



MEMORANDUM

DATE: October 20, 2020
TO: Christine Daniel, City Manager
FROM: Charles S. Bryant, Community Development Director
SUBJECT: **COVID-19 Restaurant Delivery And Takeout Commission Fee Ordinance**

An Urgency Ordinance Of The City Council Of The City Of Emeryville Restricting Restaurant Delivery And Takeout Commissions, Charges And Fees During The COVID-19 Pandemic Emergency; CEQA Determination: Exempt Pursuant to California Public Resources Code Section 21080(b)(4) and State CEQA Guidelines 15269(c) and 15061(b)(3)

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RECOMMENDATION

Staff recommends that the City Council adopt the above-referenced ordinances to mitigate the impacts from the COVID-19 pandemic on restaurants (as discussed below). The Urgency Ordinance will be effective immediately upon adoption by a 4/5 vote of the entire City Council. The companion, regular Ordinance requires the normal first and second readings and is presented here as a first reading.

BACKGROUND

COVID-19¹

On March 16, 2020, based on evidence of increasing occurrence of COVID-19 within Alameda County and throughout the Bay Area, the Alameda County Health Officer, along with Health Officers in five other Bay Area counties, issued an order “directing all individuals living in the County to shelter at their place of residence...directing all businesses and governmental agencies to cease non-essential operations at physical locations in the County; prohibiting all non-essential gatherings of any number of individuals; and ordering cessation of all non-essential travel”. On March 16, 2020 the Alameda County Director of Emergency Services also declared a local emergency based on conditions of extreme peril to the safety of persons and property within the County

¹ Information presented in this subsection is derived from information made publicly available by the Centers for Disease Control, Alameda County Department of Public Health, and the State of California.

from the introduction of COVID-19 in the County. The Alameda County Health Officer issued additional shelter in place orders, amending and extending the previous orders on March 31, 2020, April 29, 2020, May 18, 2020, June 5, 2020, June 15, 2020, July 15, 2020 and August 20, 2020. Since the May 18, 2020 order, successive orders have allowed for some additional activities outside of an individual's residence, but all orders issued to-date provide that the shelter in place order is in place until further notice. As of September 27, 2020, Alameda County has had 21,240 cases of COVID-19, and 406 deaths attributed to COVID-19.

The State of California's Response

With the unprecedented orders and directives from federal, state, and local authorities to practice social distancing measures, which include self-isolation and self-quarantine, many Emeryville residents and business owners find themselves isolating in their residences. As a result of the shelter in place orders, the City, the state, and the nation continue to face an unprecedented economic downturn and uncertainty. It has become clear that COVID-19 will continue to have a presence in society, and that society must adapt to its presence if there is to be an economic recovery.

Accordingly, the State of California has developed a "Blueprint for a Safer Economy" which guides the modification of the statewide shelter in place restrictions². The Blueprint for a Safer Economy assigns counties to one of four color-coded risk tiers, including "Purple: Widespread" where many non-essential indoor business operations are closed, "Red: Substantial" where some non-essential indoor business operations are closed, "Orange: Moderate" where some indoor businesses may open with modifications, and "Yellow: Minimal" where most indoor business operations may open with modifications. A county's tier assignment is based on its test positivity and an adjusted case rate, which is reviewed weekly. Counties must remain in a tier for at least three weeks and meet the next tier's metrics for two consecutive weeks before being assigned to the next tier. If a county's metrics worsen for two consecutive weeks, it will be assigned to a more restrictive tier.

On September 22, 2020, Alameda County moved from the Purple: Widespread tier, which does not permit indoor dining, to the Red: Substantial tier, which may allow indoor dining but at 25% capacity. Because Counties may apply more restrictive requirements than the State, it is unclear if, or when, indoor dining will be permitted in Alameda County. A press release issued by the Alameda County Health Officer on September 22, 2020 suggested a period of two weeks before re-evaluating local restrictions and made no mention of indoor dining.

Emeryville's Response

On March 17, 2020, in light of actual or threatened conditions of disaster or extreme peril to the safety of persons and property that have arisen within the City of Emeryville caused

² <https://covid19.ca.gov/safer-economy/>

by the introduction COVID-19, as to which there is no known natural immunity and for which there is currently no vaccine, which has become a pandemic, and which is contributing to a shortage of essential health care supplies, pursuant to section 4-2.08(a)(1) of the Emeryville Municipal Code, the City Manager declared a local emergency. On March 19, 2020, the City Council adopted Resolution No. 20-23 to ratify the City Manager's proclamation of emergency.

In view of the severe and ongoing economic impacts to restaurants, and the essentiality of food businesses to the community, the City Council adopted a series of ordinances to establish eviction moratoria which protect commercial tenants from eviction due to nonpayment of rent (Ordinances No. 20-002, 20-007, 20-008, and 20-017). Additionally, the City Council has adopted ordinances which require landlords to provide a 12-month repayment plan for "Food Establishments", as defined by the ordinances, for rent that is unpaid during the term of the eviction moratoria (Ordinances No. 20-010 and 20-012). The purpose of the repayment ordinances is to preserve economic infrastructure and to ensure the continued availability of food from restaurants to the people of Emeryville.

Impacts to Restaurants and Delivery Fee Limits

The restaurant industry has been significantly impacted by the public health orders outlined above. Dine-in service has been prohibited since mid-March, with restaurants restricted to takeout and delivery service only. This restriction has severely impacted restaurant revenues, especially for restaurants that did not already have a robust delivery service model. A survey by the Golden Gate Restaurant Association conducted in May 2020 found that 73% of restaurants surveyed remained open for delivery and takeout during the shelter-in-place order, but that 87% of restaurants indicated they cannot survive financially with takeout and delivery service alone³. This survey data is proving prescient; according to a study conducted by business listing company Yelp, the San Francisco, Oakland and Hayward area has seen 369 restaurants permanently close between March 1, 2020 and July 10, 2020.⁴

With the public health orders restricting restaurants to delivery and takeout service, many restaurants have turned to third-party, app-based delivery service providers (e.g. GrubHub, Doordash, UberEats, etc.) to implement delivery service. Because these providers provide a platform that aggregate restaurant offerings for consumers and provide a simple and consistent transaction format, their popularity has grown. However, commission fees charged by these platforms can vary widely. Research has shown that many third-party platforms apply commissions of up to 30% of the order amount.

³ Bitker, Janelle. "Survey reveals dire state of SF restaurants during coronavirus shelter-in-place", San Francisco Chronicle, dated May 17, 2020 at <https://www.sfchronicle.com/food/article/Survey-reveals-dire-state-of-SF-restaurants-15274517.php> Last visited on May 27, 2020.

⁴ Guerrero, Susana. "SF, Oakland, Hayward faced more than 300 permanent restaurant closures since March, study finds." SFGate, dated July 22, 2020 at <https://www.sfgate.com/food/article/Bay-Area-restaurant-closures-pandemic-Yelp-report-15424372.php> Last visited on September 22, 2020.

In response to this issue during the pandemic, several cities have established limitations on the commission fees charged by third-party, app-based delivery services. Early adopters included the Cities of San Francisco, Los Angeles, Seattle, New York City and Jersey City, all of which instituted a cap on third-party delivery service fees during the pandemic. These ordinances typically apply fee limits to third-party, app-based delivery services by defining these services as any website or mobile application that offers or arranges for the sale and same-day pick-up or delivery of food and beverages from at least 20 separately-owned food service establishments. On May 19, 2020, the Emeryville City Council directed staff to provide information on the impacts of these measures. On June 16, 2020 staff presented the City Council with an overview of the ordinances and orders limiting fees in other cities, background on the third-party delivery platform industry, and topics for consideration if the City Council wishes to consider a similar policy. The City Council referred the topic to the Economic Development Advisory Committee (“EDAC”) for monitoring.

On July 15, 2020, staff provided the EDAC with a presentation similar to the report provided to the City Council on June 16, 2020. The EDAC discussed the topic generally but had no specific recommendations at that time. Meanwhile, several additional cities in the East Bay region have adopted limits on third-party app-based food delivery platform fees. In light of these changes in the region, staff presented an update to the EDAC on September 16, 2020. The EDAC recommended that the City Council consider instituting a fee limit, as discussed further below.

DISCUSSION

The June 16, 2020 staff report to the City Council provided an outline of fee limits adopted by the Cities of San Francisco, Seattle, Los Angeles, New York City and Jersey City. One conclusion of this analysis was that adoption of a similar policy for Emeryville could create the risk of third-party app-based food delivery platforms withdrawing from the Emeryville market, or that the services could institute a surcharge for orders from Emeryville restaurants, putting them at a competitive disadvantage to other restaurants in the area.

As noted above, additional East Bay cities have adopted fee limits that may mitigate this risk. Of most relevance to Emeryville, the Cities of Berkeley and Oakland have both established fee limits, in addition to the Cities of San Leandro, Dublin, Livermore and Fremont. Additionally, the Alameda County Board of Supervisors adopted a 15% fee limit for unincorporated areas of the County on September 22, 2020.

As restaurants in Emeryville often have trade areas that extend into some of these jurisdictions, it may be appropriate to reconsider this policy at this time. An overview of the fee limits recently established in Oakland and Berkeley is provided below, followed by several policy considerations for discussion if the City Council wishes to establish a fee limit. A draft Urgency Ordinance and regular Ordinance are attached that are based on the existing ordinances in other cities and incorporate the recommendations of the EDAC.

City of Oakland

On July 28, 2020 the Oakland City Council adopted Ordinance No. 13613 entitled “Emergency Ordinance Capping the Commissions, Charges, and Fees of Food Delivery Service Providers During the COVID-19 Pandemic Emergency” (the “Oakland Ordinance”). The Oakland Ordinance limits the delivery fees charged by third-party delivery services to 15% of the menu price of the order. The Oakland Ordinance also specifies that no other fees may be charged to the restaurant except the actual costs of credit card processing. These limitations do not apply to “Formula Retail Restaurants”, defined as any restaurant having a standardized name, décor, façade color scheme, trademark, employee uniforms, merchandise and signage that have 20 or more employees in Oakland and at least 40 restaurant locations worldwide.

The Oakland Ordinance became effective on July 28, 2020 and is “...in effect for the duration of the COVID-19 pandemic crisis and for a period of 90 days after the end of a declared emergency.”

The Oakland Ordinance appears to provide two routes of enforcement. One route is through a right to private action after an affected restaurant provides notice to the provider of a potential violation and a seven-day cure period. The other route enables the City Administrator to initiate a proceeding to recover civil penalties not exceeding \$500 for the first violation and \$1,000 for subsequent violations, accruing on a daily basis for each day and for each restaurant charged a fee in violation of the Oakland Ordinance.

Uber and DoorDash have indicated in press statements that the fee limits will impact customer service quality, driver compensation and restaurant sales.

City of Berkeley

On July 7, 2020 the Berkeley City Council adopted an Ordinance Amending the Berkeley Municipal Code to Establish a Temporary Limit on the Charges Imposed by Third-Party Delivery Services on Retail Food Establishments During the Local Declared State of Emergency Resulting from the COVID-19 Pandemic (the “Berkeley Ordinance”). The Berkeley Ordinance prohibits third-party delivery services from charging a delivery fee in excess of 15% of the menu price of the order and limits all other fees to 5% of the menu price of the order. The Berkeley Ordinance also prohibits third-party delivery services from charging customers a purchase price that is higher than the amount set by the restaurant on the platform or, if the restaurant does not set a specific price on the platform, the restaurant’s menu price. The Berkeley Ordinance also prohibits reduction of compensation rates for drivers, and includes a requirement that third-party delivery services disclose an itemized list of the costs of each transaction for the customer, including the purchase price of the order, any fees, commissions or other costs, and tips.

The Berkeley Ordinance became effective on July 7, 2020 and sunsets once the declared local state of emergency is no longer in effect.

Enforcement is accomplished entirely through a right to private action, after a restaurant issues written notice of alleged violation to the third-party delivery service and a 15-day cure period.

In media accounts, Grubhub responded to the Berkeley Ordinance by noting all of its fees are optional for restaurants and that fee caps will lower volume to restaurants and reduce driver earnings opportunities. Grubhub also indicated it does not believe any fee cap can withstand a legal challenge.

Policy Considerations

A review of the various fee limits that have been established in recent months highlights several differentiating elements for consideration, as follows:

Amount of Fee Limit – Regional consistency of fee limits would enhance efficiency for customers, restaurants and third-party delivery services. This is especially true for Emeryville, as customers often order from restaurants outside of the City limits, and Emeryville restaurants often deliver to customers outside of the City. Additionally, the third-party delivery services have cited the patchwork of local regulations as a challenge. Unfortunately, there is already differentiation between the fee limits established in the inner East Bay market area. The City of Oakland’s limit is 15% for all fees, plus the actual cost of credit card processing. The City of Berkeley’s limit is 15% for delivery and 5% for all other fees, for an effective cap of 20%. The EDAC has recommended the City Council consider a fee limit similar to the Oakland Ordinance of 15% plus the actual costs of credit card processing. The attached draft ordinances reflect the EDAC recommendation.

Covered Establishments – Some ordinances limit the applicability of the fee limits to smaller, independent restaurants, while some apply to all restaurants. The logic of covering only small independent restaurants appears to be based on the idea that large chain operators have greater ability to pay higher fees. However, considering the third-party delivery services maintain that they provide more services than just delivery (including marketing support) and because some of these companies offer these services “ala carte”, this narrowing of covered establishments could have the effect of limiting marketing support for small independent restaurants as the delivery platforms attempt to comply with the fee limits. This could put small independent restaurants at a disadvantage to larger operators in terms of placement on the platforms. These limits could also discourage third-party delivery services from transacting with small independent restaurants entirely. The EDAC has recommended that, if the City Council establishes a fee limit, it should apply to all restaurants in Emeryville.

Driver Compensation – Some ordinances prohibit a reduction in driver compensation as a result of the fee limits. While well-intentioned, there are questions about the enforceability of these requirements. Ordinances that include driver compensation clauses typically provide no specifics on enforcement routes for affected drivers; presumably drivers enjoy a right to private action if they can substantiate that their compensation was reduced by the third-party delivery service as a consequence of the fee limits, but staff has not seen data that supports this. Moreover, the third-party delivery services argue that fee limits will reduce order volume, which in turn reduces demand for delivery drivers, and consequently driver compensation decreases. This may further complicate the enforceability of driver compensation claims. The EDAC took no position

regarding the inclusion of a driver compensation provision in a fee limit, and the draft ordinances do not include this provision.

Disclosure Requirements – Some ordinances require third-party delivery services to provide an itemized receipt of charges to customers. This requirement appears to be intended to accomplish two goals: first, it facilitates enforcement as customers can alert businesses to fees that exceed the limits, and second, it gives customers more detailed price information which can incentivize the placement of orders through other channels that may be more advantageous to the restaurant – e.g. calling the restaurant directly for pickup and avoiding commission and delivery charges. At this time, staff does not have any information as to the effectiveness of pricing disclosure requirements. The EDAC did not take a position on the inclusion of disclosure requirements in a fee limit and the draft ordinances do not include this provision.

Duration of Limits – The term of the applicability of fee limits varies by ordinance. Options are numerous and include (but are not limited to): a) only while dine-in service is prohibited, or restricted below normal capacity, b) for a set period of time (30, 60, 90 days or otherwise) after dine-in service is allowed, c) during the declared state of emergency (whether local, state or county), or d) for a set period of time (30, 60, 90 days or otherwise) after the declared state of emergency ends. Each of these options has logical support, however, staff notes that the greater the length of time the fee limit is in effect, the greater the risk of legal challenge, and in the interest of efficiency for restaurants and the third-party delivery services alike, consistency within the region may be desirable. The EDAC recommended that a fee limit expire 90 days after the end of the declared emergency; based on the advice of the City Attorney, the attached draft ordinances reference the City of Emeryville’s emergency declaration.

Enforcement Mechanism - Some cities such as San Francisco, Berkeley and Los Angeles have adopted a private right of action model, which does not require additional city resources for enforcement. Others such as Seattle and New York do require city resources to investigate and prosecute violations and levy administrative fines. The Oakland Ordinance provides for both models of enforcement. For those cities that involve city enforcement, staff does not have data on the number of violations or the amount of staff resources required for enforcement to date. The attached draft ordinances use the private right of action model, i.e. they do not provide for City-administered investigation, citations and fines.

ENVIRONMENTAL REVIEW

Adoption of the two proposed ordinances is exempt from the California Environmental Quality Act (CEQA) under California Public Resources Code Section 21080(b)(4) and State CEQA Guidelines Section 15269(c), which pertain to actions taken to mitigate an emergency, and the “common sense exemption” at State CEQA Guidelines Section 15061(b)(3) because it can be seen with certainty that there is no possibility that the Ordinance may have a significant effect on the environment.

FISCAL IMPACT

It is not anticipated that the proposed third-party restaurant delivery service fee limits that would be established by the attached ordinances would have a significant fiscal impact on the City.

STAFF COMMUNICATION WITH THE PUBLIC

Staff has discussed the topic of third-party delivery service fees generally with restaurants, restaurant associations and staff members in other cities. Staff has also discussed the topic with representatives from Grubhub. As noted above, the City Council discussed the issue at its June 16, 2020 meeting, and the EDAC discussed the topic on July 15, 2020 and September 16, 2020. The EDAC recommended that the City Council consider a fee limit of 15% plus the actual costs of credit card processing fees, applicable to all Emeryville restaurants, ending 90 days after the end of the declared emergency.

CONCLUSION

As noted in the June 16, 2020 report to the City Council, in other communities that have adopted fee limits, the restaurant businesses appreciate the relief, particularly those that did not have a strong delivery revenue stream prior to the onset of the pandemic. Those businesses have had to pivot to delivery and build a customer base in order to generate revenues, and third-party delivery services are critical to these efforts, particularly due to their ability to advertise to customers regionally. Limiting the fees during this difficult time would assist struggling restaurant businesses.

Previously, staff expressed concern that a fee limit could present some risks and unintended consequences. At that time, most of the cities that had adopted fee limits were large, with many restaurants and customers, which presented a risk that third-party delivery services could withdraw from the Emeryville market or take other measures that would negatively impact Emeryville restaurants and/or customers, with less consequence than they would experience in a larger city's market, potentially hurting Emeryville restaurants' competitiveness with restaurants in neighboring jurisdictions.

With the Cities of Berkeley and Oakland adopting fee limits, the risk of the third-party delivery services responding in a way that makes Emeryville restaurants less competitive with neighboring restaurants is diminished. However, all risks are not eliminated, and the third-party delivery companies have consistently maintained that they believe local fee limits are not legally supportable.

Staff recommends that the City Council adopt the attached Urgency Ordinance and regular Ordinance establishing a fee limit, consistent with the EDAC's recommendations.

PREPARED BY: Chadrick Smalley, Economic Development and Housing Manager

**APPROVED AND FORWARDED TO THE
CITY COUNCIL OF THE CITY OF EMERYVILLE:**



Christine Daniel, City Manager

ATTACHMENTS:

- Draft Urgency Ordinance
- Draft Ordinance