



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: July 21, 2020
TO: Mayor Patz and Members of the City Council
FROM: Michael Guina, City Attorney
SUBJECT: Tenant Protection Ordinances To Mitigate Impacts From COVID-19

Urgency Ordinance Of The City Council Of The City Of Emeryville Enacting A Temporary Moratorium On Residential Evictions; And A Temporary Moratorium On Commercial Evictions Due To Nonpayment Of Rent; And A Temporary Moratorium On Residential Evictions By Homeowners Associations; CEQA Determination: Exempt Pursuant To California Public Resources Code Section 21080(b)(4) And State CEQA Guidelines Section 15269(c) And 15061(b)

Urgency Ordinance Of The City Council Of The City Of Emeryville Amending Section 5-40.03(e)(1)(i) Of The Emeryville Municipal Code, Which Requires Landlords 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)

Urgency 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 above-referenced Urgency Ordinances to mitigate the impacts from the COVID-19 pandemic (as discussed below). The Urgency Ordinances will be effective immediately upon adoption by a 4/5 vote of the entire City Council.

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 July 13, 2020, the World Health Organization ("WHO") has reported more than 560,000 deaths stemming from over 12 million 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 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

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.

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 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, issued order 20-04 "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 order 20-03 from March 16, 2020.

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 order 20-10 "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 order 20-04 from March 31, 2020.

On May 18, 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 order 20-11 "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 order 20-10 from April 29, 2020.

On June 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 order 20-14 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 order 20-11 from May 18, 2020, is in effect until further notice.

Emeryville Response

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 ratified the emergency declaration on March 19, 2020 (Resolution No. 20-23).

Following the emergency declaration ratification, the City Council adopted a series of ordinances to protect residential and commercial tenants. The Council adopted eviction moratoria that prevented evictions of residential and commercial tenants, as well as foreclosures from a residential HOA (Ord. Nos. 20-007, -008). The Council also adopted ordinances which required landlords to offer a reasonable rent repayment plan to residential tenants impacted by COVID-19 prior to evicting them for non-payment of rent (Ord. Nos. 20-011, -013). Finally the Council adopted ordinances which required landlords to offer a reasonable rent repayment plan to commercial food establishment tenants impacted by COVID-19 prior to evicting them for non-payment of rent (Ord. Nos. 20-010, -012). The eviction moratoria expired on June 30, 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 process² 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. On May 29, 2020, the Governor of the State of California issued Executive Order N-66-20, extending Executive Order N-28-20 for 60 days. On June 30, 2020, the Governor of the State of California issued Executive Order N-71-20, extending Executive Order N-28-20 until September 30, 2020.

DISCUSSION

While the City's previous eviction moratoria have expired, the COVID-19 pandemic continues throughout the nation and the Bay Area, including Emeryville. The Governor has not lifted the declared state of emergency in California, and nor has the City Council rescinded the declaration of a local emergency from COVID-19 in Emeryville. At the July 7, 2020 meeting, the City Council requested, as a future scheduling item, that staff prepare ordinances to re-institute tenant protections. This item responds to that request and proposes ordinances that re-instate the various tenant protections in place prior to their expiration. The proposed ordinances are intended to mitigate the impacts from COVID-19 by:

- 1) placing a moratorium on residential evictions and foreclosures on residential units by homeowners' association, as well as commercial evictions;
- 2) requiring landlords to provide residential tenants a reasonable rent repayment plan;
- 3) requiring landlords to provide commercial food establishment tenants a reasonable rent repayment plan.

All three ordinances provide the same protections as the prior eviction moratoria (Ord. Nos. 2020-007, -008), residential rent repayment plan ordinances (Ord. Nos. 2020-011, -013), and the commercial rent repayment plan ordinances (Ord. Nos. 2020-010, -012). All three ordinances are urgency ordinances, which will take effect immediately and must be adopted by a 4/5 vote of the entire Council. The eviction moratoria ordinance is set to expire upon expiration of the Governor's Executive Order N-28-20, as extended, which currently sunsets on September 30, 2020.

² Chapter 40 of Title 5 of the Emeryville Municipal Code regulates the landlord-tenant relationship, not the eviction process.

Eviction Moratorium

Residential Evictions

The eviction moratorium ordinance offers three types of protections against evictions to mitigate the impacts of COVID-19. First, the ordinance provides 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. During the term of the ordinance, a Landlord may not terminate the tenancy of a Residential Tenant or Residential Tenant Household unless termination is necessary to protect health, safety, or welfare. The tenant is not relieved of the obligation to pay rent. Note that one of the other ordinances under concurrently under consideration will also require a landlord to offer an Affected Residential Tenant a rent repayment plan after the eviction moratorium expires but prior to initiating eviction proceedings for failure to pay rent during the moratorium period. If a Landlord attempts to comply with the residential eviction moratorium, failure to comply may be asserted as an affirmative defense by the Residential Tenant or Residential Tenant Household.

Commercial Evictions

Second, the ordinance provides 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 ordinance, but where the notice period has not expired. As with the prior eviction moratorium on commercial tenants, the proposed ordinance protects businesses with less than \$7,500,000 in gross receipts, which is the threshold the Small Business Administration uses for many industries, and these businesses are generally recognized as “small businesses” for purposes of federal programs. This threshold covers approximately 1,276 businesses in Emeryville, or about 93% of total licensed businesses, based on 2019 business license data (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.

Foreclosures on Residential Units by HOAs

Third, the ordinance provides 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.³ 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 ordinance provides that HOAs cannot vote to initiate the foreclosure action during the term of the ordinance.

Rent Repayment Ordinance – Residential

The second 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 3 Day Notice required by state law, 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 June 30, 2020⁴; as well as from the expiration of renewed eviction moratorium (i.e., the expiration of the Governor’s Executive Order N-28-20 as amended, currently September 30, 2020).

Rent Repayment Ordinance – Commercial Food Establishments

The purpose of the third 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, as well as the renewed eviction moratorium ordinance considered on July 21, 2020, prohibit 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, as well as the renewed eviction moratorium ordinance considered on July 21, 2020 for Affected Commercial Tenant, the proposed ordinance require 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.

³ See Civil Code § 5705

⁴ The expiration date of the prior eviction moratoria ordinances (Ord. Nos. 20-007, -008)

The proposed ordinance requires the landlord to provide notice of the ordinance to its Food Establishment Tenants within 15 days after adoption of the ordinance. 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 ordinances, 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.

ENVIRONMENTAL REVIEW

Adoption of the three 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

Staff has had no communications with the public on these ordinances as of the publication of this report. Staff will be providing EDAC a brief update on recent City Council actions, including the request to prepare these ordinances.

CONCLUSION

For each 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.

PREPARED BY: Michael Guina, City Attorney

REVIEWED BY: Chadrick Smalley, Economic Development and Housing Manager

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



Michael Guina, City Attorney

ATTACHMENTS

- Draft Urgency Ordinance – Eviction Moratoria
- Draft Urgency Ordinance – Rent Repayment Plan (Residential Tenants)
- Draft Urgency Ordinance – Rent Repayment Plan (Commercial Food Establishments)