



## Legislation Details (With Text)

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**Title:** RESOLUTION COMBINING AND MODIFYING THE TEMPORARY RENT DEFERRAL PROGRAM FOR QUALIFYING CONCESSION RENT TENANTS AND FIXED RENT TENANTS INTO THE EXTENDED AND COMBINED RENT DEFERRAL PROGRAM AND DIRECTION TO STAFF, AS NECESSARY

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**DATE:** June 23, 2020

**SUBJECT:**

**RESOLUTION COMBINING AND MODIFYING THE TEMPORARY RENT DEFERRAL PROGRAM FOR QUALIFYING CONCESSION RENT TENANTS AND FIXED RENT TENANTS INTO THE EXTENDED AND COMBINED RENT DEFERRAL PROGRAM AND DIRECTION TO STAFF, AS NECESSARY**

**EXECUTIVE SUMMARY:**

At the April 8, 2020 Special Meeting of the Board of Port Commissioners (Board), the Board adopted a Resolution establishing a temporary rent deferral program for qualifying concession rent paying tenants, tenants that report their gross sales to the District each month, and Seaport Village tenants (collectively, Concession Tenants) to assist them in sustaining economic viability through the COVID-19 public health crisis (Concession Tenant Rent Deferral Program). At the May 19, 2020 Board meeting, the Board adopted a Resolution establishing a temporary rent deferral program for qualifying fixed rent paying tenants (Fixed Rent Tenants) and tariff fee paying tenants/customers similarly impacted by the effects of COVID-19 (Fixed Rent Tenant Rent Deferral Program). Since then, staff has met numerous times with the San Diego Port Tenants Association (SDPTA) to better understand the economic impacts of the public health crisis on the District's tenant portfolio as businesses slowly start to reopen.

Based on information gathered directly from tenants since March, as well as meetings with the SDPTA and staff's research, staff recommends several modifications to the original rent deferral programs in order to provide immediate and continuing relief to the District's tenants as well as assist

them with the new costs associated with reopening during the various phases of the State and County orders. Staff proposes to amend the Concession Tenant Rent Deferral Program and Fixed Rent Tenant Rent Deferral Program, and combine the two programs. The combination of the two programs as modified below would be collectively referred to as, the “Extended and Combined Rent Deferral Program.” For any tenant/customer who qualified under the current rent deferral programs, but does not qualify for, or elects not participate in, the Extended and Combined Rent Deferral Program, the tenant/customer would still be able to abide by the terms of its letter agreement with the District, as if the old rent deferral programs still existed. Also, tariff fee paying tenants/customers would still be able to apply for the Fixed Rent Tenant Rent Deferral Program.

The Extended and Combined Rent Deferral Program would allow up to six consecutive months of rents to be deferred, minimum rent for Concession Tenants and 50% of rent for Fixed Rent Tenants; whereas, the current program only allows for three consecutive months. The program would not require that repayment begin until October 2021, with completion of repayment by July 1, 2022 for Fixed Rent Tenants and July 20, 2022 for Concession Tenants; whereas, the current program contemplated repayments beginning in January 2021 and being paid back by July or October 2021. The full details of the modifications to the Concession Tenant Rent Deferral Program and Fixed Rent Tenant Rent Deferral Program are further detailed in the “Discussion” section below.

The proposed Extended and Combined Rent Deferral Program would provide immediate rent relief to the tenants while delaying repayment until after summer 2021, typically the busy season for many tenants. The proposed Extended and Combined Rent Deferral Program would allow tenants extended rent relief on favorable repayment terms to allow them to focus their capital today on reopening under the new operation requirements of the State and County orders and provide an economic buffer before repayment would begin. In parallel, staff would continue to gather data as businesses begin to reopen and begin to target those tenants that may require more relief than the Extended and Combined Rent Deferral Program can offer to remain economically viable; this is staff’s approach with Seaport Village and staff has already begun conversations with impacted Seaport Village tenants.

The economic impact of the Extended and Combined Rent Deferral Program to the District, including six months of deferred rent for Concession Tenants and Fixed Rent Tenants, is expected to be felt mostly in late Fiscal Year 2020 (through June 30, 2020) and into Fiscal Year 2021, with all deferred amounts anticipated to be repaid by the end of Fiscal Year 2022. If every eligible tenant participates (which is unlikely based on participation in the current programs), the total impact in Fiscal Year 2020 could be up to approximately \$6.3 million and an additional \$7.8 million in deferred rent to the District in Fiscal Year 2021, for a total maximum deferral of \$14.1 million to be repaid in Fiscal Year 2022.

Supporting the financial stability of District tenants during this time of economic uncertainty is critical to the continued stability of the District itself, as the District depends on rents from the tenants to operate as a self-sustaining agency. Therefore, staff recommends that the Board adopt a resolution approving the Extended and Combined Rent Deferral Program which amends the temporary rent deferral program for qualifying Concession Tenants and Fixed Rent Tenants allowing an up to six month deferral of certain rental payments and an extension of the repayment period based on the criteria set forth herein and any administrative policies adopted by the Executive Director, or her designated representative, to implement the program.

If the Board approves the Extended and Combined Rent Deferral Program, the Executive Director, or her designated representative, would have full authority to implement it and no further Board action

would be required. Staff is continuing to explore alternatives to address individual tenant situations within the District on an as-needed basis and will return to the Board in the future for direction, if necessary. Based on the information available at this time, staff would not recommend any further changes to the Concession Tenant Rent Deferral Program or Fixed Rent Tenant Rent Deferral Program. However, staff will return to the Board if additional changes are needed to the Extended and Combined Rent Deferral Program after it has collected at least three full months of operations data and benchmarking over the upcoming summer months.

**RECOMMENDATION:**

Adopt a Resolution Combining and Modifying the Temporary Rent Deferral Program for Qualifying Concession Tenants and Fixed Rent Tenants into the Extended and Combined Rent Deferral Program and Direction to Staff, as Necessary

**FISCAL IMPACT:**

The fiscal impact of the proposed item, representing six months of deferred Concession and Fixed Rent if all eligible tenants participate, is approximately as follows:

<u>Year</u>	<u>Concession Rent</u>	<u>Fixed Rent</u>	<u>Total</u>
<b>FY 20</b>	\$(5.3M)	\$(1.0M)	\$(6.3M)
<b>FY 21</b>	\$(2.7M)	\$(5.1M)	\$(7.8M)
<b>FY 22</b>	\$8.0M	\$6.1M	\$14.1M
<b>Total</b>	\$0.0	\$0.0	\$0.0

The maximum potential combined deferral amount in Fiscal Year 2020 and Fiscal Year 2021 is \$14.1 million all of which is expected to be repaid gradually by the end of Fiscal Year 2022. Additional details regarding the fiscal impact are described below.

**COMPASS STRATEGIC GOALS:**

This agenda item supports the following Strategic Goal(s).

- A Port that the public understands and trusts.
- A vibrant waterfront destination where residents and visitors converge.
- A financially sustainable Port that drives job creation and regional economic vitality.

**DISCUSSION:**

Due to the economic impacts of COVID-19, staff recommends the District continue to partner with its

tenants to assist with their economic recovery as we move out of the closure phase of the pandemic and into the reopening phase. The Board previously adopted Resolutions establishing broad rent deferral programs ensuring that the majority of the District's tenant portfolio has access to three months of rent deferral. To assist with reopening and to take some of the repayment pressure off the tenants, staff has met with tenants and the SDPTA to develop a recommendation that will promote economic recovery.

## **Tenant Feedback**

Staff met numerous times with the SDPTA and tenant representatives to better understand the impacts of the COVID-19 pandemic on the various business sectors on tidelands. Staff also continues to monitor macroeconomic forecasts and trends as well as relying on industry publications for the latest information. In addition, staff is continuing to observe how similarly situated public agencies are responding to the pandemic and monitoring the types of aid that such public agencies are providing. The SDPTA has requested a waiver of minimum rents and a recalculation of minimum annual rent (MAR) based on the changes to operations caused by COVID-19, including new social distancing requirements, group business and convention-based cancellations and other restrictions on their operations. The tenants shared with staff that businesses reliant on group and convention-based business and banquets, such as some restaurants and most hotels, would likely face the biggest economic challenges in the short term as group and convention-based business is not expected to return to pre-COVID-19 levels for some time. In addition, impacts to marinas and yacht clubs are not expected to be felt for at least six months which is consistent with prior economic downturns.

Based on the conversations with the tenants and staff's assessment of market conditions, staff believes that uncertainty about the future and higher costs are driving the request for minimum rent waivers. By deferring an immediate expense, the payment of rent for six consecutive months, tenants would be able to focus the deferred rent amounts on modifications to their businesses needed to comply with any outstanding State or County orders and reopening their businesses. In addition, by pushing out the repayment of the deferred rent to the end of Fiscal Year 2022 and extending the repayment period, tenants would benefit from a more typical summer of sales activity before repayment of the deferred rent begins.

## **Participation in Current Rent Deferral Programs**

Tenant participation to date in the current rent deferral programs has been moderate. While many tenants have been severely impacted by the loss of sales and increased costs during the public health crisis, others have been able to endure without participating in the rent deferral program. As more fully discussed below, staff does not recommend rent waivers or a MAR reset as these are not justified by either the projected forecasts for economic recovery or the actual performance of our tenants based on the data available at this time.

### **Concession Tenants**

As of June 13, 2020, 29 Concession Tenants have applied for the Concession Tenant Rent Deferral Program and 41 Concession Tenants have informed staff that they decline to participate. Tenants not participating in the program include marinas, yacht clubs, sportfishing landings and convention hotels. Many of these tenants have already met their MAR for the year and therefore have no rent to defer, while others did not want to comply with the requirements to accept state and/or federal aid or

they did not want to comply with the worker rehire policy. It should be noted that Board Policy No. 355 requires that MAR be set at a minimum of 75% of market rent as determined by the average of the last three years of rents paid to the District which is intended to provide Concession Tenants with a built-in buffer to adjust to changing economic conditions. Rent reviews or adjustments are typically scheduled at 10-year intervals, therefore rent paid to the District far outpaces the MAR due to the strong performance by many of the District's tenants. Moreover, the current average MAR across the Concession Tenant portfolio is 59% meaning that on average, tenant revenue could drop by more than 40% before percentage rent generated by the tenant's business would not cover MAR payments. There are a few tenants that have MAR set in excess of 75%. However, for most of the portfolio, there is a significant built-in buffer to help tenants adjust to changing economic conditions. For these reasons, staff does not believe that waivers of MAR across the portfolio, or even by tenant sector, are justified at this time.

### Fixed Rent Tenants

As of June 13, 2020, only four Fixed Rent Tenants have applied for the Fixed Rent Tenant Rent Deferral Program. Generally, the low participation may be due to the fact that Fixed Rent Tenants depend less on group and convention type business and tourism for their revenues and have therefore not been as impacted by the COVID-19 pandemic as the Concession Tenants, while others did not have a clear understanding of, or had concerns with, the requirement to pass along the deferral to subtenants.

### **Proposed Modifications to the Concession Tenant and Fixed Rent Tenant Deferral Programs**

The following is a summary of what the Extended and Combined Rent Deferral Program would include:

- Combine the Concession and Fixed Rent tenant rent deferral programs into one program, collectively known as the "Extended and Combined Rent Deferral Program." Tenants/customers who participated in the earlier programs but do not qualify for, or elect not to participate in, the modified program would continue to abide by the terms of their letter agreements with the District.
- Extend the number of deferred months of rent by an additional three months to allow for a total of up to six consecutive months of rent to be deferred.
  - For qualifying Concession Tenants, defer MAR for up to six months for the rent paying months of March to August 2020, for rent due on April 20, May 20, June 20, July 20, August 20, and September 20, 2020.
    - Concession Tenants who participated in the Concession Tenant Rent Deferral Program would be allowed to defer rents for the additional rent paying months of June, July and August 2020.
    - Concession Tenants who did not participate in the Concession Tenant Rent Deferral Program would receive an up to six month deferral of rent retroactive to March 2020. For March, April, and May rents already paid by a Concession Tenant, the Concession Tenant would receive a rent credit for those months that would be applied to payment of rent starting the first month after the end of the deferral.
    - To demonstrate financial hardship under the Extended and Combined Rent Deferral Program, new applicants would need to show financial hardship in their

- operations for at least one month between March 2020 to August 2020.
- Applications for Concession Tenants must be received before August 31, 2020 to qualify for the deferral.
- For qualifying Fixed Rent Tenants, defer fifty percent (50%) of monthly rent for any six consecutive months for the rent paying months of June to December 2020, for rent due on June 1, July 1, August 1, September 1, October 1, November 1, December 1, 2020.
  - Fixed Rent Tenants who participated in the Fixed Rent Tenant Rent Deferral Program would be allowed to defer rents for three additional consecutive months from those selected previously by tenant provided such new three months do not go beyond December 31, 2020. The additional months could be retroactive provided they are consecutive and not before June 2020.
  - Starting in June, Fixed Rent Tenants who did not participate in the Fixed Rent Tenant Rent Deferral Program, and paid rent for June, would receive a rent credit for the month of June and be able to defer a total of six consecutive months. The June rent credit would be applied to next payment of rent after the deferral period ends.
  - Applications for Fixed Rent Tenants must be received by December 31, 2020 to qualify for the deferral.
- Tenants who have been accepted into and approved for the existing programs, will not be required to resubmit a new application (which includes evidence of financial hardship and evidence of pursuit of state and federal aid) to receive the extended benefits of the Extended and Combined Rent Deferral Program. Tenants will only be required to notify staff of their request for the additional benefits so an amendment to their existing agreement can be processed to modify the rent deferral period, repayment term, and subtenant requirement outlined below.
- Concession and Fixed Rent tenants who chose not to apply, have not yet applied, or applied but did not complete the application process for the original programs will be invited to apply for the combined program.
- Extend the repayment period for qualifying Concession Tenants by four months for a total of up to 10 months, consistent with the repayment period for the Fixed Rent Tenant Rent Deferral Program.
  - For qualifying Concession Tenants, equal monthly installment repayments of the deferred MAR must commence by October 20, 2021 and conclude by July 20, 2022.
  - For qualifying Fixed Rent Tenants, equal monthly installment repayments of the fixed rent and/or improvement rent must commence by October 1, 2021 and conclude by July 1, 2022.
- Require that Concession Tenants and Fixed Rent Tenants extend to their subtenants the benefit of any rent deferral received under the Extended and Combined Rent Deferral Program with the modifications set forth below. For Concession Tenants and Fixed Rent Tenants who are participating in the existing programs, and do not participate in the Extended and Combined Rent Deferral Program, the modified subtenant requirement would not apply. For Concession Tenants, and for Fixed Rent Tenants who apply for the Extended and Combined Rent Deferral Program, the modifications below would only apply to the new rent

deferral months.

- Clarify that a subtenant is a business operating under a sublease with the master tenant that was consented to, or deemed consented to, or that the District was not required to consent to, (short or long-term) and does not include telecommunications subtenants. The changes to the subtenant requirement would only apply for new months granted to the tenants under the Extended and Combined Rent Deferral Program.
  - Modify the requirement to pass down rent deferral benefits to the subtenants pro rata. Under the Extended and Combined Rent Deferral Program, master tenant would be given the opportunity to determine how and if the rent deferral benefits should be passed down to its subtenants, including whether a subtenant would receive more of the benefit, less of the benefit, or none of the benefit, and in which of the rent deferred months such benefits would be received. However, master tenant would be required to provide staff with an economic justification for such changes, and the Executive Director, or her designated representative, would have the authority to determine compliance by the master tenant. The changes to the subtenant requirement would only apply for new months granted to the tenants under the Extended and Combined Rent Deferral Program.
- Applications for tenants that are not already participating in one of the existing rent deferral programs will be accepted through August 31, 2020 for Concession Tenants and December 31, 2020 for Fixed Rent Tenants. Tenants will not be admitted into the program after that time without future Board action.
  - Except as modified above, all other qualifications and requirements of the Concession Tenant Rent Deferral Program and Fixed Rent Tenant Rent Deferral Program would remain in effect.

## Seaport Village

The proposed modifications to the current rent deferral programs would likely not benefit most Seaport Village tenants. Most of the Seaport Village agreements are short term (5 years and less) and do not typically have the necessary remaining term for the tenant to repay under the rent deferral programs or permit the tenant enough time to properly recover from the economic impacts associated with the pandemic. For these reasons as discussed below, and due to the heightened need and vulnerability of these tenants, staff will address each Seaport Village lease individually, but may use the rent deferral programs adopted by the Board as guidance in restructuring some of the leases. There are several reasons for addressing the Seaport Village tenants on a case by case basis, and differently from other District tenants, including the following:

- More than 60% of Seaport tenants (by square footage) have the ability to terminate their leases on short notice with no penalty, meaning many of them can decide whether to terminate or try to reopen.
- Increasing vacancy at Seaport Village would negatively impact the remaining tenants and the overall viability of the center.
- Most Seaport tenants are on short-term leases of five years or less with no significant capital investment in their leaseholds.
- The assets at Seaport Village are District-owned improvements and will become liabilities if we are unable to lease them.

- Tenants pay common area maintenance and marketing fees, which are needed to maintain the viability of Seaport Village.

For those reasons, staff is pursuing a case by case approach with Seaport Village tenants. Staff will refer to the rent deferral programs adopted by the Board as guidance in its negotiations with the Seaport Village tenants; however, staff anticipates that most Seaport Village tenants who need assistance may require approaches that are substantially different from the programs. Because most of the tenants are on short-term leases of five years or less, staff has the ability to administratively modify the agreements as needed, and would only return to the Board for approval of amendments and new leases if those agreements have a term greater than five (5) years. Staff has already initiated direct conversations with many Seaport Village tenants and intends to have a one-on-one conversation with each tenant at Seaport Village in the upcoming weeks.

### **Fiscal Impact of the Modifications to the Rent Deferral Program**

Overall, the estimated total impact for Fiscal Year 2020, Fiscal Year 2021 and Fiscal Year 2022 is revenue neutral to the District, as reflected in the Fiscal Impact section above, since the proposed program is a deferral of rent only and must be paid back in Fiscal Year 2022. The maximum potential combined deferral amount in Fiscal Year 2020 and Fiscal Year 2021 is \$14.1 million, all of which is expected to be repaid in Fiscal Year 2022. This represents six months of deferrals with every eligible tenant participating. Based on the limited participation in the deferral programs to date, the actual amount of deferred rent is likely to be significantly less than \$14.1 million.

### **Tenants Requiring Case by Case Negotiation**

While many of the tenants in the District's portfolio will likely recover from the economic shock associated with COVID-19 given the ability to defer six months of rent, there are some tenants that have been impacted to a greater extent and will require a structural reset of their agreement with the District to endure through the pandemic. These tenants may have been in a difficult economic position prior to the COVID-19 pandemic with high operating costs or improvement rent, or they may rely more exclusively on group and convention type business and out of town visitors to generate revenue. Staff does not believe that the small number of tenants that may fall into this category justify a portfolio-wide or sector-wide approach. Additionally, in these scenarios, it is possible that many other terms beyond rent may need to be re-negotiated. Staff intends to work on a case by case basis with these tenants that may not otherwise remain economically viable through the COVID-19 crisis. Staff will bring individual recommendations to the Board as needed.

### **Implementation**

As with the current programs, if the Board approves the proposed modifications to the rent deferral programs and adopts the Extended and Combined Rent Deferral Program, staff will notify tenants via the District website to determine the level of interest in participating in the program. Staff will also share a link to the District's website with the SDPTA to disseminate to its membership. The outreach will include an outline of the modifications to the current rent deferral programs and the conditions that must be met to participate in the Extended and Combined Rent Deferral Program. If the modifications are approved by the Board, and the Extended and Combined Rent Deferral Program is adopted, staff will use similar Standard Operating Procedures as that developed for the current programs to outline the process for applying, criteria for eligibility and the mechanism by which the District and tenant memorialize the terms of the rent deferral, which would be tracked in the District's

lease administration system. As previously noted, tenants who have already been accepted into and approved for a rent deferral under the existing programs would follow an expedited path and their current agreements would be amended accordingly. The Executive Director, or her designated representative, would have the authority to adopt administrative policies reasonably necessary to implement the Extended and Combined Rent Deferral Program. Staff would regularly update the Board on the status of the program, including the number of tenants participating as well as the total amount of rent deferred and repaid each month.

### **Recommendation and Next Steps**

In closing, staff recommends that the Board authorize a resolution modifying and combining the temporary rent deferral programs for qualifying Concession Tenants and Fixed Rent Tenants allowing deferral of rent payments based on the criteria set forth herein and authorize the Executive Director, or her designated representative, to adopt any administrative policies deemed necessary to implement the program.

If the Board approves the Extended and Combined Rent Deferral Program, and gives the Executive Director, or her designated representative, the authority to implement the program, the Executive Director would have full authority to implement it and no further Board action would be required. Staff will continue to monitor the economic recovery of the District's Real Estate portfolio, explore alternatives to address individual tenant situations within the District on an as-needed basis, and will return to the Board in the future as necessary for direction.

### **General Counsel's Comments:**

The Office of the General Counsel has reviewed this agenda sheet as presented to it and approves it as to form and legality.

### **Environmental Review:**

The proposed Board action and the Board's direction, including without limitation, a resolution consolidating and modifying the temporary rent deferral programs and direction to staff, do not constitute a "project" under the definition set forth in California Environmental Quality Act (CEQA) Guidelines Section 15378 because no direct or indirect changes to the physical environment would occur. CEQA requires that the District adequately assess the environmental impacts of projects and reasonably foreseeable activities that may result from projects prior to the approval of the same. Any project developed as a result of the proposed Board action and the Board's direction that requires the District or the Board's discretionary approval resulting in a physical change to the environment will be analyzed in accordance with CEQA prior to such approval. CEQA review may result in the District, in its sole and absolute discretion, requiring implementation of mitigation measures, adopting an alternative, including without limitation, a "no project alternative" or adopting a Statement of Overriding Consideration, if required. The proposed Board action and the Board's direction in no way limit the exercise of this discretion. Therefore, no further CEQA review is required.

The proposed Board action and the Board's direction comply with sections 21, 35, and 87(b) of the Port Act, which allow the Board to pass resolutions, to do all acts necessary and convenient for the exercise of its powers, and to collect and retain rents and other revenues from the leasing,

franchising, and privileging of District tidelands. The Port Act was enacted by the California Legislature and is consistent with the Public Trust Doctrine. Consequently, the proposed Board action and the Board's direction are consistent with the Public Trust Doctrine.

The proposed Board action and the Board's direction do not allow for "development," as defined in Section 30106 of the California Coastal Act, or "new development," pursuant to Section 1.a. of the District's Coastal Development Permit (CDP) Regulations because they will not result in, without limitation, a physical change, change in use or increase the intensity of uses. Therefore, issuance of a Coastal Development Permit or exclusion is not required. However, development within the District requires processing under the District's CDP Regulations. Future development, as defined in Section 30106 of the Coastal Act, will remain subject to its own independent review pursuant to the District's certified CDP Regulations, PMP, and Chapters 3 and 8 of the Coastal Act. The proposed Board action and the Board's direction in no way limit the exercise of the District's discretion under the District's CDP Regulations. Therefore, issuance of a CDP or exclusion is not required at this time.

**Equal Opportunity Program:**

Not Applicable.

**PREPARED BY:**

Tony Gordon  
Director, Real Estate