



Office of the City Manager

ACTION CALENDAR

July 18, 2006

To: Honorable Mayor and  
Members of the City Council

From:  Phil Kamlarz, City Manager

Submitted by: Manuela Albuquerque, City Attorney

Subject: Adoption of Marina Zone Workers Retention Ordinance - Rev

RECOMMENDATION

Adopt first reading of an Ordinance adding a new chapter to the Berkeley Municipal Code (“BMC”) Chapter 13.25 entitled “Marina Zone Worker Retention Ordinance” to establish a requirement that upon a transfer of ownership, specified employers within the public trust tidelands, may only terminate employees for cause for 90 days.

FISCAL IMPACTS OF RECOMMENDATION

No significant financial impact is anticipated because enforcement of this ordinance is by private right of action by aggrieved employees against violating employers, and not by the City itself.

CURRENT SITUATION AND ITS EFFECTS

Currently, purchasers of businesses in the Marina have no obligation to retain any employees currently employed. Thus, during a change of ownership, the new owners of the limited public accommodations available at the Marina could terminate large numbers of workers and cause a disruption of public services after a change in ownership. One such business is about to transfer ownership and provides the only hotel accommodations at the Marina.

BACKGROUND AND RATIONALE FOR RECOMENDATION

On June 27, 2006, the City Council asked that an ordinance be prepared to address the type of uncertainty facing workers at the Doubletree hotel because of the imminent change in ownership that may result in terminations of a number of workers. A new owner’s termination of large numbers of workers will lead to drastic consequences for these workers, a likely disruption of

business by the ensuing labor strife, community boycotts and the like, that often ensue in the wake of such employment practices, and therefore, such terminations are also likely to cause hardship for members of the public who have to use the facilities or services provided by the business. This is particularly a problem in the Marina where there is a limited pool of businesses that the public can patronize.

In 2000, the City Council recognized that low wage workers suffer severe economic hardships which disrupt their lives in dramatic ways and adopted the Living Wage ordinance to apply to specific categories of City contractors to ameliorate this problem. Later that year, the Council amended the Living Wage ordinance to apply it to certain large employers in the Marina. The Council concluded that the Marina Zone, composed of Public Trust Tidelands, was a unique part of the City, because of the huge public investment that the City and State had made in the area, the favored monopoly position of the limited number of private businesses at this location who benefit from the massive investment of public resources which have resulted in creating and protecting the special natural environment with its stunning vistas and the severely limited choice available to the public on the businesses they can patronize. These considerations apply with even greater force to the actual unfair termination of workers.

Other cities have adopted ordinances in this general area of regulation but they cover varying categories of businesses. The cities include San Francisco, Oakland, Los Angeles, Santa Cruz and San Jose. For instance, the Oakland ordinance applies to hotel and food service businesses that employ more than 150 persons; the City of Los Angeles ordinance applies to supermarkets and grocery retailers with a square footage in excess of 15,000 square feet; etc.

Given the limited time to prepare such an ordinance or to assess its impacts, the proposed ordinance, like the Marina Zone amendment to the Living Wage ordinance is confined to the Marina Zone which is defined as all land held in trust by the City of Berkeley pursuant to the Public Trust Tidelands grant from the State of California to the City of Berkeley, which includes Aquatic Park and all land, west of Marina Boulevard and all land north of Spinnaker Way.

The Ordinance applies to businesses in the Marina Zone that employ more than 50 employees. It provides that in the event of a change of ownership, the successor entity may not terminate the employment of existing employees of the preceding operator who have been employed for more than 90 days) without just cause during the first 90 days of ownership by the new operator.

#### ALTERNATIVE ACTIONS CONSIDERED

The ordinance appears to be the only feasible solution to address the Council's concerns.

CONTACT PERSON

Manuela Albuquerque, City Attorney, 981-6950

Attachment:

1. Ordinance

**ORDINANCE REGULATING LARGE MARINA BUSINESSES BY REQUIRING UPON A CHANGE OF OWNERSHIP THAT EXISTING EMPLOYEES OF 90 DAYS TENURE BE TERMINATED ONLY FOR JUST CAUSE FOR A NINETY DAY PERIOD**

BE IT ORDAINED by the City Council of the City of Berkeley as follows:

Section 1. Findings

The Council finds as follows:

A. The Council has previously found in connection with its adoption of the Marina Zone Amendment to the City’s Living Wage Ordinance, that the privilege of using the Public Trust tidelands to operate a revenue-generating enterprise should not result in an exacerbate of problems faced by lower paid workers which include inadequate compensation and lack of job security. The public welfare is adversely impacted if large Marina businesses terminate numbers of workers without cause during a change of ownership.

B. Public Trust tidelands are for the use and benefit of the public, and are only subject to certain permissible uses consistent with this purpose, which the City is charged with enforcing. The City has made a huge financial, regulatory and planning investment in the maintenance and development of the Public Trust tidelands as an environmental treasure with environmentally compatible public amenities for both the public and entities operating therein.

C. Therefore, the public interest is best served by requiring that those parties who acquire a business within the Public Trust tidelands treat their employees agree not to terminate their employees without good cause for a minimum 90 day period.

D. Employers who operate on Public Trust land enjoy a unique location and amenities which afford them significant financial benefits and thus it is reasonable to require that new owners allow existing employees to prove their worth to the new owner for a period of 90 days during which they may only be terminate for just cause.

E. Members of the public who visit the Public Trust tidelands have a limited choice of businesses to patronize in that area. The public interest is best served by ensuring that the public is not deterred from visiting the Public Trust tidelands because they do not wish to patronize businesses that engage in mass terminations of employees as a result of a change in ownership. In addition, by providing that employers will only terminate employees for just cause during the first 90 day period after transfer of ownership will ensure that there will be a smoother transition to a new owner, continuity of service to the public.

F. Providing employees an opportunity to demonstrate their merit to a new owner would reduce the amount of unemployment in the City.

G. Mass terminations of employees in the limited number of businesses in the Public Trust tidelands would drastically reduce the availability of public amenities in this area and could adversely impact tourism.

H. In light of the unique features of the Public Trust tidelands as described above and its inextricable connection with the public interest, Council has adopted policies directed toward businesses in this area such as the Living Wage Ordinance.

Section 2. That Chapter 13.25 is added to the Berkeley Municipal Code to read as follows:

**13.25.010 Title and Purpose**

This ordinance shall be known as the "Berkeley Marina Zone Worker Retention Ordinance." Its purpose is to ensure that the massive public investment in the Public Trust Tidelands inures to the benefit of the workers in Marina and that the public is not deprived of access to amenities operated by socially responsible businesses. It accomplishes this objective by providing that workers in businesses that have been acquired by new owners may not be terminated without just cause for ninety days after the acquisition.

**13.25.020 Definitions.**

The following definitions shall apply throughout this Ordinance:

A. "Marina Zone Business" means any business within the Marina Zone as defined herein which has employed more than 50 persons during any payroll period during the 18 months of operation prior to being taken over by a New Operator.

B. For purposes of determining the number of employees under the preceding section, the number of employees of separately-owned businesses shall be aggregated if part of a single enterprise as defined under the Fair Labor Standards Act or if operated on the same parcel or in the same building.

C. "New Operator" includes, but is not limited to, any purchaser or new management company, contractor, subcontractor, lessee, sublessee, or other person or entity which will take over as an employer at the facility where a Marina Zone Business has been located.

D. "Marina Zone" shall mean all land held in trust by the City of Berkeley pursuant to the Public Trust Tidelands grant from the State of California to the City of Berkeley, Stats. 1962, Ch. 55; specifically, Aquatic Park and all land, including submerged land, which is west of Marina Boulevard as it is presently constructed and as if it were extended, in both northerly and southerly directions, to the Berkeley city limits and all land north of Spinnaker Way as it is presently constructed and as if it were extended to the shoreline, to the east, and to the Berkeley city limits, to the west.

E. "Employee" shall mean any employee employed at the Marina Zone Business for at least 90 days.

**13.25.030 Maintenance of Existing Employees – Termination Within 90 Days Only for Just Cause**

A. If a New Operator takes over any Marina Zone Business or portion thereof, the Employees of the prior operator of the Marina Zone Business shall be deemed employees of the New Operator. The New Operator shall not discharge any Employee of the previous operator from his/her existing position or a position comparable thereto, without just cause, during the first 90 days of that individual's employment by the New Operator of the Marina Zone Business.

B. The comparable position shall be the one most comparable to that previously held by the employee (for example, displaced housekeepers will not be offered jobs as food servers while displaced food servers are offered jobs as housekeepers). However, nothing herein shall be construed to require the New Operator to retain the supervisory or managerial capacity of an employee.

**13.25.040 Retaliation and discrimination barred; no waiver of rights.**

A. No person shall discharge or otherwise discriminate against anyone for making a complaint, participating in any City proceeding, or using any civil remedy to enforce his or her rights, or for otherwise asserting his or her rights under this Ordinance.

B. Any waiver by an individual of any of the provisions of this Ordinance shall be deemed contrary to public policy and shall be void and unenforceable, except that employees shall not be barred from entering into a written, valid collective bargaining agreement waiving any provision of this Ordinance, if such waiver is set forth in clear and unambiguous terms.

**13.25.050 Enforcement.**

A. The City assumes no obligation to enforce the terms of this Ordinance, and nothing herein shall be construed as creating a cause of action against the City.

B. The City Manager may, in his or her discretion, develop regulations interpreting this Ordinance and/or establishing complaint procedures within the City related to enforcement of this Ordinance. Pursuit of any such complaint procedure shall not be a prerequisite for asserting a claim hereunder in a court of law.

C. Any person claiming a violation of this Ordinance may bring an action against the employer in the Superior Court of the State of California to enforce the provisions of this Ordinance. The court is authorized to award, where appropriate, back pay, any other actual damages, reinstatement, injunction, punitive damages, and any other legal or equitable relief. Violations of this Ordinance are declared to irreparably harm the public and covered employees generally.

D. The Court shall award reasonable attorney's fees, expert witness fees and costs to any plaintiff who prevails in an action to enforce this Ordinance.

E. This Ordinance shall apply, to the fullest extent permitted by law, to any discharge, layoff or hiring decision made by any person after having received notice of the pendency of this Ordinance.

**13.25.060 Severability**

In the event any court of competent jurisdiction holds any provision of this Ordinance invalid or unenforceable, such holding shall not invalidate or render unenforceable any other provision hereof.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the glass case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.