



July 14, 2021

The Honorable Dean Preston  
Supervisor, District 5  
San Francisco Board of Supervisors  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102

**Re: Proposed Ordinance # 210603- Effect Of COVID-19 on Commercial Leases**

Dear Supervisor Preston,

We write to you regarding File # 210603, your proposed ordinance that would amend the Administrative Code to establish a rebuttable presumption that a commercial tenant who was legally required to shut down due to the COVID-19 pandemic may be excused from having to pay rent that became due during the shutdown.

Our coalition agrees that the City should aid our small businesses that have been impacted by the COVID-19 pandemic. To that end, the vast majority of our property owner members who have been approached by their commercial tenants since the beginning of the pandemic, have engaged in good faith negotiations and entered into agreements restructuring rent obligations under leases in the form of deferred, reduced, or abated rent. As evidenced by our members' efforts and lease modifications, we share your sentiment that commercial property owners and government need to work together to ensure that tenants are provided with adequate support to rebound from the fallout of the public health crisis and the necessity for non-essential businesses to close. Property owners have worked diligently to avoid tenant vacancies and we remain committed to directing tenants to all available resources available to them during the economic recovery from the COVID-19 pandemic.

We do, however, have strong concerns that government action that upsets settled transactions or tries to adjust the benefits and burdens to achieve a specific purpose has consequences that will result in unfair leverage to tenants. We have outlined our specific concerns along with potential solutions and adjustments to the current draft legislation.

## **I. APPLICABILITY TO EXISTING AGREEMENTS BETWEEN PROPERTY OWNERS AND TENANTS**

As currently written, it is unclear as to whether the legislation would apply the rebuttable presumption in scenarios where tenants and property owners have come to an alternative agreement that amended the terms of their lease after the onset of the COVID-19 pandemic. We fear that, without clarification, the proposed ordinance threatens to cause uncertainty surrounding contracts that have already been amended to accommodate tenants' inability to pay rent. If the intent of the current language is to not exempt these amended contracts from the rebuttable presumption, we believe this poses two serious policy challenges: (1) the undermining of the good faith efforts of property owners to negotiate new or amended lease contracts that provided relief to tenants, effectively punishing property owners for having already worked out relief for their tenants; and (2) serving to disincentive property owners from proactively working with their tenants to provide relief to these tenants in the future.

We respectfully request the addition of language that clarifies that the ordinance is not applicable in instances where a property owner and tenant have reached any agreement that includes a temporary or permanent reduction in rent, an agreed upon forbearance period, an amended lease that calculates rent payments based off a percentage of the tenant's gross revenue, or an entirely new lease.

## **II. THE QUALIFYING THRESHOLD FOR SMALL BUSINESSES SHOULD BE ADJUSTED**

If the intent of the legislation is to provide support for small businesses, we believe that the revenue threshold for covered commercial tenants must be reduced. The proper revenue threshold can be ascertained by using the determination of dollars of revenue per square foot, which produces a more accurate determination for the typical square footage of a small business.

When calculating revenue based on dollars per square foot, a high threshold for a small business in San Francisco would be a revenue of \$1,250 per square foot. This would typically be for smaller businesses with lower assumed revenue per square foot on bigger spaces. At this high level, it would mean spaces as large as 20,000 square feet (i.e., \$25M/\$1,250) could qualify. We believe that this is much too large a threshold for what constitutes a space for a small business. Most small businesses operate in spaces of 2,000 square feet or less, constituting a threshold of \$2.5 million, not \$25 million. Even under this modified threshold, a business could qualify with less than 12 employees and with an average gross receipts per employee of \$200,000. For the purposes of the proposed legislation, we therefore recommend that a Covered Commercial Tenant be

defined as a business with \$2.5 million or less in gross receipts. This will allow for the legislation to truly focus on our City's small businesses.

Furthermore, the current local eviction moratorium already allows a Tier 1 Covered Commercial Tenant that is unable to pay rent due to a financial impact related to COVID-19 the option to terminate its lease upon thirty days' written notice to the property owner if it fails to reach a mutually satisfactory agreement for repayment of unpaid rent.

### **III. TENANTS SHOULD BE REQUIRED TO DEMONSTRATE THAT LOCAL PUBLIC HEALTH ORDERS CAUSED THEM SIGNIFICANT FINANCIAL HARDSHIP**

We remain concerned that the ordinance language may apply to businesses that, while unable to operate in their leased space, were not overwhelmingly financially impacted by the inability to operate in their space due to government health orders. We believe this could be addressed by requiring that, before the rebuttable presumption is applied, tenants must demonstrate that: (1) Their business has experienced a decrease in average monthly gross revenue of at least 50 percent during the 12 months preceding and following local public health regulations that prevented the business from operating in its space; and (2) The decrease in average monthly gross revenue described above is reasonably attributable to the local public health regulations to address the COVID-19 pandemic.

### **IV. AMBIGUOUS DATE OF SUNSET PROVISION**

We are unsure as to why the sunset provision of this legislation has been set for June 30, 2025. Is the intent of this language to account for future local health orders that may prohibit commercial tenants from operating in their leased space? In the alternative, is this ordinance only intended to cover the previous time periods where the City required businesses to shut down due to the spread of COVID-19? We believe that the clearest option would be to tie the sunset date for this legislation to the end of the forbearance periods defined in the City's Commercial Eviction Moratorium, particularly given that this new legislation is directly related to the moratorium.

### **V. ABSENCE OF MORTGAGE OR TAX RELIEF FOR PROPERTY OWNERS**

Although the proposed legislation has been designed to afford relief to tenants, it is essential that the potential impact on property owners be considered as well. With respect to tenant relief, the federal government, state of California, and the City and County of San Francisco have all established a number of different programs outside the scope of the legislation that should be allowed to work and run their course. More funding is needed, but there are now several existing programs for small businesses to access. We firmly believe the impact of these programs should be better analyzed and incorporated

to determine whether such a broad-brush policy approach is the most beneficial to all involved parties. These factors are particularly relevant given the City's recent establishment of a \$12 million fund for zero-interest small business loans and Supervisor Safai's proposal to provide grants of up to \$35,000 for businesses with gross receipts of \$2.5 million or less.

Typically, rent is not a major percentage of overall expenses for a business tenant – whereas rent is the major revenue source that commercial real estate companies use to pay employees, insurance, and taxes and to maintain their properties. This is especially true for many real estate companies that are also small businesses. These companies also have employees, subcontractors, insurance, taxes, and many other bills to pay. Unlike the residential programs adopted by the Board of Supervisors, this proposal offers no funding to provide relief to compensate commercial property owners. While this will have negative financial impacts to the commercial real estate industry as a whole, small property owners will be disproportionately impacted as this legislation may put them in danger of being unable to meet their debt and other monetary obligations such as building repair and maintenance. There is no consideration as to fair compensation for property owners should the rebuttable presumption be applied to their tenants.

Absent this type of relief for property owners, we have serious concerns about the legality of the proposal. Without proper consideration of relief for property owners, we believe that the proposal represents an unbalanced involvement by the government with respect to existing contracted relationships between private parties, tipping the scale toward one business over another. Selecting one party or sector of the economy over the other creates several unanswered legal questions and will not provide the immediate certainty and relief needed to drive our City's economic recovery.

We remain committed to working with you to identify policy solutions which include financial relief, incentives, or compensation for property owners, in addition to their commercial tenants. We believe that the most effective way to do so would be to adopt accompanying legislation which would enable a property owner who loses revenue due to the rebuttable presumption to be reimbursed via tax rebates or grant funding.

Our coalition recognizes the unique public health and economic challenges posed by the COVID-19 pandemic. We remain committed to supporting our small business tenants who have been adversely impacted by these challenges and the local public health orders taken to mitigate the spread of the virus. However, as we all seek to recover, we believe that relief must be provided in a manner that is targeted, respects private contracts, does not disincentivize future cooperation, and identifies funding sources or mechanisms for relief for property owners, in addition to their commercial tenants. Thank you for your consideration of the above-mentioned solutions to thwart the unintended consequences

of your legislation. We hope our questions and comments are useful to you as you continue to refine the proposed legislation. We, of course, welcome further discussion to address the issues mentioned above.

Sincerely,



John R. Bryant, CEO  
BOMA San Francisco



Kevin Carroll, President and CEO  
Hotel Council of San Francisco



Adam Lasoff, President  
NAIOP San Francisco



Noni Richen, President of the Board  
Small Property Owners of San Francisco



Charley Goss, Government and Community Affairs Manager  
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