

## MEMORANDUM

March 27, 2020

**TO:** Port Staff

**FROM:** Elaine Forbes  
Executive Director

**SUBJECT:** Executive Directive Regarding Enforcement of Lease Obligations From March 1, 2020 through April 30, 2020 ("Directive").

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### **Background**

The actions described below are prompted by the remarkably rapid developments in the recognition of and reaction to the Covid-19 pandemic. Some major milestones over the past month include:

- On February 25, 2020, Mayor London Breed issued the Proclamation by the Mayor Declaring the Existence of a Local Emergency (the "Mayor's Emergency Declaration") under Sections 8550 et seq. of the Government Code, Section 3.100(13) of the San Francisco Charter, and Chapter 7 of the San Francisco Administrative Code, establishing the existence of an emergency within the City and County of San Francisco due to the ongoing spread of "Covid-19".
- On March 3, 2020, the Board of Supervisors passed a motion concurring in the Mayor's Emergency Declaration and in the actions taken by the Mayor to meet the emergency.
- On March 4, 2020, Governor Newsom issued the Proclamation of a State of Emergency ("Governor's Proclamation") under Section 8625 of the California Government Code and the California Emergency Services Act, establishing the existence of a state of emergency throughout California due to Covid-19.
- On March 16, 2020, Mayor Breed issued a further Order directing all residents to remain at their place of residence, except to conduct Essential Activities, Essential Businesses, and Essential Government Functions (as defined in the Order). Among other things this order closed bars and restaurants except for takeout and delivery service, which caused a great deal of dislocation among the Port's retail portfolio.

The impacts of the emergency on the small business community have been fairly immediate. In response to those impacts, on March 17, 2020, Mayor Breed issued a 30-day moratorium on commercial evictions related to financial impacts caused by COVID-19 for small and medium-sized businesses that have less than \$25 million in

annual gross receipts (the “Eviction Moratorium Order”). Under normal state law, localities are prohibited from regulating commercial evictions. San Francisco was allowed to take this action following Governor Newsom’s March 16, 2020 Executive Order lifting those restrictions. The moratorium can be extended and will be automatically rescinded if the Mayor’s Emergency Declaration ceases. On March 27, 2020, City Administrator Naomi Kelly issued a “City Policy Regarding Enforcement of Certain Tenant Lease Obligations by City Departments From March 17, 2020 through April 30, 2020” (the “Citywide Policy”). This Directive implements the recommendations in the Citywide Policy and extends additional relief as described below.

These orders mandating that citizens shelter in place and observe social distancing precautions have required many businesses to temporarily close or severely curtail their operations with the effect of greatly reducing economic activity on Port property, both directly and indirectly. Businesses both on and off Port property are in a precarious position in maintaining their operations and avoiding defaulting on their various legal agreements and/or insolvency. Port staff have been contacted by numerous tenants describing the negative impacts and seeking assurances and relief from the Port in its capacity as a landlord. Of course, the ability to grant such assurances and relief must be balanced with the Port’s own financial health and obligations and its role as a trustee of public lands.

I have consulted with the City Attorney’s Office and the City’s Risk Manager in formulating this Directive. This Directive supports the Port’s Strategic Plan goal of stability by taking steps to retain the Port’s diversified tenant base during this unprecedented economic slowdown.

Under Charter Section B3.581(h) and Port’s Operating Grants of Authority (Port Commission Resolutions 80-99 and 80-112), the Port’s Executive Director is responsible for the management of all the affairs and activities placed under the jurisdiction of the Port Commission including general management, administration and enforcement of leases. In issuing this Directive, I also rely on Port Commission Resolution 10-01, which delegates authority to the Executive Director to settle unlitigated claims of up to \$25,000 provided that the City Attorney approves such settlements.

### **Directive**

The Port is in a position to assist tenants with immediate temporary relief to allow them to keep their businesses operational and their workforce in place for when these extraordinary orders are lifted. This Directive is intended to alleviate some financial pressure on tenants as we collectively face an uncertain period in fighting the Covid-19 virus outbreak over the coming weeks and months. Current projections of the course of the Covid-19 outbreak and the measures taken to protect public health indicate this situation will extend beyond the period covered by this Directive. Port staff will monitor Mayoral Orders and Health Department Orders and other developments and will supplement this Directive as needed, and in consultation with the Port Commission when it resumes regular meetings. In short, this is a temporary bridge to a more comprehensive and targeted rent relief policy once Port staff has an opportunity to study the impacts of this situation and the policy response from federal, state and City governments.

As with the Citywide Policy and the Eviction Moratorium Order, the Port is taking this action in acknowledgement that its ability to generate revenues to fulfill its public stewardship mission is directly related to the health of its tenant businesses and their ability to pay rent. In most scenarios where a tenant is in danger of default and seeking a workout plan, Port staff must weigh the foregone revenues against the potential costs, lost revenues and disruption resulting from a tenant default and/or bankruptcy. In our experience, in many instances, providing a benefit in terms of temporarily deferring rent payments during a tenant's cash crunch (subject to repayment later) results in better long term and more stable revenues to the Port than strict adherence to the lease terms which would dictate an eviction action and the need re-lease the property.

With that experience as our guide, the Port must now confront this unprecedented economic challenge using our best professional judgment.

**1. Actions:**

Under this Directive, Port staff will waive all late charges, default interest and associated penalties and fees for any delinquent rent payments that were or are due for use of Port property during the period of March 1 through April 30, 2020. Port staff will also follow the policies and timeframes set forth in the Eviction Moratorium Order with respect to the initiation of any default enforcement or eviction process due to the failure to pay rent owed under any commercial lease due to the impact of COVID-19 while the Eviction Moratorium Order is in effect. Further, between now and April 30, 2020 the Port will not issue any Three Day Notice to Pay or Quit for nonpayment of any portion of rent due during the period of March 1 through April 30, 2020 due to the impact of COVID-19.

These actions are intended to give tenants confidence in being able to retain their leasehold while they use their financial reserves on immediately pressing operational needs to remain solvent. All tenant rent is still due and payable in accordance with the applicable lease, license or other agreement; as such the Port will be issuing invoices in its normal course of business.

**2. Lease Obligations and Payment Provisions:**

The relief offered by this Directive is contingent upon the tenant's continued compliance with all lease obligations other than the payment of rent (such as maintenance and repair obligations and percentage rent reporting obligations), the tenant's resumption of normal timely rent payments on May 1, 2020 and payment of any rent arrearages (including for March and April 2020) in full no later than June 30, 2020 (subject to any extension of these deadlines and/or additional relief as noted above). Any amounts not paid in full as of June 30, 2020 would then be subject to interest and penalties from and after that date (subject to any further relief action taken by the Port before that date).

If a tenant is unable to fulfill non-monetary lease obligations due to impacts from the current emergency situation, Port staff will address those issues on a case-by-case basis. The forbearance program outlined in this Directive does not change the terms or conditions of any lease or other Port agreement.

This Directive will not affect ongoing lease enforcement actions or lease enforcement actions for defaults not related to the current emergency. For any tenant claiming the benefit of force majeure or similar provisions in its lease, those provisions will control.

### **3. Reporting:**

Port staff will monitor rent collections and tenant operational conditions during this time and will track and report on the amounts deferred under this Directive and the parties that received relief. This information will be provided to the Port Commission as soon as possible, but no later than the next Port Commission meeting. Currently any concessions, amendments or other deferrals with a value of \$25,000 or more require Port Commission approval. Though this outcome is not expected due to the scope and timing of the relief, Port staff will monitor and advise management of any case where the amounts deferred approach \$25,000.

### **4. Other Sources of Relief:**

Staff is directed to work with the Risk Manager to document and seek recovery from any possible private or public insurance program or other assistance that is forthcoming in the ongoing response to this situation. Tenants have been and should continue to be encouraged to investigate any coverage available to them under any business interruption or similar policies or programs along with public assistance efforts.

### **5. Eligibility:**

This Directive applies to all leases, licenses and other agreements to use Port lands. This Directive also applies to our Maritime agreements with excursion operators and other similar maritime tenants. This Directive does not apply to MOUs with City departments, lay berthing agreements, and berthing agreements for small vessels at South Beach Harbor. In any scenario where a Port tenant has subleased some or all of its space, including master tenants, such relief will only be available to the extent that the Port's tenant has offered equivalent relief to the subtenant(s).

### **Analysis**

The Port has engaged in similar rent relief efforts due to economic conditions in the past, notably including the 2016 Crab Industry Relief Program that among other things provided three months of rent forgiveness to the crab fishing industry in the face of the severely truncated crab season that year. There, as here, the goal was targeting assistance to help the industry survive so that it can endure the current challenges and regain its footing and ability to generate rent revenues for the Port in the future.

The impact of the specific actions proposed here will be primarily felt in the Port's cash flow and timing of receipts, depending on how many tenants take advantage of this relief. Based on tenant communications to date, the Port's cash flow is going to be impacted regardless, especially with regard to percentage rents and parking revenues. Port staff will continue to monitor these trends and report to the Port Commission. It is notable that the Port's budget does not assume recoveries for default interest or late fees as a source. In the most recently completed fiscal year (FY 2018-2019) this source amounted to 0.1% of Port revenues.

It is important to note that this Directive is simply an initial measure shifting the timing of otherwise due rent payments. In the current regulatory environment the Port fully expects that further deferrals and/or installment payment plans (with interest) will be worthy of consideration. This is especially the case with regard to certain Port tenant classes that support the Port's trust mission. In developing these strategies it will be

important to understand those tenants' plans as well as the overall economic and regulatory environment so that Port staff can strike the appropriate balance to safeguard the Port's revenue needs as described above.

As further actions become warranted, Port staff will communicate as much as possible with affected tenants and the Port Commission so that appropriate financial decisions can be made. As always, the goal is to take the steps that provide the best opportunity to regain the Port's economic footing at such time when the disease no longer necessitates these impactful defensive measures.