

File No. 210603 Committee Item No. 7  
Board Item No. 11

## COMMITTEE/BOARD OF SUPERVISORS

### AGENDA PACKET CONTENTS LIST

Committee: Land Use and Transportation Committee Date July 19, 2021

Board of Supervisors Meeting Date July 27, 2021

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Completed by: Erica Major Date July 15, 2021

Completed by: Erica Major Date July 20, 2021

BOARD of SUPERVISORS



City Hall  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco 94102-4689  
Tel. No. (415) 554-5184  
Fax No. (415) 554-5163  
TDD/TTY No. (415) 554-5227

## MEMORANDUM

### LAND USE AND TRANSPORTATION COMMITTEE SAN FRANCISCO BOARD OF SUPERVISORS

TO: Supervisor Myrna Melgar, Chair, Land Use and Transportation Committee

FROM: Erica Major, Assistant Clerk, Land Use and Transportation Committee

DATE: July 20, 2021

SUBJECT: **COMMITTEE REPORT, BOARD MEETING**  
Tuesday, July 20, 2021

The following file should be presented as a **COMMITTEE REPORT** at the Board meeting, Tuesday, July 20, 2021. This item was acted upon at the Committee Meeting on Monday, July 19, 2021, at 1:30 p.m., by the votes indicated.

**Item No. 70**                      **File No. 210603**

Ordinance amending the Administrative Code to establish a rebuttable presumption that a commercial tenant who was legally required to shut down due to COVID-19 may be excused from having to pay rent that came due during the shutdown.

#### **AMENDED, AN AMENDMENT OF THE WHOLE BEARING SAME TITLE**

Vote: Supervisor Myrna Melgar - Aye  
Supervisor Dean Preston - Aye  
Supervisor Aaron Peskin - Aye

#### **RECOMMENDED AS AMENDED AS A COMMITTEE REPORT**

Vote: Supervisor Myrna Melgar - Aye  
Supervisor Dean Preston - Aye  
Supervisor Aaron Peskin - Aye

cc: Board of Supervisors  
Angela Calvillo, Clerk of the Board  
Alisa Somera, Legislative Deputy  
Anne Pearson, Deputy City Attorney  
Kristen Jensen, Deputy City Attorney

1 [Administrative Code - Effect Of COVID-19 On Commercial Leases]

2

3 **Ordinance amending the Administrative Code to establish a rebuttable presumption**  
4 **that a commercial tenant who was legally required to shut down due to COVID-19 may**  
5 **be excused from having to pay rent that came due during the shutdown.**

6 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.  
7 **Additions to Codes** are in *single-underline italics Times New Roman font*.  
8 **Deletions to Codes** are in ~~*strikethrough italics Times New Roman font*~~.  
9 **Board amendment additions** are in double-underlined Arial font.  
10 **Board amendment deletions** are in ~~strikethrough Arial font~~.  
11 **Asterisks (\* \* \* \*)** indicate the omission of unchanged Code  
12 subsections or parts of tables.

10

11 Be it ordained by the People of the City and County of San Francisco:

12

13 Section 1. Chapter 37C of the Administrative Code is hereby amended by adding a  
14 new Section 37.4, renumbering existing Section 37.4 as Section 37.5, and revising existing  
15 Section 37C.5, to read as follows:

16 **SEC. 37C.4. SHUTDOWNS DUE TO HEALTH ORDERS.**

17 *(a) Purpose and Findings. The COVID-19 pandemic has created an unprecedented crisis in*  
18 *the City, leading to disputes between commercial landlords and tenants regarding whether a tenant is*  
19 *required to pay rent that accrued during periods when the tenant was legally prohibited from operating*  
20 *due to COVID-19. In some cases, where performance of a contractual duty has become impossible or*  
21 *where the purposes of a contract have been frustrated, state law excuses a party to the contract from*  
22 *performance. The Board of Supervisors finds that it is appropriate to presume – at least in the absence*  
23 *of a contract provision or other agreement between the parties to the contrary – that a legally required*  
24 *shutdown due to COVID-19 is a circumstance that made it impossible for those tenants to perform or*  
25 *frustrated the purpose of those tenants’ leases. This presumption applies only to those situations where*

1 a tenant fell under a category of businesses that was required to shut down under a health order, not  
2 where a tenant would have been allowed to stay open but had to close due to a COVID-19 outbreak, or  
3 where the tenant closed due to the economic impacts of COVID-19. The payment of rent pursuant to a  
4 commercial lease should be excused if the operation of the business was rendered illegal by a COVID-  
5 19 health order(s), if the parties have not agreed otherwise.

6 (b) **Excusing Performance.** Absent an agreement to the contrary between a Covered  
7 Commercial Tenant and the landlord, if the Covered Commercial Tenant fell under a category of  
8 businesses that was legally prohibited from operating in the unit due to a state or local health order  
9 concerning COVID-19, then there shall be a rebuttable presumption that the shutdown frustrated the  
10 purpose of the lease and that payment of rent covering the period of the shutdown is excused. The  
11 Covered Commercial Tenant need not seek to terminate the lease to invoke the protections of this  
12 ordinance. This presumption shall apply unless and until evidence is introduced that would support a  
13 finding that, notwithstanding the shutdown order(s), the purpose of the lease was not frustrated and  
14 performance remained possible.

15 (c) **Non-Applicability to Certain Negotiated Agreements.** In some cases,  
16 commercial landlords and their tenants may have executed written agreements in response to  
17 the COVID-19 pandemic in order to reduce, waive, or extend the tenant's deadline to pay rent  
18 that might otherwise have been due. It is the policy of the Board of Supervisors to encourage  
19 such negotiated agreements. Accordingly, the presumption in subsection (b) shall not apply  
20 to those rent payments that the landlord and tenant addressed in such a negotiated  
21 agreement, assuming the agreement is otherwise legal and valid.

22 (d) **Federal and state law.** Nothing in this Section 37C.4 shall be interpreted or applied so as  
23 to conflict with the terms of the lease or any federal or state law. This Section 37C.4 does not override  
24 the terms of any lease, does not modify any state laws that relate to the interpretation or enforcement of  
25 leases, and does not alter the burden of proof under state law with regard to a landlord's claim that a

1 tenant has breached the lease or a tenant's defense or excuse regarding the alleged breach. Instead,  
2 this Section 37C.4 seeks to simplify the burden of presenting evidence so that landlords and tenants,  
3 especially those who may be unable to afford legal representation or protracted litigation, may resolve  
4 their disputes more easily and more economically.

5

6 **SEC. 37.45. SEVERABILITY.**

7 \* \* \* \*

8

9 **SEC. 37C.65. SUNSET PROVISION.**

10 This Chapter 37C shall expire by operation of law on June 30, 2025~~after the Tier 1~~  
11 ~~Forbearance Period has ended.~~ Upon expiration, the City Attorney shall cause this Chapter 37C  
12 to be removed from the Administrative Code.

13

14 Section 2. Severability. If any section, subsection, sentence, clause, phrase, or word of  
15 this ordinance, or any application thereof to any person or circumstance, is held to be invalid  
16 or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not  
17 affect the validity of the remaining portions or applications of the ordinance. The Board of  
18 Supervisors hereby declares that it would have passed this ordinance and each and every  
19 section, subsection, sentence, clause, phrase, and word not declared invalid or  
20 unconstitutional without regard to whether any other portion of this ordinance or application  
21 thereof would be subsequently declared invalid or unconstitutional.

22

23 //

24 //

25 //

1 Section 3. Effective Date. This ordinance shall become effective 30 days after  
2 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the  
3 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board  
4 of Supervisors overrides the Mayor's veto of the ordinance.

5  
6 APPROVED AS TO FORM:  
7 DENNIS J. HERRERA, City Attorney

8  
9 By: /s/  
10 MANU PRADHAN  
11 Deputy City Attorney  
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**REVISED LEGISLATIVE DIGEST**  
(Amended in Committee, 7/19/2021)

[Administrative Code - Effect Of COVID-19 On Commercial Leases]]

**Ordinance amending the Administrative Code to establish a rebuttable presumption that a commercial tenant who was legally required to shut down due to COVID-19 may be excused from having to pay rent that came due during the shutdown.**

Existing Law

Chapter 37C of the Administrative Code grants eviction protections to Covered Commercial Tenants who could not pay their rent due to the financial impacts of COVID-19. The term “Covered Commercial Tenant” means a tenant or subtenant registered to do business in San Francisco with combined worldwide gross receipts for tax year 2019 equal to or below \$25 million, but does not include for-profit tenants and subtenants who are occupying space zoned or approved for Office Use under the Planning Code. The eviction protections for Covered Commercial tenants are currently scheduled to expire in June 2023.

Meanwhile, state law may excuse a party to a contract from performing under the contract, in some cases, if performance has become impossible or where the purposes of a contract have been frustrated.

Amendments to Current Law

The ordinance would enact a new provision, Section 37C.4, that would apply to any Covered Commercial Tenant who had been legally prohibited from operating in a unit due to a state or local health order concerning COVID-19. As to that situation, Section 37C.4 would create a rebuttable presumption – absent a contract provision or other agreement between the parties to the contrary – that the tenant’s shutdown frustrated the purpose of the lease and that the tenant’s duty to pay rent that accrued during the period of the shutdown is excused. This presumption would apply unless and until evidence was introduced that would support a finding that the purpose of the lease was not frustrated and that performance remained possible, notwithstanding the shutdown order(s). The presumption also would not apply to rent covered by a written agreement between the landlord and tenant to waive, reduce, or extend the payment due date due to COVID-19. Section 37C.4 would sunset on June 30, 2025. The expiration date of Chapter 37C’s eviction protections would not change.

Background Information

This version of the digest reflects amendments made on July 19, 2021. The purpose of the ordinance is to simplify the burden of presenting evidence so that landlords and tenants, especially those who may be unable to afford legal representation or protracted litigation, may resolve their disputes regarding COVID-19 more easily and more economically.

FILE NO. 210603

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BOARD of SUPERVISORS



City Hall  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco 94102-4689  
Tel. No. (415) 554-5184  
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## MEMORANDUM

TO: Dr. Grant Colfax, Director, Department of Public Health  
Robert Collins, Executive Director, Rent Board

FROM: Erica Major, Assistant Clerk, Land Use and Transportation Committee

DATE: June 1, 2021

SUBJECT: LEGISLATION INTRODUCED

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The Board of Supervisors' Land Use and Transportation Committee has received the following proposed legislation, introduced by Supervisor Preston on May 25, 2021:

**File No. 210603**

**Ordinance amending the Administrative Code to establish a rebuttable presumption that a commercial tenant who was legally required to shut down due to COVID-19 may be excused from having to pay rent that came due during the shutdown.**

If you have comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102 or by email at: [erica.major@sfgov.org](mailto:erica.major@sfgov.org).

cc: Greg Wagner, Department of Public Health  
Dr. Naveena Bobba, Department of Public Health  
Sneha Patil, Department of Public Health  
Arielle Fleisher, Department of Public Health



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  
San Francisco Apartment Association

# REUBEN, JUNIUS & ROSE, LLP

**James A. Reuben**  
jreuben@reubenlaw.com

July 13, 2021

**Delivered Via Email (erica.major@sfgov.org)**

Chair Myrna Melgar  
Supervisor Dean Preston  
Supervisor Aaron Peskin  
San Francisco Board of Supervisors  
Land Use Committee  
1 Dr. Carlton B. Goodlett Place  
City Hall, Room 244  
San Francisco, CA 94102-4689

**Re: File No. 210603 - Effect Of COVID-19 On Commercial Leases**  
**Hearing Date: July 19, 2021**  
**Our File No.: 7574.99**

Dear Chair Melgar and Supervisors Preston and Peskin:

We are writing regarding the proposed commercial rent relief ordinance [File No. 210603] that is pending action by the Land Use and Transportation Committee of the San Francisco Board of Supervisors (the “Committee”). We urge the Committee not to refer this item to the full Board of Supervisors.

We are a law firm that represents commercial landlords that own and lease commercial space to tenants operating a variety of businesses in San Francisco. Like most businesses, commercial landlords have been harmed by the COVID-19 pandemic. While our clients appreciate the policy goals of the legislation, we respectfully must note that the ordinance would constitute a form of commercial rent control, and so is preempted by California law.

The proposed ordinance would establish a rebuttable presumption that the purpose of a commercial lease in San Francisco was “frustrated” if the tenant had been required to shut down due to COVID-19 orders. The ordinance would create a presumption that excuses the payment of rent during this shutdown period. In this way, the law would alter the affirmative defense of “commercial frustration” available to California tenants, which turns on the landlord’s warrant that the premises are suitable for their intended use.<sup>1</sup>

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<sup>1</sup> Miller and Starr, 10 Cal. Real Est. § 34:166 (4th ed.).

Chair Melgar  
Supervisor Preston  
Supervisor Peskin  
San Francisco Board of Supervisors  
Land Use Committee  
July 13, 2021  
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Under the *Costa-Keene-Seymour Commercial Property Investment Act of 1987*, no public entity shall enact or enforce any measure constituting “commercial rental control.”<sup>2</sup> In adopting this Act, the Legislature expressly found that the price charged for commercial real property is a matter of statewide concern.<sup>3</sup> Accordingly, the Legislature has enacted a uniform system with respect to commercial rents, which applies to every local jurisdiction in the state.<sup>4</sup>

On March 16, 2020, California Governor Gavin Newsom issued an emergency order that temporarily suspended this prohibition to the extent it related to evictions.<sup>5</sup> Through a series of subsequent emergency orders, the suspension remained in effect through June 30, 2021.<sup>6</sup> However, the Governor’s order expressly provided that “[n]othing in [it] shall relieve a tenant of the obligation to pay rent, nor restrict a landlord’s ability to recover rent due.”<sup>7</sup> The proposed ordinance would do exactly what the Governor did not intend.

Normally, if a party is able to invoke the doctrine of “commercial frustration,” the remedy is termination of the lease.<sup>8</sup> In contrast, the proposed ordinance provides that a “Covered Commercial Tenant” would not have to seek termination of its lease, but instead may cite COVID-19 shutdown orders as a defense against paying rent.<sup>9</sup> This recasting of the commercial frustration doctrine is preempted by state law because it is a *de facto* form of commercial rent control, not allowed by the Governor’s order.

To reiterate, the *Costa-Keene-Seymour Act* prohibits local governments from enacting “any control or system of controls, on the price at which . . . commercial real property may be offered for rent.”<sup>10</sup> The proposal would not merely affect commercial evictions, which was allowed temporarily by

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<sup>2</sup> Cal. Civ. Code § 1954.27(a).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Exec. Order N-28-20.

<sup>6</sup> Exec. Orders N-66-20, ¶ 21 (May 29, 2020), N-71-20, ¶ 3 (June 30, 2020), N-80-20, ¶ 2 (Sept. 23, 2020), and N-03-21, ¶ 3 (Mar. 4, 2021).

<sup>7</sup> Exec. Order N-28-20, ¶ 2.

<sup>8</sup> See *Knoblauch v. McKinney* (1935) 5 Cal.App.2d 339, 340-41 [“The lessees make no claim that they elected to terminate the lease under the provisions of section 1932 of the Civil Code. [Citations.] They chose to remain in possession while the lessors proceeded with repairs. . . . Under circumstances such as here presented, the obligation devolving upon lessees to continue paying rent as provided by the lease was not diminished or otherwise affected by the impairment of the property by earthquake.”].

<sup>9</sup> File No. 210603, Leg Ver 1, proposed S.F. Admin. Code § 37C.4 (b).

<sup>10</sup> Cal. Civ. Code § 1954.26(f).



Chair Melgar  
Supervisor Preston  
Supervisor Peskin  
San Francisco Board of Supervisors  
Land Use Committee  
July 13, 2021  
Page 3

the Governor's order, but also control the price of at least some commercial rental property – by dropping it to zero.

The entire world has been deeply harmed by the COVID-19 crisis, commercial landlords and tenants included. The City and County of San Francisco has many tools it may use to mitigate the devastating impact of the pandemic, but the proposed ordinance reaches into an area beyond its power.

We urge you to consider different approaches. Thank you.

Very truly yours,

**REUBEN, JUNIUS & ROSE, LLP**



James A. Reuben



CITY AND COUNTY OF SAN FRANCISCO  
LONDON BREED, MAYOR

OFFICE OF SMALL BUSINESS  
REGINA DICK-ENDRIZZI, DIRECTOR

June 17, 2021

Ms. Angela Calvillo, Clerk of the Board  
City Hall Room 244  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4689

RE: BOS File No. 210603: Administrative Code - Effect Of COVID-19 On Commercial Lease

Small Business Commission Recommendation to the Board of Supervisors: **Approve**  
This motion passed 5 to 0, with 2 recused.

Dear Ms. Calvillo,

On June 14, 2021, the Small Business Commission (SBC) heard BOS File No. 210603: Administrative Code - Effect Of COVID-19 On Commercial Lease, presented by Kyle Smeallie, aide to Supervisor Preston.

The SBC recommends the Board of Supervisor approve this ordinance and enact a new provision to Chapter 37C. The SBC supports the purpose of the ordinance, which simplifies the burden of presenting evidence, and more easily resolve disputes between landlord and commercial tenants forced to cease operations at the direction of the San Francisco Health Officer due to COVID-19.

Thank you for considering the Commission's recommendation. Please feel free to contact me should you have any questions.

Sincerely,

Regina Dick-Endrizzi  
Director, Office of Small Business

cc: Dean Preston, Member, Board of Supervisors,  
Sophia Kittler, Mayor's Liaison to the Board of Supervisors  
Lisa Pagan, Office of Economic and Workforce Development  
Erica Major, Clerk of the Rules Committee

**From:** [La Marsa team](#)  
**To:** [Major, Erica \(BOS\)](#)  
**Subject:** File #210603.  
**Date:** Friday, June 4, 2021 2:55:08 AM

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Hi,

I understand that there a 30 day rule before your board vote on the legislation .I wanted to mention that June 25th or 26 th its only 4 days and landlord will start evicting tenants left and right . My landlord has refused any form of arrangement I proposed I have a long lease and he wants to brake it .and he has already started to lay the ground on eviction process and I am sure that July 1st he will try to evict me . Please don't let this happen to me and to thousands of tenants . Thank you very much and god bless

**From:** [Smeallie, Kyle \(BOS\)](#)  
**To:** [soul fist](#)  
**Cc:** [Major, Erica \(BOS\)](#)  
**Subject:** RE: Small biz relief from back rent ?  
**Date:** Tuesday, June 29, 2021 12:26:07 PM

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Absolutely – you can submit written remarks to the Land Use Committee Clerk Erica Major ([erica.major@sfgov.org](mailto:erica.major@sfgov.org)) to be submitted to the public record. Thanks again for your support!

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**From:** soul fist <[soulfistication@yahoo.com](mailto:soulfistication@yahoo.com)>  
**Sent:** Tuesday, June 29, 2021 11:40 AM  
**To:** Smeallie, Kyle (BOS) <[kyle.smeallie@sfgov.org](mailto:kyle.smeallie@sfgov.org)>  
**Subject:** Re: Small biz relief from back rent ?

Thanks kindly for the update - sounds good.

One quick question - is it possible to provide written comment in advance, rather than verbal during the call? If so, what is best email address?

Thank you !

On Monday, June 28, 2021, 10:48:16 PM PDT, Smeallie, Kyle (BOS) <[kyle.smeallie@sfgov.org](mailto:kyle.smeallie@sfgov.org)> wrote:

Hi Geoff,

Thanks for your follow up and for your advocacy. The latest update is that the item was unanimously [recommended](#) by the Small Business Commission on June 17, and the next step is it will be heard at the Land Use and Transportation Committee of the Board of Supervisors. We have requested and tentatively confirmed July 19<sup>th</sup> for that hearing, at which we encourage you to call in and make public comment.

Let me know if you have any other questions, and thanks again!

Kyle

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**From:** soul fist <[soulfistication@yahoo.com](mailto:soulfistication@yahoo.com)>  
**Sent:** Thursday, June 24, 2021 6:55 AM  
**To:** PrestonStaff (BOS) <[prestonstaff@sfgov.org](mailto:prestonstaff@sfgov.org)>; Smeallie, Kyle (BOS) <[kyle.smeallie@sfgov.org](mailto:kyle.smeallie@sfgov.org)>  
**Subject:** Re: Small biz relief from back rent ?

Hello, I am following up on message below - could you please let me know if there is still time to enter public comment in support of this bill? I would also like to understand the current status as well - could you let me know ?

<https://sfgov.legistar.com/LegislationDetail.aspx?ID=4967609&GUID=1421AF9C-5CDF-4737-B119-D68D4537825E&Options=&Search=>

Thanks !

On Sunday, June 20, 2021, 11:47:52 AM PDT, soul fist <[soulfistication@yahoo.com](mailto:soulfistication@yahoo.com)> wrote:

Hello Mr. Preston. I am hoping for just a quick moment of help and input - could you (or perhaps Kyle Smeallie, who is noted in your twitter feed) perhaps provide me with a quick update, or at least the BOS legislative language reference, for the small business rent relief proposal that you made back on 5/25?

The proposal looks very similar in spirit to the suggestion that I had made below in public comment about "presumption" handling, and so I am interested in following the developments. Naturally I am also hoping that the proposal passes, as our small business continues to struggle with our landlord. I am also available to discuss at an anecdotal level the practicalities behind this bill if you would like to have further input, particularly if that discussion might assist with analysis of any issues you are addressing as you work with other supervisors on passage.

Thanks kindly once again for your help on this critical issue !

Geoff

----- Forwarded Message -----

**From:** soul fist <[soulfistication@yahoo.com](mailto:soulfistication@yahoo.com)>

**To:** Carroll, John (BOS) <[john.carroll@sfgov.org](mailto:john.carroll@sfgov.org)>

**Sent:** Thursday, March 18, 2021, 01:54:02 PM PDT

**Subject:** Re: Public Comment on Lease matters for Government Audit and Oversight Committee March 18, 2021

That is fantastic, as with apologies I did not realize that the comment period was so short.

Thanks once again for your assistance following the hearing rules, establishing good public comment records, and just generally helping folks out here - very much appreciated.

One other quick question - is there perhaps a deck or other set of materials from the meeting that is made publicly available? There was some helpful information provided about legal support networks, but I am a bit unclear how/whether to access the public record for this meeting (or whether I should just ask my supervisor's office directly?). No problem if you don't know or can't provide - but if there is a public link to materials please consider sending.

Thanks John !!

On Thursday, March 18, 2021, 01:32:10 PM PDT, Carroll, John (BOS) <[john.carroll@sfgov.org](mailto:john.carroll@sfgov.org)> wrote:

Thank you for your messages and for following up. I have already forwarded your first message to the committee, and I will do the same with this message as well.

Regards,

**John Carroll**

**Assistant Clerk**

Board of Supervisors

San Francisco City Hall, Room 244

San Francisco, CA 94102

(415) 554-4445

**(VIRTUAL APPOINTMENTS)** To schedule a virtual meeting with me (on Microsoft Teams), please ask and I can answer your questions in real time.

*Due to the current COVID-19 health emergency and the Shelter in Place Order, the Office of the Clerk of the Board is working remotely while providing complete access to the legislative process and our services.*



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**From:** soul fist <[soulfistication@yahoo.com](mailto:soulfistication@yahoo.com)>

**Sent:** Thursday, March 18, 2021 1:05 PM

**To:** Carroll, John (BOS) <[john.carroll@sfgov.org](mailto:john.carroll@sfgov.org)>

**Subject:** Re: Public Comment on Lease matters for Government Audit and Oversight Committee March 18, 2021

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Hi John, my public comment period on the call was cut-off, and I have amended my written comment - would you please kindly consider entering the following comment into the record, as a replacement to my initial email?

Thank you!!!!

Thank you to those Board members, city employees, and public servants who have been working actively to protect small SF businesses during this difficult time. I can tell you as a small business owner that your careful and thoughtful work has provided a lifeline to those of us who are struggling to survive, employee local citizens, provide services and goods to the community, and enhance the cultural, economic and tax revenue base for the city through successful operations. The public policy considerations at stake are unquestionably immense for our blighted neighborhoods and our fellow citizens. Many small business owners need no additional data entered into the public record at this time to reach the fundamental and common-sense conclusion that they are on the verge of personal financial ruin due to the

pandemic, and more support is critical please.

I would like to address the recent commercial lease ordinance that has provided an opportunity for tier one covered tenants and landlords to address, renegotiate, or even terminate leases. While the ordinance is welcome and I believe designed to encourage active and holistic renegotiation of lease terms, I am hoping to respectfully encourage further review and consideration to continue to refine this ordinance for clarity. In particular, my direct experience, and additional anecdotal evidence indicates that many landlords are refusing to even recognize the ordinance, and continue to threaten to take legal action against tenants for FUTURE rent, attorneys fees, and contract penalties despite the clear and recent guidance with respect to the lease termination framework stated directly in the ordinance. Landlords also continue to assert that full pre-pandemic market value is due for back rent and future rent despite clear and common-sense conclusions that the pandemic has fundamentally shifted the property rental values in the city through no fault of tenants. So, my comments are directed towards three potential legislative considerations.

First, to address numerous comments about possible limits under the state statutory regime, and the argument that new legislation cannot look backwards, nor reform or reshape existing rent terms or contracts. I ask the Board of Supervisors to please immediately enact additional ordinance or legislation which states in simple terms that the city's legislative intent is to be consistent with Section 1511 of the California Civil Code with respect to force majeure events. This statute – which was in effect at the state level prior to the pandemic, and is therefore immune to temporal or jurisdictional challenges - provides a direct and legitimate excuse from contract performance for certain force majeure events. There is no barrier to enacting new legislation that is consistent with the state's own law that completely excuses contract performance in certain conditions, and is therefore not a local rent control provision but rather a pure contract rescission mechanism under state law. Specifically, the updated city legislation should indicate that the pandemic is a (quote) “irresistible superhuman event” consistent with section 1511 of the state's civil code. There need be no legal conclusion enacted that such event actually caused a contract breach for a particular tenant (which is a question of fact). Rather, the local law should indicate that in any future administrative proceedings or legal proceedings within city jurisdiction there will be a presumption that a tier one covered tenant did not assume the risk of the pandemic at the time that they entered into the lease, and that the landlord, and not the tenant, shall have the burden of proof to demonstrate that the lease terms clearly, expressly, and unequivocally override subsection (2) of Section 1511 of the California Civil Code. Additionally, evidentiary and remedy provisions should limit damages claims to a cap related to a landlord's demonstrable interim mortgage payments and building expenses rather than pre-pandemic property rental values, and provided that the landlord has introduced evidence demonstrating that they took reasonable steps to secure tenant safety and facilitate the tenant's use of the property for its intended purpose. Finally, as part of this presumption, any attorney fees or penalties as applied to a tenant should be expressly limited unless the landlord has not only met their burden of proof but has also demonstrated bad faith negotiation activities by the tenant. I believe that underscoring the force majeure framework alongside future evidentiary process considerations and damages limits would frame the constitutionality of the ordinance and the clear legislative intent behind our city rules. I encourage the board to consult with the city attorney regarding this legal framework – not only with respect to force majeure and contract concepts but also the basic and fundamental value to everyone – the city included - provided by certainty rather than ongoing multi-year litigation.

Second, I ask the Board to please consider the legal obligations of realty agents in this



framework. Many brokerages are representing tenants and landlords without full transparency or recognition of the standard of care obligations that they have to their clients. This is particularly true with respect to those brokers who have entered into a dual-agency relationship for both parties to a lease, yet are not properly facilitating the resolution of outstanding lease disputes, and in some cases may be favoring their commercial landlord clients to the detriment of small business tenants. Accordingly, I ask the Board to consider legislation that underscores basic standard of care owed to small business tenants. Such legislation should have no bearing upon those realty agents who are already properly facilitating negotiation and handling of outstanding leases, and should otherwise provide for penalties consistent with state law concepts for those brokers who are not honoring their duties.

Third and finally, I ask the Board to please consider the most appropriate **enforcement** mechanisms for willful violations of the ordinance. It is a law. Compliance is required, not optional. It needs to be enforced by the appropriate city department(s) when landlords are not playing along. It is unclear in the ordinance language where tenants can report the possibility of non-compliance, and what, if anything, would even be done with such an allegation.

Please give this ordinance some teeth so that alleged violators are investigated, and actual violators are penalized. The city should have the legal authority to provide for penalties, prohibit grants or incentives, or take other actions if its rules are not followed. Tenants should have a mechanism for reporting alleged violations, and landlords should have a mechanism for defending their actions amidst such allegations so that there is city follow-up to determine the nature and extent of any possible violations. Citizens and small business owners would like to see that proverbial and actual broken windows are being identified and repaired, not left unattended, and there is a strong belief that enforcement mechanisms need to be revisited and strengthened please.

Thank you once again for the opportunity to express my opinions on possible steps forward.

On Thursday, March 18, 2021, 10:00:24 AM PDT, soul fist <[soulfistication@yahoo.com](mailto:soulfistication@yahoo.com)> wrote:

I would like to submit a public comment related to the discussion of future legislation for landlord and tenant rules and interactions.

I appreciate all the work that is being done to help small businesses address critical rent issues.

I have two comments, which are both related to the ongoing resistance in the commercial landlord community whereby landlords are refusing to acknowledge the validity of the new ordinance which allows tier one tenants to terminate their lease if they cannot reach a satisfactory resolution of issues. I am hoping that the Board of Supervisors will enact additional legislation to provide legal certainty.

First, some landlords are arguing that the ordinance is not constitutional - their position is that legislation cannot look backwards, nor reform or reshape existing contracts. I ask the Board of Supervisors to please enact additional ordinance or legislation which states that their relief measures are consistent with Section 1511 of the California Civil Code with respect to force majeure events. Specifically, the updated legislation should indicate that the pandemic is an irresistible superhuman event. The law should also indicate that in any future legal proceedings in SF courts there will be a presumption that a tier one covered tenant did not assume the risk of the pandemic at the the time they entered into the lease, and that the landlord, and not the tenant, shall have the burden of proof in a future proceeding to demonstrate that lease terms clearly, expressly, and unequivocally override subsection (2) of Section 1511 of the California Civil Code.

Second, I ask the Board to please consider the enforcement mechanism for willful violations of the ordinance. It is a law. It needs to be enforced when landlords are not playing along. It is unclear where tenants can report non-compliance. Please give this some teeth so that violators are penalized. The city should have the legal authority to provide for penalties or other actions if a law is not followed. Tenants should have a mechanism for reporting alleged violations, for city follow-up.

Thank you,

Geoff



**MYRNA MELGAR**

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DATE: July 15, 2021

TO: Angela Calvillo  
Clerk of the Board of Supervisors

FROM: Supervisor Myrna Melgar, Chair, Land Use and Transportation Committee *mm*

RE: Land Use and Transportation Committee  
COMMITTEE REPORTS

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Pursuant to Board Rule 4.20, as Chair of the Land Use and Transportation Committee, I have deemed the following matters are of an urgent nature and request them be considered by the full Board on Tuesday, July 20, 2021, as Committee Reports:

- File No. 210674      Planning Code - Code Corrections Ordinance**
- File No. 210698      Administrative Code - Displaced Tenant Preference in City Affordable Housing**  
Sponsor: Mayor
- File No. 210563      Environment Code - Climate Action Plan**  
Sponsor: Mayor
- File No. 201151      Environment, Public Works Codes - Construction and Demolition Debris Recovery**  
Sponsors: Safai; Walton
- File No. 210603      Administrative Code - Effect Of COVID-19 On Commercial Leases**  
Sponsors: Preston; Peskin, Ronen, Mar, Walton and Chan

These matters will be heard in the Land Use and Transportation Committee at a Regular Meeting on Monday, July 19, 2021, at 1:30pm.

# Introduction Form

By a Member of the Board of Supervisors or Mayor

Time stamp  
or meeting date

I hereby submit the following item for introduction (select only one):

- 1. For reference to Committee. (An Ordinance, Resolution, Motion or Charter Amendment).
- 2. Request for next printed agenda Without Reference to Committee.
- 3. Request for hearing on a subject matter at Committee.
- 4. Request for letter beginning : "Supervisor  inquiries"
- 5. City Attorney Request.
- 6. Call File No.  from Committee.
- 7. Budget Analyst request (attached written motion).
- 8. Substitute Legislation File No.
- 9. Reactivate File No.
- 10. Topic submitted for Mayoral Appearance before the BOS on

Please check the appropriate boxes. The proposed legislation should be forwarded to the following:

- Small Business Commission
- Youth Commission
- Ethics Commission
- Planning Commission
- Building Inspection Commission

**Note: For the Imperative Agenda (a resolution not on the printed agenda), use the Imperative Form.**

Sponsor(s):

Subject:

The text is listed:

Signature of Sponsoring Supervisor:

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