

**BEFORE THE CITY COUNCIL OF THE CITY OF LAFAYETTE**

**IN THE MATTER OF:**

An Urgency Ordinance of the City Council of the City )  
of Lafayette Establishing a Temporary Cap on )  
Commission, Fees and Costs Charged by Third-Party ) Ordinance No. 680  
Delivery Services on Local Restaurants Within the City )  
During the COVID-19 Pandemic )  
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WHEREAS, international, national, state, and local health and governmental authorities are responding to an outbreak of respiratory disease caused by a novel coronavirus (“COVID-19”); and

WHEREAS, on March 15, 2020, the Mayor of the City of Lafayette proclaimed the existence of a local emergency due to COVID-19 that was ratified by the City Council on March 20, 2020; and

WHEREAS, on March 16, 2020, public health officers within six Bay Area counties, including Contra Costa County, issued a legal order directing residents to shelter at home and limit activity, travel and business functions to only the most essential needs. A similar shelter in place order was issued statewide by the Governor of the State of California on March 19, 2020; and

WHEREAS, on July 13, 2020, the State Public Health Officer issued an order closing all indoor restaurant dining, among other indoor operations; and

WHEREAS, under these public health orders, restaurants were prohibited from providing in-person dining and limited to drive through, pick-up or delivery. Subsequent health orders have allowed limited in-person dining where physical distancing can be maintained in accordance with evolving guidance from the State of California and local health officials; and

WHEREAS, these new operating restrictions placed a sudden and severe financial strain on many restaurants, particularly those that already operate on thin margins, adding to financial pressures in the industry that predate the COVID-19 crisis; and

WHEREAS, as restaurants return to modified, lower capacity restaurant service, it is unclear how restaurants will fare, as restaurants must create new, physically distanced dining areas and implement increased training and sanitation measures. It is also unclear how quickly restaurant patrons will return to in-person restaurant dining and restaurants may continue to see a significant loss of revenue for an ongoing period of time; and

WHEREAS, takeout and delivery orders have become a primary source of revenue for restaurants, and many consumers use third-party applications and websites to place orders with restaurants for delivery and takeout; and

WHEREAS, given that only a few companies in the marketplace provide such delivery services, small restaurants that do not operate their own delivery service resort to contracting with third-party delivery service providers as a means to compete in the marketplace; and

WHEREAS, these third-party platforms charge restaurants fees. Service agreements between some

restaurants and third-party platforms provide that the platform charges the restaurant between ten percent (10%) to thirty percent (30%) of the purchase price per order; and

WHEREAS, restaurants, eating and drinking establishments, and particularly those that are small businesses, have limited bargaining power to negotiate lower fees with third-party platforms given the market saturation of third-party platforms and the financial straits restaurants are facing during this period of emergency; and

WHEREAS, capping delivery service per-order fees at 15% and non-delivery services at 10% per order, will achieve the public purpose of ensuring the continued operation of local restaurants and third-party platforms during the period of emergency; the 15% cap and 10% cap on fees charged to restaurants is based on the findings and experience of other California cities and cities nationwide that have already adopted 15% fee ceilings or similar caps as reasonable emergency regulations in collaboration with food delivery companies; and

WHEREAS, it is in the public interest to take action to ensure the delivery of essential food services to residents who are sheltering in place and make the use of third-party delivery services more affordable, thereby enabling an increase in their use by consumers, and thereby reducing the potential for spread of COVID-19 from in-person dining; and

WHEREAS, it is in the public interest to maximize restaurant revenue from the takeout and delivery orders to enable these restaurants to survive this crisis and remain as sources of neighborhood character and vitality in the City; and

WHEREAS, it is in the public interest to maintain economic infrastructure so that the City's restaurant and food service industry may remain open and have the ability to recover from the impacts of the COVID-19 pandemic outbreak and continue to provide employment and generate tax revenue and so that economic recovery is possible after the emergency is over, all of which are in the interest of the public peace, health, safety and welfare; and

WHEREAS, this urgency ordinance is temporary in nature and necessary to avoid the continuing and immediate threat to public peace, health, and safety as failure to adopt this urgency ordinance would result in the avoidable displacement or exposure to COVID-19 of the City's restaurant and food service industry and to the amplification of the factors that lead to the spread of the virus, as described in these Recitals; and

WHEREAS, the California Constitution, Article XI, Section 7, provides cities and counties with the authority to enact ordinances to protect the health, safety, and general welfare, of their citizens; and

WHEREAS, California Government Code Section 36937 authorizes the City Council to introduce and adopt an ordinance it declares to be necessary as an emergency measure to preserve the public peace, health, and safety at one and the same meeting if passed by at least four-fifths affirmative votes.

**THE CITY COUNCIL OF THE CITY OF LAFAYETTE DOES ORDAIN AS FOLLOWS:**

**Section 1.      Incorporation of Recitals; Urgency Declaration.**

- A. The City Council hereby finds that all of the foregoing recitals and the staff report presented herewith are true and correct and are hereby incorporated and adopted as findings of the City Council as if fully set forth herein.
- B. The City Council finds and declares there is a current and immediate threat to the public health, safety and/or welfare and a need for immediate preservation of the public peace, health, or safety that warrants this urgency measure, which finding is based upon the facts stated in the Recitals above, the accompanying staff report, and any oral and written testimony and additional information presented to this Council at its October 26, 2020 meeting.
- C. The City Council finds and declares the adoption and implementation of this Ordinance is an urgency measure necessary for the immediate preservation and protection of the public peace, health and safety as detailed above and as this Ordinance is an emergency response measure aimed at ensuring the vitality and return of the restaurant industry after closure and limited operations. The facts constituting such urgency are all of those certain facts set forth and referenced in this Ordinance and the entirety of the record before the City Council.

**Section 2. Food Service Delivery and Non-Delivery Commissions Cap Established.**

- A. Commissions Cap and Prohibitions. During the period of declared local emergency pursuant to City Council Resolution No. 2020-10, as may be amended from time to time, it shall be unlawful for any third-party food delivery service to do any of the following:
  - 1. Charge a restaurant, eating or drinking establishment, or similar food facility located within the City of Lafayette:
    - a. A fee, commission, or cost of more than fifteen percent (15%) of the purchase price per online order for delivery services; and
    - b. A fee, commission or cost of more than ten percent (10%) of the purchase price per online order for non-delivery services.
    - c. As used in this section, fee, commission or cost includes fees charged for listing, delivery, and marketing services, as defined herein. However, this section does not prohibit a restaurant, eating or drinking establishment, or similar food facility from electing to pay for optional upgrades for existing marketing services where such upgrades may be offered by third-party food delivery services.
    - d. Notwithstanding (a)-(c) above, a third party food delivery service may charge a restaurant, establishment, or facility a separate fee up to three percent (3%) of the purchase price per online order for the purpose of passing through any credit card convenience fee or surcharge resulting from that transaction.

2. Limit or impede in any manner the ability for a restaurant, eating or drinking establishment, or similar food facility to otherwise determine the purchase price for food or beverage items listed in their respective menus.
3. List any restaurant, eating or drinking establishment, or similar food facility, or their respective menus in the delivery service's website, mobile application or other internet service, without the specific consent of the restaurant, establishment or facility.

**B. Tips and Gratuities; no reduction of compensation.**

1. A third-party food delivery service shall offer customers the option to, as a part of an online order for delivery or non-delivery service, authorize a tip or gratuity to be paid to food delivery service workers and any restaurant, eating or drinking establishment, or similar food facility from which the customer places an order through the third-party food delivery service.
2. It shall be unlawful for a third-party food delivery service to reduce the compensation, including any tip or gratuity, paid to any food delivery service worker, or to reduce any tip or gratuity authorized by a customer to be paid to any restaurant, eating or drinking establishment, or similar food facility, as a result of the prohibitions stated in this ordinance.

**C. Enforcement.**

1. A restaurant, eating or drinking establishment, or similar food facility, or food delivery service worker claiming a violation of this ordinance shall first provide written notice to the third-party food delivery service of the specific section of this ordinance which is alleged to have been violated and the facts to support the alleged violation. The third-party food delivery service shall have seven (7) business days from the date of receipt of the written notice to cure any alleged violation including but not limited to providing a refund of any charges exceeding the caps imposed herein.
2. If, after written notice is provided pursuant to subsection (C)(1) above and the third-party food delivery service fails to cure the alleged violation, including failing to provide a refund or continuing to charge fees in violation of this ordinance, the person or entity claiming a violation of this ordinance may bring a civil action seeking damages and injunctive relief. The prevailing party in any such action shall be entitled to an award of reasonable attorney's fees.
3. This ordinance is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the City of Lafayette, its departments, officers, or employees.

**D. Definitions.** For the purposes of this ordinance, the following definitions shall apply:

1. "Customer" means any person, firm, or association who makes use of a third-party food delivery service for the purpose of obtaining food or beverage items from a restaurant, eating or drinking establishment, or similar food facility located within the City.
2. "Listing services" means services offered by a third-party food delivery service to list the information and/or menu of a restaurant, eating or drinking establishment, or similar food facility located within the City and processing online orders.
3. "Marketing services" means services offered by a third-party food delivery service to a restaurant, eating or drinking establishment, or similar food facility located within the City for the purposes of promoting, advertising, or otherwise strengthening the business or performance of the restaurant, establishment or facility on the mobile application, website or other internet services of the third-party food delivery service.
4. "Online order" means an order for a consumer food item placed through an application or platform provided by a third-party food delivery service for delivery or pickup within the City.
5. "Purchase price" means the menu price of an online order, excluding taxes, gratuities, and any other fees which may contribute to the total cost to the customer of an online order.
6. "Third-party food delivery service" means any individual, firm, association, corporation or entity through website, mobile application or other internet service that offers or arranges for the sale of consumer food or beverage items for same-day delivery or same-day pickup from a restaurant, eating or drinking establishment, or similar food facility located within the Lafayette.

**Section 3. Effective Date; Duration.**

This Urgency Ordinance shall become effective after seven (7) days upon its adoption pursuant to California Government Code Section 36937. This Urgency Ordinance shall expire on the date that the Lafayette City Council terminates the local emergency proclaimed pursuant to Resolution No. 2020-10 as may be amended from time to time, related to COVID-19, unless such term is otherwise specifically amended by the City Council. The City Council may review this ordinance prior to its expiration and determine whether to extend its provisions.

**Section 4. CEQA.** The City Council finds that adoption and implementation of this Ordinance is not a "project" for purposes of the California Environmental Quality Act (CEQA), as that term is defined by CEQA guidelines (Guidelines) sections 15061(b)(3), and 15378(b)(5). This is an emergency response measure aimed at capping delivery services fees on existing restaurants. No new development will result from the proposed action and the regulation temporary. No direct or indirect impact to the physical environment will result. The City Council also alternatively finds that the adoption and implementation of this Ordinance is exempt from the provisions of CEQA Guidelines section 15064(e) (economic regulations).

**Section 5. Severability.** If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance for any reason is held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

**Section 6. Publication.** The City Clerk shall either (a) have this Ordinance published in a newspaper of general circulation once within fifteen (15) days after its adoption, or (b) have a summary of this Ordinance published twice in a newspaper of general circulation, once five (5) days before its adoption and again within fifteen (15) days after adoption.

PASSED, APPROVED AND ADOPTED by the City Council of the City of Lafayette at a regular meeting of the City Council held on the 9th day of November, 2020 by the following vote:

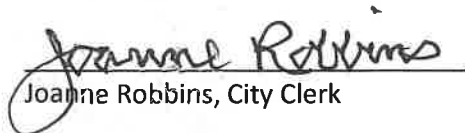
AYES: **Anderson, Candell, Bliss, Burks and Gerringer**

NOES: **None**

ABSTAIN: **None**

ABSENT: **None**

ATTEST:

  
Joanne Robbins, City Clerk

APPROVED:

  
Mike Anderson, Mayor