

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.