



Monterey, California

Monterey City Council
Special Meeting Agenda

Council Special Meeting
(Study Session)

Wednesday, September 30,
2020

4:00 PM – 7:00 PM

City Council

Clyde Roberson, Mayor
Dan Albert, Councilmember
Alan Haffa, Councilmember
Ed Smith, Councilmember
Tyler Williamson, Councilmember

City Manager

Hans Uslar

IMPORTANT NOTICE:

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- Meetings of the Monterey City Council and its Boards and Commissions will be conducted with virtual (electronic) participation only. Members of the public may watch the live stream of the City Council and Boards and Commission meetings at <https://www.youtube.com/cityofmonterey> (up to 10 second delay) or on television on Channel 25 (up to 90 second delay). The YouTube live stream has the shortest delay and is recommended for anyone wishing to provide public comment (see details below).
- **BEFORE EACH MEETING**, members of the public may participate by submitting comment(s) to cityclerk@monterey.org from an email account or a cell phone's texting app until ½ hour before the start of the meeting. These emails and text messages will be shared with the Council or relevant Board or Commission prior to the start of the meeting, but will not be read aloud during the meeting. All comments received will become part of the record.
- **DURING EACH MEETING**, members of the public may participate by calling and speaking live during the designated time(s), subject to time limits that may be imposed pursuant to the Brown Act. To provide public comment:
 - Please follow along with the meeting on the YouTube live stream, as it has the shortest delay, and only call when the public comment period is announced.
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 - Between comment periods, please hang up the phone. If you wish to comment on another item, please call back when the public comment period is announced.

CALL TO ORDER

PLEDGE OF ALLEGIANCE

STUDY SESSION

STUDY SESSION items are used to provide information to the City Council and answer their questions to clarify issues. Study Sessions provide a setting for informal discussions between staff, consultants, board, commission, committee members and the City Council regarding specific programs, projects or policies. Council does not take formal action on the items.
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1. Commercial Cannabis Business Use Policy Framework Discussion (Not a Project Under CEQA per Article 20, Section 15378 and Under General Rule Article 5, Section 15061)
2. Update on Recent Developments in the Law Regarding COVID-19 Tenant Protections (Exempt from CEQA Guidelines Article 20, Section 15378)

ADJOURNMENT

Members of the public have the right to address the City Council on any item on the Agenda, before or during its consideration [G.C. §54954.3(a)]. The Mayor will formally open the floor for public comment on items such as "Public Appearance" and "Public Hearings." Comment may be made via the method described in the Important Notice (re: COVID-19) at the top of the agenda.

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Council Agenda Report

Date: 9/30/2020

Item No.: 1.

FROM: Hans Uslar, City Manager

SUBJECT: Commercial Cannabis Business Use Policy Framework Discussion (Not a Project Under CEQA per Article 20, Section 15378 and Under General Rule Article 5, Section 15061)

RECOMMENDATION:

That the City Council receive and discuss an initial analysis and assessment of various aspects concerning permitting commercial cannabis businesses within the City of Monterey and provide guidance for commercial cannabis policy.

FISCAL IMPLICATION:

The analysis, discussion, implementation and management of cannabis businesses will require allocation of staff resources. Some of those costs can be recovered through fees and taxes. Cannabis businesses are expected to bring in additional tax revenues.

ENVIRONMENTAL DETERMINATION:

The City of Monterey determined that the proposed action is not a project as defined by the California Environmental Quality Act (CEQA) (CCR, Title 14, Chapter 3 CEQA Guidelines Article 20, Section 15378). In addition, CEQA Guidelines Section 15061 includes the general rule that CEQA applies only to activities which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. Because the proposed action and this matter have no potential to cause any effect on the environment, or because it falls within a category of activities excluded as projects pursuant to CEQA Guidelines section 15378, this matter is not a project. Because the matter does not cause a direct or any reasonably foreseeable indirect physical change on or in the environment, this matter is not a project. Any subsequent discretionary projects resulting from this action will be assessed for CEQA applicability.

DISCUSSION:

The topics regarding the potential implementation of cannabis operations in the City of Monterey are plentiful and complex. Council requested that Community Development, Finance, Police, City Attorney's Office, and City Manager's Office start working on creating and presenting an initial analysis and assessment. This report accomplishes this task.

Since 1997, the City of Monterey has maintained a moratorium or prohibition of medical marijuana dispensaries, delivery businesses, or any other cultivation, sales, exchanges or distribution of marijuana within the City's limits.

At a public hearing held on January 21, 2020, the City Council interpreted Monterey City Code section 22-39 as not prohibiting commercial cannabis laboratory testing in the Industrial, Administration and Research (IR) zoning district. Thereafter, the City Council adopted Ordinance 3610, a temporary moratorium on commercial cannabis activity, and extended that moratorium until February 4, 2021 with the adoption of Ordinance 3613.

On August 8, 2020, Councilmember Alan Haffa requested the Monterey City Council decide whether to agendize a discussion to consider amending the City Code to allow commercial cannabis uses as a means to generate additional tax revenue for the City. The Council agreed to place the item on a future agenda.

Staff recommends to Council to critically read and evaluate the presented information with the following questions in mind:

What are Council's objectives and goals with respect to cannabis? What is Council's vision for Monterey's business districts and adjacent neighborhoods when permitting various types of retail cannabis businesses? Specifically:

- Does the Council just want to allow unrestricted access to marijuana or limit access to medicinal purposes?
- Revenues - Does the Council want to allow cannabis operations to increase tax revenues?
- Economic Development - Does the Council want to create more jobs and/or a more diversified economy?
- Public Safety - What are the Council's concerns and how does the Council assess potential costs / impacts?
- What other objectives are important for your decision making?

The following areas will be introduced and discussed to illustrate the complexity of the topic as well as help the Council in facilitating constructive debates. Here are the subjects this report will cover:

- **Legal Background**
- **Revenue-generation** (i.e., business license tax, excise taxes, and special sales tax)
- **Known impacts on policing and community services**
- **Retail operations** (i.e., brick-and-mortar and delivery services, business districts and allowable locations)
- **Distribution and transport** of cannabis
- **Cultivation, manufacturing, and/or microbusinesses**
- **Cannabis testing laboratories**
- **Temporary cannabis events**
- **Selection process** (either a Request for Proposals (RFP) process or a first come - first served basis)

Legal Background

History of Federal and State Cannabis Policy and Regulation

Under federal law, the **Controlled Substances Act** prohibits the production, sale, and possession of marijuana. It is also illegal under the Controlled Substances Act to open, use, lease, or maintain any place for the purposes of manufacturing, distributing, or using marijuana. Federal law is enforceable despite State law.

Because of its Schedule I status, the cannabis industry cannot leverage traditional banking or financial services, resulting in public safety and health concerns from cash transactions. Because of its Schedule I status, the industry is also precluded from taking ordinary deductions, resulting in an unsustainable tax rate for cannabis entrepreneurs and driving the illicit market. That may change if the United States Supreme Court decides to hear the case of Marvin Washington et al. v. William P. Barr, Attorney General, et. al. which seeks to invalidate cannabis's Schedule I designation on constitutional grounds. (Case No. 20-148.)

In 1996, California voters enacted the Compassionate Use Act, legalizing the medical use and possession of cannabis for qualified patients. In 2003, the California Legislature adopted the Medical Marijuana Program Act (MMPA), allowing for the cultivation and distribution of medical cannabis at collectives and dispensaries. In 2015, the State enacted the Medical Marijuana Regulation and Safety Act (now Medical Cannabis Regulation and Safety Act, or MCRSA), which created a framework for state-level licensing and regulation for cultivation, manufacturing, distribution, transport, laboratory testing and dispensing of medical cannabis. The MCRSA legalized and currently regulates for-profit commercial medical marijuana businesses in the State.

In 2016, California voters passed Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA). The AUMA legalized recreational use (referred to as "adult use") of cannabis for adults 21 years of age or older. The act created a new regulatory and licensing framework for adult use commercial cannabis businesses. In 2017, the State legislature passed SB 94, which essentially merged the regulations and licensing requirements of the MCRSA and AUMA. The resulting Medicinal and Adult Use Cannabis Regulation and Safety Act (MAUCRSA) regulates all commercial cannabis uses in the State. California is one of 11 states that allow recreational consumption.

Cities retain full regulatory authority over all commercial cannabis businesses (both medical and adult use). Deliveries may still be regulated or prohibited by local governments. Cities must allow indoor cultivation for personal use, but can reasonably regulate it. Commercial indoor cultivation may still be banned. All cannabis businesses must have a State license.

According to local governments' cannabis policy experts HdL Companies, two years ago there were 16,000 cannabis businesses and, as time has evolved, there are now almost 8,000. HdL indicates this reduction is in part because there is insufficient retail to sustain all of the various types of businesses. The consumer demand for cannabis as a product in California is 18-22%.

In California there are 661 storefront retail licenses in 120 jurisdictions that allow retail. HdL indicates the market demand is for 1,842 retail licenses. Monterey County is short five retail licenses as of June (with Pacific Grove approving one dispensary, then the shortage is four).

State Regulatory Agencies

As part of implementation of the MAUCRSA, the State created multiple authorities to regulate and license the different types of commercial cannabis businesses:

- **Bureau of Cannabis Control (BCC).** A Division of the Department of Consumer Affairs, the BCC is the lead agency in regulation of commercial cannabis licenses for medical and adult-use cannabis in California. The Bureau is responsible for licensing retailers, distributors, testing labs, microbusinesses, and temporary cannabis events.
- **Manufactured Cannabis Safety Branch (MCSB).** A Division of the California Department of Public Health, MCSB is responsible for regulating the manufacturers of cannabis concentrates and cannabis-infused edibles and topicals for both medical and nonmedical use.
- **CalCannabis Cultivation Licensing (CCL).** A Division of the California Department of Food and Agriculture, CCL is responsible for licensing cultivators of medicinal and adult-use (recreational) cannabis and implementing a track-and-trace system to record the movement of cannabis through the distribution chain.

Revenue generation

Revenue Outlook based on State Financial Information:

According to HdL Companies, there are 29 major cannabis businesses on the stock market. A majority of cannabis stock value continues to drop 40-60%. Businesses are downsizing due to high cost and less revenue than expected. Businesses are not paying their bills and aged receivables are getting higher.

Banking is still a major issue for operators which is affecting their ability to obtain loans. Multistate operators are holding onto their cash.

HdL has been tracking sales tax gross receipts over a 14-year period. There is almost \$26 billion in revenue being put into the legal market. For 2018-2019, gross receipts were \$4,499,679,511 and local tax allocations of (1%) were \$44,996,795.

Effective January 1, 2018, a 15% excise tax became imposed upon retail purchasers of all cannabis and cannabis products. Distributors are required to collect the excise tax when the products are sold to a retailer. The tax is calculated on the "average market price" sold in a retail sale. The California Department of Tax and Fee Administration (CDTFA) computes a markup rate on a biannual basis and is currently 80%. CDTFA accepts cash payments by appointment only at 10 locations throughout the state using enhanced security measures and armored car services.

According to the League of California Cities, "[a] cumulative tax rate that is too high will stimulate [illicit] market activity and deny cities whatever revenue they anticipate from local marijuana taxes. For this reason, cities should ideally examine which other existing local taxes can produce marijuana-related revenue streams before levying a new marijuana-specific tax." (Tim Cromartie, "What Cities Should Know About Prop 64, the Adult Use of Marijuana Act" *Western City* [February 2017]).

The spectrum of cannabis fiscal implications includes revenues, costs, implementation and market demand/shortage. From a broad perspective, there are revenues in the form of local fees, taxation and fines.

City Fees:

The City would incur costs for a cannabis program in the areas of: program planning/development; operator(s) selection and permitting; enforcement; public education, response, and safety; and program administration. Fees and taxation may or may not adequately fund the City cannabis program costs. Implementation also requires developing new fees and business license taxes and revenue protocols for the cash-only cannabis industry. Local fees can charge for cost recovery such as application, permit, enforcement and licensing. These fees will be approved by the Council.

Business Tax:

Local taxation would require the approval of City of Monterey voters and this could include a local cannabis business tax measure in a general election. The tax structure may vary depending on the cannabis business category, such as cultivation, manufacturing, distribution, retail, testing and cannabis special events. The local tax(es) would be in addition to the State excise tax at 15% and cultivation tax which ranges from \$1.35 to \$9.65 per ounce.

Additional fiscal-related considerations include regional and local market demand for retail cannabis. With a possible oversaturation of cannabis retailers on the Monterey Peninsula, actual demand and therefore revenue, may not yield as much revenue as expected.

Policymakers should consider how the cannabis business category (cultivation, manufacturing, distribution, retail, testing and/or special events) would fit within the City's retail mix.

Currently, staff cannot provide Council with an estimate of anticipated revenues. We believe that cannabis business operations will result in an increase in revenues, which will not be significant and which will be partially offset by new demands for services on City staff and City Council.

Examples of neighboring communities' revenues from cannabis sales include:

- City of Seaside: 6% cannabis tax (3 dispensaries): \$1.1m
- City of Del Rey Oaks: 5% cannabis tax (1 dispensary): \$450K

Illicit cannabis sales still dominate the market

According to the Los Angeles District Attorney's Office, the illicit market remains an issue.

Approximately \$3.1 billion is the legal market for cannabis sales and \$8.7 billion illicit market, resulting in lost tax revenue of \$2.6 billion, not including local taxes.

California is a 74% illicit market. In 2016, California produced 13.5 million pounds of cannabis and Californians consumed 2.5 million pounds. Approximately 81% of cannabis produced was illicit, with an estimated value of \$22 billion, and was exported to other states.

Impacts on policing and community services

The Monterey Police Department (MPD) believes there is a potential for an increase in violent crimes and quality of life concerns that may arise should cannabis businesses be permitted in Monterey.

With regard to violent crime, some cannabis businesses have been victimized by robberies and other violent crime, primarily because both cannabis and cash have immediate value and are immediately profitable. Simply stated, because there is always a lot of cash on the premise, cannabis businesses could be likely targets for felony crimes such as armed robberies.

With regard to quality of life issues, which are much more prevalent, communities with cannabis businesses have experienced issues with traffic, parking, persons loitering both on foot and in vehicles, persons smoking cannabis in the area, odors, and other related issues. Many of these issues can be mitigated by stringent regulatory procedures. It is important to point out that many jurisdictions have struggled with illegal, non-sanctioned cannabis businesses, which are separate from city-sanctioned businesses, and those illegal businesses create many of the issues. One other crime concern is the potential increase to driving under the influence resulting in property damage, injury and death.

In addition to potential crime issues, Cannabis retail, cultivation, manufacturing, and/or testing facilities in Monterey will result in a substantial increase to MPD workload, diverting police resources from other priorities.

MPD staff would need to work with other City team members and most likely a consultant

- to ensure a robust regulatory system is developed and put in place;
- a process to vet prospective businesses is established;
- regulation of the cannabis business(es) is undertaken;
- and appeals are prepared for and addressed.

Much of that work would include:

- conducting background checks,
- establishing security plans,
- research and addressing non-compliance.

While the Bureau of Cannabis Control (BCC) is the state agency responsible for regulating the Cannabis Industry, BCC is primarily a licensing agency, and almost all regulatory action is undertaken by the local entity tasked with enforcement (i.e., City of Monterey). In addition to the regulatory enforcement, any crimes committed against the legal businesses and quality of life issues would need to be addressed by the Police Department.

Retail Operations

Retail establishments include both brick-and-mortar storefront retail businesses (dispensaries) and delivery services. Under State law, the City may prohibit retail storefront sales.

State law allows sales from 6:00 a.m. to 10:00 p.m.; the City may further limit hours of operation. Retail establishments may not be within 600 ft. of a K-12 school, day care or youth center; the City may impose additional zoning restrictions such as greater distances from

schools and City parks, or require additional distances from existing cannabis retail establishments or other uses.

The City Council may consider allowing retail uses to be located within the City's commercial districts which currently allow general retail sales establishments, such as

- the Downtown Specific Plan area,
- the North Fremont Specific Plan area, and
- Lighthouse Specific Plan area, and the Commercial zoning districts:
- Neighborhood Commercial (C-1) district,
- Community Commercial (C-2) district,
- General Commercial (C-3) district,
- and Cannery Row Commercial (CR) district,
- and non-storefront (delivery) retail in the Industrial (IR) zone, as these businesses only require commercial space for storage.

The Council may decide to consider allowing medical cannabis dispensaries in

- the Office and Professional (CO) district and
- Industrial (IR) district, as it may align with the medical office uses that are common in those zones.

The Council will ultimately need to adopt an ordinance regulating retail sales. Many cities adopt numerical or geography based limits on retail establishments. Municipal ordinances typically include an objective system to evaluate applications - first come/first serve requirement or Request for Proposal (RFP) process. At a recent conference on this issue, attorneys recommended first come/first serve with the land use restrictions as a preferred selection method due to frequent lawsuits challenging the RFP approach due to decisions being considered arbitrary.

The approach taken in West Hollywood was to have a merit based selection process. The City of West Hollywood developed criteria and issued a RFP. West Hollywood received 325 applications for 40 licenses. A scoring committee of five ranked the applications. Each application was 75 pages, and the scoring committee reviewed over 20,000 pages.

The approach taken in Mount Shasta was to have a subcommittee evaluate the industries that should be allowed. Mount Shasta focused on industry rather than retail. At the time Mount Shasta had three medical dispensaries, and there were concerns with youth access over time. Mount Shasta kept that number for retail and focused on industry. The City of Mount Shasta used a first come first served basis to award the licenses. There are 21 licenses and 7 total facilities in Mount Shasta.

The City of Desert Hot Springs' legal counsel advised against merit based or lottery selection processes. It is much easier to defend a well-reasoned zoning ordinance.

The City of Santa Rosa tried a merit based system and will not try to utilize that process again. There was a two-week window application period and they received 35 applications. It was controversial, political, etc. It did not work well. A year or two later, Santa Rosa did a first come first served process with an over concentration policy. They received twenty applications in one day. A decision was made to treat cannabis businesses like other businesses, and a use permit is issued that runs with the land.

In 2017, the City of Seaside adopted regulations to allow the sale, distribution, and cultivation of medical and adult use cannabis for a limited number of businesses within the City. Initially, the City would allow three use permits for adult use cannabis dispensaries and created a 30-day application period during which they received 17 applications. Seaside staff recommended approval of the top two applications and asked their Council to choose one of three applications which tied on their scoring matrix. Ultimately, their Council decided to approve six applications and requested staff update the City's ordinance to allow additional locations. Seaside City Council was impressed with the applicants' willingness to invest in their community. Seaside's ordinance requires that applicants provide a quantifiable community benefit; many applicants proposed annual contributions to local nonprofit organizations, such as Boys & Girls Club and The Salvation Army (the chosen applicants proposed ~\$10,000 in annual contributions).

Important: The Planning Office is staffed at a level to support current application levels. There will not be adequate capacity in the Planning Office to process these types of applications. One city reported that it received 80 applications in one day, competing for the opportunity to open a retail facility. Planners reported that it takes considerable time to evaluate the applications to ensure that they meet the submittal requirements. Monterey would most likely need to hire contract planning staff to process these applications. Application fees would need to cover 100% of this cost.

Distribution and transport of cannabis

Cannabis distributors are divided into two State license types: distributor and transport only distributors. Distributors purchase, sell, arrange for testing, conduct quality assurance review of packaging and labeling, and store and transport cannabis goods between licensees.

Transport only distributors transport goods between licenses (not including immature plants and seeds to licensed retailers or microbusinesses). Distributors do not offer direct to consumer sales and may be best located in the City's IR zone due to their need for storage and office space.

Pending the regulations adopted by the Council, the same capacity issues for the Planning Office described in the retail section will apply.

Cultivation, Manufacturing, and/or Microbusinesses

Cultivators grow medical and adult use cannabis in indoor and/or outdoor settings and are annually licensed by the CalCannabis division of CDFA. Indoor cultivation may be appropriate in IR zones due to the need for warehousing and storage facilities and to minimize impacts, such as odors, to residential neighborhoods.

Water will be a constraint to cultivation. There are inadequate water credits when converting existing office buildings into cultivation sites.

Pending the regulations adopted by the Council, the same capacity issues for the Planning Office described in the retail section will apply.

Manufacturers produce adult-use and medical cannabis concentrate and cannabis-infused edible or topical products. Annual licensing is required by MCSB. Manufacturing businesses may be best located in the Commercial and IR zones due to their use of medical lab equipment and commercial kitchens.

Manufacturing facilities require careful review and regulation due to potential fire and waste issues. At a recent conference, fire marshals described the challenges with inadequate regulations to evaluate the safety issues that they are observing during plan check review and site inspections. The manufacturing by-products need to be carefully disposed of are not appropriate for typical landfill disposal as well.

Under State law, microbusinesses must engage in at least three of the following commercial cannabis activities: cultivation, manufacturing, distribution and retail sales. Cultivation areas must be less than 10,000 square feet. The concept is similar to small-scale breweries or vineyards and tasting rooms: in-house cultivation, production, distribution and retail operations. Individual activities for each microbusiness should be located as previously described. Should a prospective microbusiness desires to conduct all activities in one location, it may be best located in the IR zone.

Pending the regulations adopted by the Council, the same capacity issues for the Planning Office described in the retail section will apply.

Cannabis testing laboratories

In 2019, a prospective agricultural testing laboratory was proposed at a location in Ryan Ranch. Staff found that the use would be inconsistent with the City's cannabis business prohibition in place at that time, as the lab operators proposed to conduct cannabis testing. The staff determination was appealed to the Planning Commission and City Council. Staff was directed to prepare a temporary moratorium ordinance to prohibit such activity, with the exception of the Ryan Ranch location. Staff was then tasked with studying the impacts of commercial cannabis testing laboratory testing businesses and make recommendations to the City Council on regulations to ensure the public's health, safety, and welfare. The moratorium has been extended until February 4, 2021 and the City Council must address whether to continue prohibition or adopt regulations to allow testing laboratories by this date.

Prior to licensing by the State, prospective testing laboratories must have valid International Organization for Standardization for accreditation (ISO/IEC 17025), standard operating procedures, and method validation reporting for the following: cannabinoids, heavy metals, microbial impurities, mycotoxins, residual pesticides, solvents and processing chemicals, and terpenoids. The State requires applicants to detail Chain of Custody protocols for transportation, handling, storage and destruction of samples. Testing facilities would be best located in the IR zone.

Planning staff is currently drafting these regulations and expects to have the Planning Commission review them in fall 2020.

Temporary cannabis events

The Monterey County Fairgrounds has met with City staff on multiple occasions. The Fairgrounds is interested in allowing events that involve either the sales or use of cannabis. Due to the City's existing ordinances, these events have been prohibited.

The City can consider allowing temporary cannabis events. Licensed organizers can apply to hold licensed temporary cannabis events where onsite sale and consumption of cannabis goods is authorized at the location indicated on the event license during specific dates. Cannabis consumption may not be visible from public places or non-age-restricted areas. No temporary

cannabis event license can be issued for more than four days. Educational or information cannabis events where no cannabis sales or consumption will occur do not require licensing by State.

Final Thoughts

During a recent three-day seminar that City staff attended a presentation titled “Cannabis Policy and Public Health: What are local governments doing and what can they do,” delivered by Lynne Silver, MD, MPH, a senior advisor of the Public Health Institute related the following Action Steps:

- Mobilize, Align & Engage Partners to Avoid a New Big Tobacco
- Enforce creatively without refilling the jails
- Prohibit certain products
- Cap the number and distribution of retail outlets including delivery, prioritize economic equity, consider nonprofit monopoly
- Maintain price
- Inform Consumers of Health Risks & Educate Youth
- Prohibit marketing to the maximum extent allowed by law (billboards, signs, etc.)
- Control conflicts of Interest

Next Steps

Staff recommends that the City Council discuss the policy considerations listed above and provide feedback to Staff.

Since the temporary moratorium for cannabis testing labs will expire, staff will return to Council prior to February 2021 with a proposed set of regulations.

Pending Council’s direction, staff estimates that the process to implement commercial cannabis operations in the City of Monterey will take between 9 to 15 months understanding that other projects and initiatives will be delayed as a new major initiative is getting implemented.

Writings distributed for discussion or consideration on this agenda item, pursuant to Government Code § 54957.5, are posted at <https://monterey.org/Submitted-Comments> within 72 hours of the meeting.



Council Agenda Report

Date: 9/30/2020

Item No.: 2.

FROM: Christine Davi, City Attorney

SUBJECT: Update on Recent Developments in the Law Regarding COVID-19 Tenant Protections (Exempt from CEQA, Article 20, Section 15378 and Guidelines 15061)

RECOMMENDATION:

That the City Council receive a report on recent developments in the law regarding COVID-19 tenant protections. This report provides a summary of new and complex laws. The City Attorney's Office cannot provide legal advice to the public.

POLICY IMPLICATIONS:

Housing, and in particular affordable housing, has been identified as a priority in the City's Housing Element and by the City Council during recent retreats/workshops. The City Council is committed to protecting the quality of life of City residents and in preventing homelessness.

FISCAL IMPLICATIONS:

There is no fiscal impact to the general fund in receiving this report.

ENVIRONMENTAL DETERMINATION:

The City of Monterey determined that the proposed action is not a project as defined by the California Environmental Quality Act (CEQA) (CCR, Title 14, Chapter 3 CEQA Guidelines Article 20, Section 15378). In addition, CEQA Guidelines Section 15061 includes the general rule that CEQA applies only to activities which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. Because the proposed action and this matter have no potential to cause any effect on the environment, or because it falls within a category of activities excluded as projects pursuant to CEQA Guidelines section 15378, this matter is not a project. Because the matter does not cause a direct or any reasonably foreseeable indirect physical change on or in the environment, this matter is not a project. Any subsequent discretionary projects resulting from this action will be assessed for CEQA applicability.

DISCUSSION:

Current Status of City Urgency Ordinances:

The City's tenant protections set forth in Urgency Ordinance 3614 expired on May 31, 2020, and the protections set forth in Urgency Ordinance 3632 will expire on September 30, 2020. This means that as of October 1, 2020, the City does not have in effect any ordinances halting residential or commercial evictions or freezing rent increases. Rather, State laws set forth in the

Tenant Protection Act of 2019 (rent control) and the COVID-19 Tenant Relief Act of 2020 (eviction moratorium) govern residential landlord/tenant relationships in Monterey.

Under the new State law, cities are not authorized to enact new residential eviction moratoria related to COVID-19 with an effective date before February 1, 2021. (Code of Civil Procedure section 1179.05.)

Cities continue to have the authority to enact rent control measures that are more protective of tenants than the Tenant Protection Act of 2019, as long as those measures fit within the constraints imposed by the Costa-Hawkins Rental Housing Act and the Ellis Act.

Background:

Since March 2020, there have been many layers of laws from various government agencies and the judiciary addressing residential and/or commercial landlord/tenant relationships. These are briefly described below, followed by a discussion on the COVID-19 Tenant Relief Act of 2020 (AB 3088), which is the law applicable today.

On March 16, 2020, Governor Newsom issued Executive Order N-28-20, which authorized local governments to halt residential and commercial evictions for renters affected by COVID-19 through May 31, 2020. Pursuant to the powers granted under this executive order, on March 25, 2020, the City Council adopted Urgency Ordinance 3614 to temporarily prohibit residential and commercial evictions for the non-payment of rent related to COVID-19 through May 31, 2020. Urgency Ordinance 3614 also deferred payment of rent due from the effective date of the ordinance, which was March 25, 2020, through May 31, 2020.

On March 27, 2020, the Governor signed Executive Order N-37-20, imposing a statewide moratorium on residential evictions, also effective through May 31, 2020. There was some overlap between Executive Order N-37-20 and City's Ordinance 3614 with respect to residential evictions. Where the City's regulation was more protective, the City's ordinance controlled, and where the Executive Order was more protective, or regulated where the City did not, it controlled.

The Judicial Council of California adopted a temporary emergency rule on April 6, 2020 that prohibited the issuance of a summons or entering a default in all eviction action unless the case involved public health and safety issues. This effectively halted most evictions, including those not related to COVID-19. On August 13, 2020, the Judicial Council of California voted to sunset this emergency rule effective September 1, 2020.

On May 29, 2020, Governor Newsom extended Executive Order N-28-20, authorizing local governments to halt residential and commercial evictions until July 28, 2020. He did not extend the statewide moratorium on residential evictions.

August 17, 2020, the City Council adopted Urgency Ordinance 3623 to temporarily prohibit residential evictions and residential rent increases related to COVID-19. This was necessary in light of the Judicial Council's sunset of its emergency rule, allowing eviction proceedings to commence on September 1st except in cities with a local moratorium. Urgency Ordinance 3632 expires on September 30, 2020, concurrent with Executive Order N-28-20.

AB 3088 became effective on August 31, 2020, and it provides statewide tenant protections until February 1, 2021. This legislation is described below.

On September 1, 2020, the Centers for Disease Control and Prevention (CDC) ordered a national residential eviction moratorium halting evictions through December 31, 2020 to prevent the spread of COVID-19. The CDC's moratorium does not apply in any state with a moratorium on residential evictions that provides the same or greater level of public health protection than the requirements listed in the order. Depending on a tenant's particular situation, the CDC's order may be more or less protective than AB 3088. Legal challenges to the CDC's order are already underway.

COVID-19 Tenant Relief Act of 2020 (AB 3088)

Overview

AB 3088 is now in effect and it governs tenant protections in the City. AB 3088 prohibits residential evictions between March 1, 2020 and January 31, 2021 for qualifying tenants for the failure to pay rent due to financial hardship related to COVID-19. (Code of Civil Procedure sections 1179.02, 1179.03.) AB 3088 is thought to be a temporary fix, and future legislation is anticipated to address a longer term solution.

AB 3088 was approved by Governor Newsom on August 31, 2020, and it establishes a framework for tenants to avoid residential evictions and for landlords to avoid foreclosures. AB 3088 does not apply to commercial evictions, and those may commence starting September 2, 2020.

City Urgency Ordinance 3641 Deferred Rent and Repayment Under AB 3088

AB 3088 coordinates repayment of rents with local ordinances. It provides that any city provision in effect on August 19, 2020 that conditioned the rent repayment period on the termination of a proclamation of a local emergency, the repayment period is deemed to begin on March 1, 2021. The City's Urgency Ordinance 3641 was adopted on March 25, 2020. It authorized the deferred payment of rent from its effective date, March 25, 2020, through May 31, 2020. Ordinance 3641 required repayment of any deferred rent within 120 calendar days from May 31, 2020, or from the date the County's Emergency Shelter in Place Order terminated, whichever date is later.

AB 3088 now controls the repayment terms of Ordinance 3614. The repayment period is deemed to begin on March 1, 2021. (Code of Civil Procedure section 1179.05(a)(2)(B).) Thus, the repayment of rent that was deferred from March 25, 2020 through May 31, 2020 under Urgency Ordinance 3614 will become due for payment on March 1, 2021.

March 1, 2020-August 31, 2020 COVID-19 Related Debt Period

For COVID-19 related rental debt accrued between March 1, 2020 and August 31, 2020, tenants cannot be evicted based on this nonpayment if they provide a financial distress form under penalty of perjury, declaring that they have a financial hardship related to COVID-19. COVID-19 related hardships can range from an increase health care, child care, and family care

expenses, loss of income, and increased work expenses. Higher income tenants¹, meaning those earning more than \$100,000 per household, must provide documentation supporting their claim of hardship to be entitled to the eviction ban.

By September 30, 2020, residential landlords are required to provide a special notice to tenants who have not paid one or more rental payments during this period. (Code of Civil Procedure section 1179.04(a).) The unpaid rent is not waived and it remains owed to the landlords. It becomes a consumer debt collectable in small claims court. (Code of Civil Procedure section 116.223.)

September 1, 2020 – January 31, 2021 COVID-19 Related Debt Period

For new COVID-19 related rental debts accrued between September 1, 2020 and January 31, 2021, tenants that send hardship declarations cannot be evicted provided that the tenants pay at least 25% of the rent due during that period if they provide a COVID-19 financial distress declaration form to their landlords. The 25% rent requirement can be paid as late as January 31, 2021. (Code of Civil Procedure section 1179.03(g)(2)(B).) Thus, landlords may or may not receive rents during this time period. Unpaid rent is not waived and remains owed to the landlords. The debt becomes a consumer debt collectable in small claims court (Code of Civil Procedure section 116.223.)

Increased Notice

Under the new law, the notice period for non-payment of COVID-19 rental debt is extended from three to 15 days (exclusive of Saturdays, Sundays, and other judicial holidays). (Code of Civil Procedure section 1179.03.)

Landlord Obligations

AB 3088 requires the landlord to provide the hardship form to residential tenants. Landlords are also prohibited from taking action against tenants or modifying existing leases in retaliation for nonpayment of rent due to COVID-19.

Landlord Protections

The specific provisions applicable to landlords are not discussed here. In sum, AB 3088 does not prohibit foreclosures or requires banks to provide forbearances. It does encourage mortgage services to grant forbearance requests to some landlords. AB 3088 also provides that a lender's compliance with the federal CARES Act is deemed compliance with AB 3088 for federally-backed loans. (Civil Code section 3273.10.) AB 3088 extends the Homeowner's Bill of Rights protections to "small landlords."

Resources

The State has created an educational website. Tenant and Landlord resources are available at <https://landlordtenant.dre.ca.gov/>

¹ A higher income tenant under state law is a household income of at least \$100,000 or 130% of the published HCD median income limit for Monterey County, or 130% of (\$81,600) = \$106,080.

The State of California Department of Real Estate also has answers to frequently asked questions about AB 3088 available at <https://landlordtenant.dre.ca.gov/faqs.html>

The State of California Department of Real Estate also has landlord forms for the notices required under AB 3088 available at <https://landlordtenant.dre.ca.gov/Landlord/forms.html> (Attachment 1.)

Attachment 1: State of California DRE Form notices

e: All Neighborhood Associations
 All Business Associations
 Housing Outreach List

Writings distributed for discussion or consideration on this agenda item, pursuant to Government Code § 54957.5, are posted at <https://monterey.org/Submitted-Comments> within 72 hours of the meeting.



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Landlord Forms

- **Notice for Code of Civil Procedure Section 1179.02.5(d)** - A landlord must send this notice out with the Notice for Code of Civil Procedure section 1179.03(b)(4) and the Notice for Code of Civil Procedure section 1179.03(c)(4) if the landlord has proof of income in the landlord's possession that the tenant is a "high-income tenant" (i.e., exceeds 130% of area median income as published by the Department of Housing and Community Development for the county in which the property resides).

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- **15-Day Notice to Pay or Quit (Nonpayment of Rent between March 1, 2020 and August 31, 2020)** - A landlord should use this notice in addition to other notices/information that the landlord may be required to give to the tenant (i.e., notices covered by Code of Civil Procedure section 1161, Code of Civil Procedure section 798 et seq. (the Mobilehome Residency Law), etc.) if the landlord wants to file an unlawful detainer action to evict the tenant for non-payment of rent between March 1, 2020 and August 31, 2020 (i.e., the "protected time period").

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- **15-Day Notice to Pay or Quit (Nonpayment of Rent between September 1, 2020 and January 31, 2021)** - A landlord should use this notice in addition to other notices/information that the landlord may be required to give to the tenant (i.e., notices covered by Code of Civil Procedure section 1161, Code of Civil Procedure section 798 et seq. (the Mobilehome Residency Law), etc.) if the landlord wants to file an unlawful detainer action to evict the tenant for non-payment of rent between September 1, 2020 and January 31, 2021 (i.e., the "transition time period").

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- **Notice for Code of Civil Procedure Section 1179.04(a)** - A landlord must use this notice if their tenant has failed to pay rent between March 1, 2020 and August 31, 2020, even if the landlord is not intending (at least at this time) to file an unlawful detainer action. This notice is to notify the tenant that they may have protections through the COVID-19 Tenant Relief Act of 2020 and the landlord must serve this notice on or before September 30, 2020. Notice for Code of Civil Procedure section 1179.04(a) must be served before or concurrently with the Notice for Code of Civil Procedure section 1179.03(b)(4) or the Notice for Code of Civil Procedure section 1179.03(c)(4) if the landlord wants to file an unlawful detainer action to evict the tenant.

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NOTICE FROM THE STATE OF CALIFORNIA

Code of Civil Procedure Section 1179.02.5(d)

Proof of income on file with your landlord indicates that your household makes at least 130 percent of the median income for the county where the rental property is located, as published by the Department of Housing and Community Development in the Official State Income Limits for 2020.

As a result, if you claim that you are unable to pay the amount demanded by this notice because you have suffered COVID-19-related financial distress, you are required to submit to your landlord documentation supporting your claim together with the completed declaration of COVID-19-related financial distress provided with this notice.

If you fail to submit this documentation together with your declaration of COVID-19-related financial distress, and you do not either pay the amount demanded in this notice or deliver possession of the premises back to your landlord as required by this notice, you will not be covered by the eviction protections enacted by the California Legislature as a result of the COVID-19 pandemic, and your landlord can begin eviction proceedings against you as soon as this 15-day notice expires.

For information about legal resources that may be available to you, visit <https://lawhelpca.org/>.

For information, resources, and support visit www.LandlordTenant.dre.ca.gov.

15-Day Notice to Pay or Quit

(Nonpayment of Rent between March 1, 2020 and August 31, 2020)
(Code of Civil Procedure Section 1179.03(b)(4))

TO: _____
 (Name of Tenant(s))

NOTICE FROM THE STATE OF CALIFORNIA

If you are unable to pay the amount demanded in this notice, and have decreased income or increased expenses due to COVID-19, your landlord will not be able to evict you for this missed payment if you sign and deliver the declaration form included with your notice to your landlord within 15 days, excluding Saturdays, Sundays, and other judicial holidays, but you will still owe this money to your landlord. If you do not sign and deliver the declaration within this time period, you may lose the eviction protections available to you. You must return this form to be protected. You should keep a copy or picture of the signed form for your records.

You will still owe this money to your landlord and can be sued for the money, but you cannot be evicted from your home if you comply with these requirements. You should keep careful track of what you have paid and any amount you still owe to protect your rights and avoid future disputes. Failure to respond to this notice may result in an unlawful detainer action (eviction) being filed against you.

Premises location: _____

Amount of total rent due and owing: _____

_____ (month/year) \$ _____
 _____ (month/year) \$ _____
 _____ (month/year) \$ _____
 _____ (month/year) \$ _____
 _____ (month/year) \$ _____

For information about legal resources that may be available to you, visit <https://lawhelpca.org/>.

For information, resources, and support visit www.LandlordTenant.dre.ca.gov.

DISCLAIMER: THIS NOTICE CONTAINS INFORMATION REQUIRED BY CODE OF CIVIL PROCEDURE SECTION 1179.03(B). ADDITIONAL INFORMATION MAY BE REQUIRED BY CODE OF CIVIL PROCEDURE SECTION 1161 OR OTHER APPLICABLE FEDERAL, STATE OR LOCAL LAWS DEPENDING ON THE NATURE, LOCATION AND FINANCING OF YOUR RENTAL UNIT. FOR ADDITIONAL GUIDANCE, PLEASE CONSULT AN ATTORNEY, A LEGAL AID ORGANIZATION, A LANDLORD ASSOCIATION, OR A TENANT ADVOCACY GROUP.

15-Day Notice to Pay or Quit

*(Nonpayment of Rent between September 1, 2020 and January 31, 2021)
(Code of Civil Procedure Section 1179.03(c)(4))*

TO: _____
(Name of Tenant(s))

NOTICE FROM THE STATE OF CALIFORNIA

If you are unable to pay the amount demanded in this notice, and have decreased income or increased expenses due to COVID-19, you may sign and deliver the declaration form included with your notice to your landlord within 15 days, excluding Saturdays, Sundays, and other judicial holidays, and your landlord will not be able to evict you for this missed payment so long as you make the minimum payment (see below). You will still owe this money to your landlord. You should keep a copy or picture of the signed form for your records.

If you provide the declaration form to your landlord as described above AND, on or before January 31, 2021, you pay an amount that equals at least 25 percent of each rental payment that came due or will come due during the period between September 1, 2020, and January 31, 2021, that you were unable to pay as a result of decreased income or increased expenses due to COVID-19, your landlord cannot evict you. Your landlord may require you to submit a new declaration form for each rental payment that you do not pay that comes due between September 1, 2020, and January 31, 2021.

For example, if you provided a declaration form to your landlord regarding your decreased income or increased expenses due to COVID-19 that prevented you from making your rental payment in September and October of 2020, your landlord could not evict you if, on or before January 31, 2021, you made a payment equal to 25 percent of September's and October's rental payment (i.e., half a month's rent). If you were unable to pay any of the rental payments that came due between September 1, 2020, and January 31, 2021, and you provided your landlord with the declarations in response to each 15-day notice your landlord sent to you during that time period, your landlord could not evict you if, on or before January 31, 2021, you paid your landlord an amount equal to 25 percent of all the rental payments due from September through January (i.e., one and a quarter month's rent).

You will still owe the full amount of the rent to your landlord, but you cannot be evicted from your home if you comply with these requirements. You should keep careful track of what you have paid and any amount you still owe to protect your rights and avoid future disputes. Failure to respond to this notice may result in an unlawful detainer action (eviction) being filed against you.

Premises location: _____

Amount of total rent due and owing: _____

_____ (month/year) \$ _____
_____ (month/year) \$ _____
_____ (month/year) \$ _____
_____ (month/year) \$ _____
_____ (month/year) \$ _____

For information about legal resources that may be available to you, visit <https://lawhelpca.org/>.

For information, resources, and support visit www.LandlordTenant.dre.ca.gov.

DISCLAIMER: THIS NOTICE CONTAINS INFORMATION REQUIRED BY CODE OF CIVIL PROCEDURE SECTION 1179.03(C). ADDITIONAL INFORMATION MAY BE REQUIRED BY CODE OF CIVIL PROCEDURE SECTION 1161 OR OTHER APPLICABLE FEDERAL, STATE OR LOCAL LAWS DEPENDING ON THE NATURE, LOCATION AND FINANCING OF YOUR RENTAL UNIT. FOR ADDITIONAL GUIDANCE, PLEASE CONSULT AN ATTORNEY, A LEGAL AID ORGANIZATION, A LANDLORD ASSOCIATION, OR A TENANT ADVOCACY GROUP.

NOTICE FROM THE STATE OF CALIFORNIA

Code of Civil Procedure Section 1179.04(a)

The California Legislature has enacted the COVID-19 Tenant Relief Act of 2020 which protects renters who have experienced COVID-19-related financial distress from being evicted for failing to make rental payments due between March 1, 2020, and January 31, 2021.

“COVID-19-related financial distress” means any of the following:

1. Loss of income caused by the COVID-19 pandemic.
2. Increased out-of-pocket expenses directly related to performing essential work during the COVID-19 pandemic.
3. Increased expenses directly related to the health impact of the COVID-19 pandemic.
4. Childcare responsibilities or responsibilities to care for an elderly, disabled, or sick family member directly related to the COVID-19 pandemic that limit your ability to earn income.
5. Increased costs for childcare or attending to an elderly, disabled, or sick family member directly related to the COVID-19 pandemic.
6. Other circumstances related to the COVID-19 pandemic that have reduced your income or increased your expenses.

This law gives you the following protections:

1. If you failed to make rental payments due between March 1, 2020, and August 31, 2020, because you had decreased income or increased expenses due to the COVID-19 pandemic, as described above, you cannot be evicted based on this nonpayment.
2. If you are unable to pay rental payments that come due between September 1, 2020, and January 31, 2021, because of decreased income or increased expenses due to the COVID-19 pandemic, as described above, you cannot be evicted if you pay 25 percent of the rental payments missed during that time period on or before January 31, 2021.

You must provide, to your landlord, a declaration under penalty of perjury of your COVID-19-related financial distress attesting to the decreased income or increased expenses due to the COVID-19 pandemic to be protected by the eviction limitations described above. Before your landlord can seek to evict you for failing to make a payment that came due between March 1, 2020, and January 31, 2021, your landlord will be required to give you a 15-day notice that informs you of the amounts owed and includes a blank declaration form you can use to comply with this requirement.

If your landlord has proof of income on file which indicates that your household makes at least 130 percent of the median income for the county where the rental property is located, as published by the Department of Housing and Community Development in the Official State Income Limits for 2020, your landlord may also require you to provide documentation which shows that you have experienced a decrease in income or increase in expenses due to the COVID-19 pandemic. Your landlord must tell you in the 15-day notice whether your landlord is requiring that documentation. Any form of objectively verifiable documentation that demonstrates the financial impact you have experienced is sufficient, including a letter from your employer, an unemployment insurance record, or medical bills, and may be provided to satisfy the documentation requirement.

It is very important you do not ignore a 15-day notice to pay rent or quit or a notice to perform covenants or quit from your landlord. If you are served with a 15-day notice and do not provide the declaration form to your landlord before the 15-day notice expires, you could be evicted. You could also be evicted beginning February 1, 2021, if you owe rental payments due between September 1, 2020, and January 31, 2021, and you do not pay an amount equal to at least 25 percent of the payments missed for that time period.

For information about legal resources that may be available to you, visit <https://lawhelpca.org/>.

For information, resources, and support visit www.LandlordTenant.dre.ca.gov.