adoption of this Ordinance is exempt from the California Environmental Quality Act ("CEQA") pursuant to Section 21080(b)(4) of the California Public Resources Code and Section 15269(c) of the State CEQA Guidelines because adoption of this ordinance is to mitigate an emergency and under Section 15061(b)(3) of the State CEQA Guidelines because it can be seen with certainty that there is no possibility that the adoption of this Ordinance may have a significant effect on the environment.

SECTION NINE. SEVERABILITY

Every section, paragraph, clause, and phrase of this Ordinance is hereby declared to be severable. If for any reason, any section, paragraph, clause, or phrase is held to be

invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining section, paragraphs, clauses or phrases.

SECTION TEN. EFFECTIVE DATE

This Ordinance shall take effect thirty (30) days following its final passage. The City Clerk is directed to cause copies of this Ordinance to be posted or published as required by Government Code section 33693.

SECTION ELEVEN. CODIFICATION

This Ordinance shall NOT be codified.

This Ordinance was introduced and first read by the City Council of the City of Emeryville at a special meeting on Tuesday, June 9, 2020, and **PASSED AND ADOPTED** by the City Council at a regular meeting on Tuesday, June 16, 2020.

AYES: _____
NOES: _____
ABSTAIN: _____
ABSENT: _____

MAYOR

ATTEST:

APPROVED AS TO FORM:



CITY CLERK

CITY ATTORNEY