

ORDINANCE NO. 20-_____

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)

WHEREAS, the United States of America has confirmed cases of individuals who have a severe acute respiratory illness caused by a novel (new) corona virus ("COVID-19" or "the virus") first detected in Wuhan, Hubei Province, People's Republic of China ("China"). The virus was first reported in China on December 31, 2019. As of September 29, 2020, the World Health Organization ("WHO") has reported 1,000,040 deaths stemming from 33,249,563 confirmed cases of COVID-19 and the virus is present in virtually every country. The number of confirmed cases has continued to escalate dramatically over a short period of time; and

WHEREAS, WHO officials now report that sustained human-to-human transmission of the virus is occurring. Transmission from asymptomatic individuals has been documented. Community transmission of the virus is occurring in the United States. Although the majority of individuals infected with COVID-19 recover from the disease without special treatment, there is significant potential for serious infection and death; and

WHEREAS, on January 30, 2020, WHO declared the COVID-19 outbreak a public health emergency of international concern, and on January 31, 2020, the U.S. Department of Health and Human Services declared a Public Health Emergency for the United States of America; and

WHEREAS, the United States Centers for Disease Control and Prevention (CDC) has determined that the virus presents a serious public health threat, requiring coordination among state and local health departments to ensure readiness for potential health threats associated with the virus; and

WHEREAS, on March 4, 2020, the Governor of California proclaimed a state of emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS, on March 12, 2020, the Governor of the State of California issued Executive Order N-25-20 which, among other things, orders that all California residents are to "... heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19"; and

WHEREAS, on March 16, 2016, the California Department of Public Health issued a directive that all individuals who are 65 or older, who have serious chronic medical conditions or who have a compromised immune system should self-isolate during the COVID-19 pandemic as these individuals are particularly at risk of encountering medical complications due to the virus; and

WHEREAS, 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”; and

WHEREAS, on March 16, 2020, the Alameda County Director of Emergency Services declared a local emergency based on conditions of extreme peril to the safety of persons and property within the County from the introduction of COVID-19 in the County; and

WHEREAS, on March 17, 2020, in light of actual or threatened conditions of disaster or extreme peril to the safety of persons and property have arisen within the City of Emeryville caused 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 an emergency; and

WHEREAS, on March 19, 2020, the City Council of the City of Emeryville adopted Resolution 20-23, ratifying the City Manager’s declaration of an emergency; and

WHEREAS, on March 19, 2020, the Governor issued Executive Order N-33-20, ordering all Californians to stay at home, except to maintain continuity of critical infrastructure. Critical infrastructure includes the Food and Agriculture sector, which includes food service establishments. In addition, Executive Order N-33-20 acknowledges that despite the stay at home order, Californians must also have access to basic necessities such as food; and

WHEREAS, on March 31, 2020, based on evidence of continuing and 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”, which clarifies and supersedes the order from March 16, 2020; and

WHEREAS, the Alameda County Health Officer issued orders on April 29, 2020, May 18, 2020, June 5, 2020, June 18, 2020, July 15, 2020, and August 20, 2020, which successively revised and clarified previous orders directing all individuals living within the County to shelter at their place of residence, leaving only for Essential Businesses, Outdoor Businesses, Additional Businesses, Essential Activities, Outdoor Activities,

Essential Governmental Functions, Essential Travel or to work for Essential, Outdoor or Additional Businesses, as those terms are defined by the respective public health orders; and

WHEREAS, the aforementioned Alameda County Health Officer orders prohibit restaurants from offering dine-in service, limiting restaurants to delivery and takeout offerings; and

WHEREAS, certain segments of the food supply chain have experienced disruption due to COVID-19 forcing the temporary closure of food processing plants and grocery stores; and

WHEREAS, during the COVID-19 pandemic, it is critical that restaurants stay open because they are performing essential functions, along with grocery stores and other food services, to provide the public with access to food; and

WHEREAS, restricting restaurants to takeout and delivery offerings has placed a sudden and severe financial strain on many restaurants, many of which operate on thin margins of profitability, adding to financial pressures in the industry that predate the COVID-19 pandemic; and

WHEREAS, due to the COVID-19 pandemic, the City, as well as the state and the nation, are facing unprecedented economic uncertainty, which has required government at all levels to offer assistance to its constituents to ensure the public health, safety and welfare of society; and

WHEREAS, the City Council of the City of Emeryville desires to ensure that all residents can comply with federal, local and state directives to practice social distancing, which is the interest of the public peace, health, safety and welfare, to ensure residents sheltering in place have reliable access to food delivery, and to ensure that businesses creating jobs are able to survive the transition to recovery; and

WHEREAS, it is in the public interest to take action to maximize restaurant revenue from the takeout and delivery orders that are currently the sole source of revenue for restaurants, to enable restaurant to survive during the COVID-19 pandemic and remain as sources of employment and neighborhood vitality in the City of Emeryville; and

WHEREAS, many consumers use third-party applications and website to place orders with restaurants for delivery and takeout, and these third-party platforms charge restaurants fees based on a percentage of the purchase price per order; and

WHEREAS, restaurants have limited bargaining power to negotiate lower fees with third-party platforms due to the high market saturation of third-party platforms and the financial difficulties restaurants are facing during the COVID-19 pandemic; and

WHEREAS, restriction of the amount of per-order fees charged by third-party platforms at 15% of the per-order purchase price plus the actual costs of credit card processing fees will accomplish the legitimate public purpose of easing the financial burden on restaurants during the COVID-19 pandemic while not unduly burdening third-party platforms; and

WHEREAS, Government Code Section 36937(b) requires that urgency ordinances be passed by a four-fifths vote of the City Council.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF EMERYVILLE DOES HEREBY ORDAIN AS FOLLOWS:

SECTION ONE. TITLE

This Urgency Ordinance shall be known as the “COVID-19 Restaurant Delivery and Takeout Commission Fee Ordinance.”

SECTION TWO. POLICY AND PURPOSES DECLARATION; FINDINGS FOR ADOPTING EMERGENCY ORDINANCE

The purpose of this ordinance is to preserve economic infrastructure and to ensure continuity in food availability from restaurants to the people of Emeryville, thereby serving public peace, health, safety and public welfare. A further purpose of this ordinance is to implement Executive Order N-33-20, which requires Californians to shelter in place but allows persons to access basic necessities such as food; this ordinance also furthers the executive order by supporting the Food and Agriculture sector, an identified critical infrastructure component.

The City Council of the City of Emeryville makes the following finding for an Urgency Ordinance pursuant to Government Code Section 36937(b):

The adoption of this ordinance is an urgent matter in light of the ongoing limitations applicable to restaurants’ ability to serve dine-in customers, which is creating reliance on third-party delivery platforms and creating a burden on restaurant businesses to serve the public while covering the costs of operations.

SECTION THREE. DEFINITIONS

- A. “Online Order” means an order placed through a platform provided by a Third-Party App-based Delivery Platform for take-out or delivery from a Restaurant located within Emeryville.

- B. “Purchase Price” means the menu price of an Online Order. Such term excludes taxes, gratuities, and any other fees that may make up the total cost to the customer of an Online Order.
- C. “Third-Party, App-Based Delivery Platform” means 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.
- D. “Restaurant” shall have the same meaning as defined in Emeryville Municipal Code section 9-2.319(b).

SECTION FOUR: DELIVERY AND TAKE-OUT COMMISSIONS, CHARGES AND FEES

It shall be unlawful for a Third-Party, App-Based Delivery Platform to charge a Restaurant a fee per Online Order for the use of its services that totals more than 15% of the Purchase Price of such Online Order, plus the actual costs incurred by the Third-Party, App-Based Delivery Platform for credit card processing.

A Third-Party, App-Based Delivery Platform shall not be found in violation of this Ordinance if between October 21, 2020 and October 28, 2020, it imposes a fee per Online Order for the use of its services that totals more than 15% of the Purchase Price of such Online Order plus the actual costs of credit card processing provided it refunds the portion of the fee that exceeds the limitations of this Section to the Restaurant prior to November 4, 2020.

SECTION FIVE. ENFORCEMENT

If a Third-Party, App-Based Delivery Platform charges a Restaurant fees that violate this Ordinance, the Restaurant shall provide written notice to the Third-Party, App-Based Delivery Platform requesting a refund of the fees paid in excess of 15% of the Purchase Price of applicable Online Orders plus the actual costs of credit card processing fees within seven days. If the Third-Party, App-Based Delivery Platform does not provide the refund requested after seven days, or the Third-Party, App-Based Delivery Platform continues to charge fees in violation of this Ordinance after the initial notice and seven-day cure period, a Restaurant may enforce this Ordinance by means of a civil action seeking damages and injunctive relief. The prevailing party in any such action shall be entitled to an award of reasonable attorney fees.

SECTION SIX. EXPIRATION

This Urgency Ordinance shall expire upon the effective date of a substantially identical Ordinance or 90 calendar days after the date of expiration or termination of the City of

Emeryville declared State of Emergency due to the COVID-19 pandemic confirmed by Resolution No. 20-23, whichever occurs first.

SECTION SEVEN. CEQA DETERMINATION

The City Council finds that adoption of this Urgency Ordinance is exempt from the California Environmental Quality Act ("CEQA") pursuant to Section 21080(b)(4) of the California Public Resources Code and Section 15269(c) of the State CEQA Guidelines because the purpose of this ordinance is to mitigate an emergency, and under the "common sense exemption" at Section 15061(b)(3) of the State CEQA Guidelines because it can be seen with certainty that there is no possibility that the adoption of this Urgency Ordinance may have a significant effect on the environment.

SECTION EIGHT. SEVERABILITY

Every section, paragraph, clause, and phrase of this Urgency Ordinance is hereby declared to be severable. If for any reason, any section, paragraph, clause, or phrase is held to be invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining section, paragraphs, clauses or phrases.

SECTION NINE. EFFECTIVE DATE

Pursuant to Government Code Section 36937, this Urgency Ordinance shall take effect immediately upon its adoption by the City Council.

SECTION TEN. CODIFICATION

This Ordinance shall NOT be codified.

This Urgency Ordinance was **PASSED AND ADOPTED** by the City Council at a regular meeting on Tuesday, October 20, 2020 by the following vote:

AYES: _____
NOES: _____
ABSTAIN: _____
ABSENT: _____

MAYOR

ATTEST:

APPROVED AS TO FORM:



CITY CLERK

CITY ATTORNEY