

**CITY COUNCIL
AGENDA REPORT**



**CITY OF MILLBRAE
621 Magnolia Avenue
Millbrae, CA 94030**

SUBJECT: Consider Approval of an Urgency Ordinance Establishing a Moratorium on Eviction for Non-Payment of Rent by Small Commercial Tenants Impacted by the COVID-19 pandemic. ATTACHMENTS: Proposed Ordinance	Report No. 6445
	For Agenda of: April 14, 2020
	Department: City Manager
	Originator: Tom Williams
	Approved:
Budget Action Yes: ____ No: <u>X</u> Finance Review:	

REPORT TYPE: ACTION X INFORMATIONAL ____

ITEM TYPE: CONSENT __ PUBLIC HEARING __ EXISTING BUSINESS __ NEW BUSINESS X

RECOMMENDATION:

Adopt an urgency ordinance establishing a moratorium on eviction for non-payment of rent by small commercial tenants directly impacted by the COVID-19 pandemic.

BACKGROUND:

The scale of the COVID-19 pandemic is staggering. To date, there have been over 1,500,000 confirmed COVID-19 cases worldwide and over 450,000 in the United States, with thousands of deaths. Closer to home, California has close to 20,000 confirmed cases. These effects are not only being felt throughout the world and nationally, but are also being felt in San Mateo County and the City of Millbrae. San Mateo County has over 633 confirmed cases, and 21 residents of San Mateo County have died of the disease. The economic impacts have been swift and severe, with nearly 10 million Americans suddenly unemployed and many businesses forced to shut down in response to shelter-in-place orders.

Small businesses are suffering from reductions in income due to lower customer demand, forced closures, decreases in available workforce, and increased expenses. These abrupt and severe negative impacts have affected, and will continue to affect, the ability of many small businesses to make rent payments. Without action, these small businesses, along with the people they serve and the residents they employ, may never recover.

Timeline and Summary of Significant Local and State Actions:

1. March 3, 2020: the San Mateo County Health Officer ("Health Officer") declared a local health emergency throughout the County related to COVID-19. The San Mateo County Board of Supervisors ("Board of Supervisors") ratified and extended this declaration of local health emergency, which remains in effect. In addition, the San Mateo County Director of Emergency Services proclaimed a local emergency throughout San Mateo County related to COVID-19. The Board of Supervisors ratified and extended the proclamation of local emergency, and this local emergency remains in effect.
2. March 4, 2020: Governor Newsom issued a Proclamation of State of Emergency related to COVID-19 effective throughout the State of California.

3. March 16, 2020: The Health Officer issued an order that, among other things, directs all individuals currently living within San Mateo County to shelter in their place of residence ("Shelter-in-Place Order"), and authorizes individuals to leave their residences only for certain "Essential Activities," Essential Governmental Functions," or to operate "Essential Businesses," all as defined in the Shelter-in Place-Order.
4. March 16, 2020: Governor Newsom also issued Executive Order N-28-20, which grants local jurisdictions authority to enact temporary moratoria on residential and commercial evictions based on a non-payment of rent caused by the COVID-19 pandemic or the federal, state, and/or local response to the COVID-19 pandemic.
5. March 19, 2020: the Governor issued Executive Order N-33-20, which imposed a state-wide shelter-in-place order.
6. March 19, 2020, the City Council adopted a resolution declaring a "local emergency," pursuant to the California Emergency Services Act (Gov. Code §§ 8550 *et seq.*) ("Act") and an "emergency" pursuant to Millbrae Municipal Code Chapter 2.25 Emergency Organization and Functions ("Chapter 2.25"), in response to the COVID-19, also known as the coronavirus outbreak. Adoption of this emergency declaration allows the City of Millbrae to access funding, equipment and supplies from California Governor's Office of Emergency Services (CalOES), and Federal Emergency Management Agency (FEMA) to assist the City in the battle against the coronavirus.
7. March 23, 2020: The Board of Supervisors adopted an Emergency Regulation establishing a temporary, countywide moratorium on eviction for non-payment of rent by residential tenants directly impacted by the COVID-19 pandemic. This Emergency Regulation applies both in unincorporated San Mateo County and incorporated cities, including the City of Millbrae.
8. March 27, 2020: The Governor issued Executive Order N-37-20 extending the deadline for residential tenants affected by COVID-19 to respond to summons and complaints in unlawful detainer actions.
9. March 31, 2020: The Health Officer issued an order that extended and revised the County's Shelter-in Place Order.
10. April 6, 2020: The California Judicial Council adopted Emergency Rule 1 of the California Rules of Court prohibiting courts from issuing most summons, entering most defaults, and postponing most trials in unlawful detainer actions.

Need to Protect Local Small Business Commercial Tenants.

Immediate steps are necessary to mitigate the economic impacts of COVID-19 on local small businesses, which are essential to the health and vibrancy of the Millbrae community. A number of local small businesses provide essential items and services to Millbrae residents and community (such as food and pharmaceutical supply retailers), and are deemed "Essential Businesses" under the Shelter In Place Orders. The public interest is served by helping these businesses remain open. Moreover, to the extent that other local small businesses are not currently operating due to the Shelter-in-Place Orders, the public interest is served by helping those businesses resume operations as soon as the Shelter-in-Place Orders are lifted because the ongoing existence of such small businesses are essential to the protection of the public peace and the health, safety, life, property, and general welfare of City residents.

ANALYSIS:

Legal Authority

Section 36937 of the Government Code authorizes the City to adopt an urgency ordinance to protect the public peace, health, or safety by a four-fifths vote where there is a declaration of the facts constituting the urgency. Such ordinances are effective immediately.

Moreover, Section 8634 of the California Government Code provides that during a declared local emergency, cities may promulgate orders and regulations necessary to provide for the protection of life and property. The law requires that such orders must be in writing and shall be given widespread publicity and notice.

Unlawful detainer actions, commonly known as evictions, are governed by state law, which typically preempts city ordinances on the same subject. However, Executive Order N-28-20 grants local jurisdictions authority to enact temporary moratoria on residential and commercial evictions based on a non-payment of rent caused by the COVID-19 pandemic or the federal, state, and/or local response to the COVID-19 pandemic. This executive order is effective until May 31, 2020.

Proposed Ordinance

The proposed urgency ordinance prohibits an owner of commercial real property within the City from evicting a small business commercial tenant for non-payment of rent if the tenant establishes, through documentation, that their inability to pay rent is due to a decrease in net business income directly resulting from COVID-19 or the federal, state or local government response to COVID-19. Examples of qualifying circumstances include reduced business income caused by illness; an inability to work; a reduction in operating hours, in available workforce, or consumer demand; increases in the tenant's health care expenses employee health care expenses for which the tenant is responsible; increases in the cost of supplies or other overhead expenses necessary to carry out the tenant's business; or temporary closure of the tenant's business.

The urgency ordinance protects "small commercial tenants," defined as registered nonprofits and small businesses with annual gross receipts of not more than five million dollars (\$5,000,000) for the 2019 calendar year. This \$5,000,000 figure is prorated if a business did not operate for the entire 2019 calendar year. For example, a business that operated for only six months of 2019 would qualify if its gross receipts were \$2,500,000 or less. In the case of a business that began operating after the 2019 calendar year, but before the adoption of the urgency ordinance, the \$5,000,000 annual gross receipt figure is similarly prorated. For example, a business that began operating in February 2020 and operated for only two months before adoption of the urgency ordinance would qualify if its gross receipts were \$834,000 or less.

Prior to evicting a small commercial tenant based on nonpayment of rent during the time the urgency ordinance remains in effect, the owner of the commercial property must provide the tenant written notice of the urgency ordinance using a form developed by the City Manager's Office or designee. The small commercial tenant then has at least 14 days, or more if reasonable under the circumstances, to provide the owner evidence of inability to pay rent due to COVID-19. The urgency ordinance would not relieve any small commercial tenants of liability for unpaid rent or change the amount of rent due under the lease.

The urgency ordinance would also grant a small commercial tenant up to 180 days after the urgency ordinance expires to pay the full amount of rent payments missed as a direct result of COVID-19. Within 90 days after the urgency ordinance expires, the small commercial tenant must pay the full amount of missed payments, if able to do so. If the tenant is still unable to pay the past-due rent during the initial 90 day period as a direct result of COVID-19, the tenant may obtain an additional 30 day extension by providing the owner of the commercial real property another written notice and additional documentation of the COVID-19 related losses. The tenant may provide additional written notices and documentation every 30 days to further extend the deadline, but under no circumstances is the owner required to extend the deadline beyond 180 days after the urgency ordinance expires. The owner cannot charge or collect a late fee for any missed payment covered by this urgency ordinance.

The urgency ordinance provides an affirmative defense to eviction in the event that an action to recover possession is commenced in violation of its terms. In the event a knowing violation of the urgency ordinance, a commercial tenant may file an action seeking injunctive relief, money damages and any other relief the Court deems appropriate. The prevailing party in that action is entitled to reasonable attorney's fees and costs.

Owners of commercial real property who believe that the urgency ordinance denies them a fair rate of return from their property may apply to the City Manager for an exemption from the moratorium.

The proposed urgency ordinance would remain in effect through May 31, 2020, unless extended by the City Council.

FISCAL IMPACT:

The adoption of the proposed urgency ordinance will result in a temporary increased workload for the City Manager's Office and Code Compliance as it is expected that owners of commercial real property and small commercial tenants will contact the City with questions as potential violations are reported. City staff will provide information about the urgency ordinance and make referrals to legal resources.

COUNCIL ACTION:

Approve, by at least a 4/5 majority, the urgency ordinance establishing a temporary moratorium on eviction for non-payment of rent by small commercial tenants impacted by the COVID-19 pandemic.

ORDINANCE NO. 2020-__

**CITY OF MILLBRAE, COUNTY OF SAN MATEO
STATE OF CALIFORNIA**

**ADOPTING AN URGENCY ORDINANCE IMPOSING A MORATORIUM ON EVICTIONS FOR
NON-PAYMENT OF RENT BY SMALL COMMERCIAL TENANTS IMPACTED BY THE COVID-19
PANDEMIC**

WHEREAS, international, national, state, and local health and governmental authorities are responding to an outbreak of respiratory disease, COVID-19, caused by a novel coronavirus (“COVID-19”); and

WHEREAS, on March 4, 2020, the Board of Supervisors of the County of San Mateo proclaimed a local state of emergency and the Health Officer of County of San Mateo declared a local health emergency in response to the COVID-19 outbreak; and

WHEREAS, the Centers for Disease Control and Prevention, the California Department of Health, and the San Mateo County Department of Public Health have all issued recommendations including, but not limited to, social distancing, staying home if sick, canceling or postponing large group events, working from home, and other precautions to protect public health and prevent transmission of this communicable virus; and

WHEREAS, on March 13, 2020, the President of the United States of America declared a national emergency and announced that the federal government would make emergency funding available to assist state and local governments in preventing the spread of and addressing the effects of COVID-19; and

WHEREAS, on March 16, 2020, the County Health Officer issued a further order directing, among other things, that all individuals living in the county to shelter at their place of residence except to provide or receive essential services, or engage in essential activities, and that all businesses and governmental agencies cease non-essential operations at all physical locations in the county; and

WHEREAS, on March 16, 2020, the Governor of the State of California, through Executive Order N-28-20, suspended until May 31, 2020 the preemptive reach of state statutes imposing substantive limitations on residential and commercial evictions to the extent a local government chooses to impose limitations on evictions for non-payment of rent arising out of a substantial decrease in household or business income or substantial out-of-pocket medical expenses caused by the COVID-19 pandemic or by an local, state or federal government response to COVID-19; and

WHEREAS, on March 19, 2020 the City Council adopted Resolution No. 2020-18 proclaiming the existence of an emergency and a local emergency within the City; and

WHEREAS, on March 19, 2020, the Governor of the State of California, through Executive Order N-33-20, imposed a statewide shelter in place order except as needed to maintain continuity of operations of the federally-defined critical infrastructure sectors or to access necessities such as food, prescriptions, and health care or other authorized activities; and

WHEREAS, on April 6, 2020, the California Judicial Council adopted Emergency Rule 1 of the California Rules of Court prohibiting courts from issuing most summons, entering most defaults, and postponing most trials in unlawful detainer actions; and

WHEREAS, as a result of the public health emergency, the precautions recommended by state and county health officers, and in compliance with orders issued by those officers, many residents and businesses in Millbrae have experienced or expect soon to experience sudden and unexpected income loss.

WHEREAS, further economic impacts are anticipated as result of COVID-19-related workplace closures, childcare expenditures due to school closures, health care expenses, labor shortages, and other expenditures stemming from compliance with emergency orders; and

WHEREAS, these economic impacts may inhibit nonprofits and small businesses from fulfilling their financial obligations, including rent and public utility payments such as water, sewer, and solid waste collection charges; and

WHEREAS, large scale eviction of small businesses and nonprofits would be disruptive to the welfare of the City, and could worsen the impacts of the pandemic by limiting access to essential services.

NOW, THEREFORE, THE COUNCIL OF THE CITY OF MILLBRAE ORDAINS AS FOLLOWS:

Section 1. INCORPORATION OF RECITALS. The City Council finds that the facts in the foregoing recitals and the agenda report presented with this Ordinance are true and correct and are incorporated into this Ordinance by this reference and adopted as findings of the City Council.

Section 2. URGENCY ORDINANCE. The City Council hereby finds, determines, and declares based on the facts in the foregoing recitals and the agenda report that this urgency ordinance is needed for the immediate preservation of the public peace, health, safety, or welfare pursuant to Section 36937 of the California Government Code.

Section 3. DEFINITIONS. For purposes of this Ordinance, the following definitions shall apply:

- (a) “Commercial Real Property” means any real property that is used for business, income-producing purposes, or any purpose other than for residential use;
- (b) “Owner” means any natural person, partnership, corporate, or fictitious entity, acting as a lessor or sublessor, whether as a principal or through an agent, who receives or is entitled to receive Rent in exchange for the use or occupancy of any Commercial Real Property, and includes a predecessor in interest;
- (c) "Recover Possession" means any of the following:
 - (1) serving any notice pursuant to Code of Civil Procedure 1161
 - (2) filing, serving, or otherwise prosecuting or threatening to prosecute any action under Code of Civil Procedure §§ 1159 *et seq.*
 - (3) enforcing any judgment obtained pursuant to any action under Code of Civil Procedure §§ 1159 *et seq.*
 - (4) termination of a lease for nonpayment.
- (d) “Rent” means the financial obligation or monetary payment a Small Commercial Tenant owes an Owner for the occupancy or use of Commercial Real Property, whether by written or oral agreement, or any part thereof;
- (e) “Small Commercial Tenant” means the lawful occupant of Commercial Real Property, whether by lease or sublease, that operates a nonprofit entity approved by the U.S. Internal Revenue Service pursuant to 26

U.S.C. §501(c)(3) or a business with not more than Five Million Dollars (\$5,000,000) of annual Gross Receipts, as defined in Section 6012 of the Revenue & Taxation Code, for the 2019 calendar year. This \$5,000,000 figure shall be prorated in the case of a Small Commercial Tenant that was not operating for the entire 2019 calendar year. For a Small Commercial Tenant that began operating after the 2019 calendar year but before the adoption of this Ordinance, this \$5,0500,000 annual Gross Receipt figure shall be prorated for the period of time that the Small Commercial Tenant had been operating prior to the adoption of this Ordinance.

(f) "COVID Related Loss of Income" means a substantial decrease in net business income, including but not limited to, increased costs or loss of income due to any of the following caused by or arising out of COVID-19 or the COVID-19 pandemic:

- (1) being sick with COVID-19, or caring for a household or family member who is sick with COVID-19;
- (2) a reduction in, or elimination of operating hours, in available workforce, or consumer demand;
- (3) increases in the Small Commercial Tenant's health care expenses, including employee health care expenses for which the Small Commercial Tenant is responsible, the Small Commercial Tenant's own health care expenses, or the health care expenses of the Small Commercial Tenant's family members;
- (4) supplies, services, or other overhead expenses necessary to carry out the Small Commercial Tenant's business;
- (5) child care needs arising from school closures related to COVID-19; and
- (6) compliance with a law, regulation, order, guidance, or recommendation from a federal, state, or local authorities relating to the COVID-19 pandemic.

Section 4. MORATORIUM IMPOSED. A temporary moratorium on Recovering Possession of Commercial Real Property for non-payment of Rent by Small Commercial Tenants impacted by the COVID-19 crisis is imposed as follows:

- (a) During the term of this Ordinance and any subsequent extensions of the term adopted by the City Council, an Owner of Commercial Real Property may not Recover Possession of the Commercial Real Property for failure to timely pay Rent from a Small Commercial Tenant who demonstrates that such failure is directly related to a COVID Related Loss of Income. Nothing herein restricts the ability of an Owner to Recover Possession of a Commercial Real Property from a Small Commercial Tenant for any reason other than a failure to timely pay Rent due to a COVID Related Loss of Income.
- (b) During the term of this Ordinance, an Owner must provide to a Small Commercial Tenant with written notice of this Ordinance using a form developed and approved by the City Manager or designee prior to taking any action to Recover Possession of Commercial Real Property for non-payment of Rent. The notice must state, at a minimum, (i) the amount of Rent to which the Owner is legally entitled pursuant to any written or oral agreement and under the provisions of State or local law; (ii) that this Rent is due unless the Small Commercial Tenant provides notice to the Owner within a reasonable timeframe that the Small Commercial Tenant's inability to pay is due to a COVID Related Loss of Income, which must include documentation sufficient to demonstrate such COVID Related Loss of Income.
- (c) Notices provided by a Small Commercial Tenant to the Commercial Real Property's Owner within fourteen (14) days of the Small Commercial Tenant's receipt of the written notice required pursuant to Section 4(b) is presumed to have been provided within a reasonable timeframe. Nothing herein prevents notices

provided more than fourteen (14) days from the Small Commercial Tenant's receipt of the written notice from being deemed reasonable, depending on the totality of the circumstances.

(d) An action taken by an Owner to Recover Possession of a Commercial Property from a Small Commercial Tenant for non-payment of Rent taken before the Small Commercial Tenant provided the Owner notice of the Small Commercial Tenant's COVID Related Loss of Income is not a knowing violation of this Ordinance subject to Section 5(b). Subsequent actions to Recover Possession of the Commercial Real Property upon receiving the notice from the Small Commercial Tenant may constitute knowing violations of the Ordinance.

(e) An Owner may not Recover Possession of a Commercial Property from a Small Commercial Tenant who has demonstrated a COVID Related Loss of Income pursuant to this Section where the Small Commercial Tenant tenders the full amount of all past-due Rent within 90 days of the expiration or termination of this Ordinance. Notwithstanding the foregoing, if the Small Commercial Tenant provides the Owner a written notice and additional documentation demonstrating a continued COVID Related Loss of Income during the 90 day period, the Owner may not Recover Possession of the Commercial Property for an additional 30 days. The Small Commercial Tenant may provide up to two additional written notices of 30 day extensions where the Small Commercial Tenant can demonstrate a continued COVID Related Loss of Income during the previous extension, for a total maximum extension of 180 days after the expiration or termination of this Ordinance. An Owner may not charge or collect a late fee for any portion of unpaid Rent that is delayed because a Small Commercial Tenant's COVID Related Loss of Income.

(f) Owners must hold any medical or financial information provided by Small Commercial Tenants pursuant to this Section in confidence, and may only use such information for evaluating the Small Commercial Tenant's claim.

(g) Nothing in this Ordinance relieves a Small Commercial Tenant of the obligation to pay Rent or modifies the amount of Rent due under any lease.

Section 5. REMEDIES.

(a) Any attempt to Recover Possession of Commercial Real Property from a Small Commercial Tenant during the term of this Ordinance is void. This Ordinance provides an affirmative defense to any attempt to Recover Possession of Commercial Real Property from a Small Commercial Tenant commenced in violation of this Ordinance.

(b) An Owner who commits a knowing violation of this Ordinance is liable for to the aggrieved Small Commercial Tenant for injunctive relief, actual damages and any other relief the Court deems appropriate. The prevailing party in a civil proceeding for violation of this Ordinance is entitled to reasonable attorney's fees and costs pursuant to court order.

(c) The remedies available under this Section shall be in addition to any existing remedies which may be available to the Small Commercial Tenant under local, state, or federal law.

Section 6. ADMINISTRATIVE REVIEW. The City Manager may exempt an Owner who is denied the Owner a fair rate of return from the Commercial Real Property as a result of this moratorium. An Owner may file a written request for an exemption, which must include an explanation of the nature of the hardship and documentation supporting the claimed hardship, such as the property owner's interest in the property, price paid or option price, assessed value, tax on the property, mortgage indebtedness, income and expense statements for income-producing property. The City Manager will issue a written decision within ten days. The decision of the City Manager is final and is subject to judicial review.

Section 7. CEQA NOT APPLICABLE. This Ordinance is not subject to the California

Environmental Quality Act (CEQA) pursuant to CEQA Guidelines Section 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and Section 15060(c)(3) (the activity is not a project as defined Section 15378 of the CEQA Guidelines because it has no potential for resulting in physical change to the environment, directly or indirectly).

Section 8. SEVERABILITY. In the event any section, clause or provision of this Ordinance shall be determined invalid or unconstitutional, such section, clause or provision shall be deemed severable and all other sections or portions hereof shall remain in full force and effect. It is the intent of the City Council that it would have adopted all other portions of this Ordinance irrespective of any such portion declared to be invalid or unconstitutional

Section 9. PUBLICATION. The City Clerk shall promptly cause the Ordinance to be posted in the City Clerk's office; posted on the City's website; and be published once in a newspaper of general circulation published in the County of San Mateo and circulated in the City of Millbrae.

Section 10. EFFECTIVE TERM. This Ordinance is introduced and adopted on April 14, 2020 and shall be effective immediately in accordance with Government Code Section 36937, and shall remain in full force and effect until May 31, 2020, unless extended or replaced by an affirmative vote of the City Council.

The foregoing ordinance was adopted by the City Council of the City of Millbrae, County of San Mateo, State of California by the following vote:

AYES:

NOES:

ABSENT:

Mayor

ATTEST:

City Clerk