



City of Newark

MEMO

DATE: December 10, 2020

TO: City Council, City Manager, Assistant City Manager, City Attorney

FROM: Sheila Harrington, City Clerk *A.H.*

SUBJECT: **F.1 Adoption of an Urgency Ordinance of the City of Newark to Establish a Temporary 15% Limit on Third-Party Delivery Fees on Food Delivery Service Providers – from City Manager Benoun, Interim City Attorney Kokotaylo, Community Development Director Turner, and Economic Development Manager Stedler.**

After distributing the City Council packet, staff received a request from Council Member Hannon to include an option for the proposed urgency ordinance to include an administrative enforcement mechanism. Staff has prepared a revised ordinance that provides a City enforcement action that provides that a violation of the proposed ordinance constitutes an infraction that can be enforced solely by means of an administrative citation. An administrative citation may include a fine of up to \$100 for the first violation, \$200 for the second violation, and \$500 for each subsequent violation within the same year. The amount of these fines is established by state law.

A copy of the ordinance with the proposed revision, identified by redline, is attached.

URGENCY ORDINANCE NO.

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF
THE CITY OF NEWARK ESTABLISHING A TEMPORARY
LIMIT OF FIFTEEN PERCENT (15%) ON FEES BY THIRD-
PARTY FOOD DELIVERY SERVICES TO RESTAURANTS IN
NEWARK DURING THE COVID-19 PANDEMIC

WHEREAS, international, national, state, and local health and governmental authorities are responding to an outbreak of respiratory disease caused by a novel coronavirus named “SARS-CoV-2,” and the disease it causes has been named “coronavirus disease 2019,” abbreviated COVID-19 (“COVID-19”); and

WHEREAS, on January 30, 2020, the World Health Organization (“WHO”) declared COVID-19 a Public Health Emergency of International Concern; and

WHEREAS, on January 31, 2020, the Secretary of the United States Department of Health and Human Services declared a public health emergency for the entire United States to aid the nation’s healthcare community in responding to COVID-19; and

WHEREAS, on February 25, 2020, the Centers for Disease Control and Prevention (“CDC”) announced that community spread of COVID-19 is likely to occur in the United States; and

WHEREAS, on March 1, 2020, the Alameda County Health Officer declared a public health emergency throughout the County of Alameda; and

WHEREAS, on March 4, 2020, California Governor Gavin Newsom declared a State of Emergency to make additional resources available, formalize emergency actions already underway across multiple state agencies and departments, and help the state prepare for a broader spread of COVID-19. The proclamation comes as the number of positive California cases rises and following one official COVID-19 death; and

WHEREAS, on March 10, 2020, the Alameda County Board of Supervisors ratified the Alameda County Health Officer’s declaration of a local health emergency; and

WHEREAS, on March 11, 2020, the WHO declared COVID-19 a pandemic; and

WHEREAS, on March 13, 2020, the President of the United States of America declared a national emergency and announced that the federal government would make emergency funding available to assist state and local governments in preventing the spread of and addressing the effects of COVID-19; and

WHEREAS, on March 16, 2020, the Alameda County Health Officer, along with six other health officers within six Bay Area counties, took a unified step to slow the spread of COVID-19 and preserve critical health care capacity across the region by issuing a legal order directing their respective residents to shelter at home beginning March 17, 2020 through April 7, 2020 (the “shelter in place order”). The shelter in place order in Alameda County limits activity, travel, and business functions; and

WHEREAS, on March 16, 2020, due to an escalating increase in the number of COVID-19 cases in Alameda County, the City Manager, acting as Director of Emergency Services, found that the conditions related to the COVID-19 pandemic were of extreme peril to the safety of persons and property within the territorial limits of the City and thus proclaimed a local emergency pursuant to Newark Municipal Code Chapter 2.16 and Government Code Section 8558; and

WHEREAS, on March 17, 2020, at a special meeting the Newark City Council ratified the Director of Emergency Services' proclamation of a local emergency related to the COVID-19 pandemic; and

WHEREAS, on March 19, 2020, the Governor of California issued Executive Order N-33-20 ordering all individuals within the State of California to stay home or at their place of residence, except as needed to maintain continuity of operation of the federal critical infrastructure sectors, critical government services, schools, childcare, and construction (the "State order"); and

WHEREAS, the City Council has approved multiple resolutions declaring the continued existence of a local emergency within the City of Newark; and

WHEREAS, the shelter in place order and the State order have been modified to gradually allow some activity under limited circumstances and social distancing guidelines, but both remain in place and large segments of the economy, particularly related to indoor activities such as dining, remain closed or severely limited; and

WHEREAS, continuity of operations among the City's restaurants is critical for the delivery of essential food services to the residents of Newark and to sustain these sources of employment and neighborhood vitality within the City; and

WHEREAS, if restaurants permanently close, then essential workers will be displaced, storefronts will be vacant, and residents will lose access to contactless delivery of locally prepared meals; and

WHEREAS, many consumers use third-party applications and websites to place orders with restaurants for delivery and takeout, and these third-party platforms charge restaurants fees; service agreements between some restaurants and third-party platforms provide that the platform charges the restaurant between twenty five percent (25%) to thirty three percent (33%) 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 financial straits restaurants are facing during this period of emergency; and

WHEREAS, given that only a few companies in the marketplace provide such delivery services, 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, capping delivery service per-order fees at 15% will achieve the public purpose of ensuring the continued operation of local restaurants and third-party platforms during the period of emergency; the 15% limit 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, the adoption of a cap among cities establishes a temporary, imminent and new competitive environment for Newark restaurants, and adoption of the 15% fee limitation by adjacent cities creates a competitive disadvantage to Newark restaurants during the COVID-19 pandemic when Newark restaurants are already struggling; and

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

WHEREAS, both large and smaller events across the Bay Area and in Newark are cancelling or being postponed due to the County's and State's Orders and recommendations at all levels of government to cancel large gatherings amid concerns over spread of the virus. These cancellations and postponements cause loss in revenue for the event, as well as surrounding local businesses including eating and drinking establishments that rely on such events to bring in patrons to their businesses; and

WHEREAS, with modified capacity, many restaurants are seeing an increase in carry-out and delivery offerings, placing a sudden and severe financial strain on the industry, particularly on restaurants that are small businesses, a category of businesses which typically already operate on thin margins; and

WHEREAS, restricting restaurants to takeout or delivery offerings, and limited to outdoor dining with decreased capacity as a result of physical distancing, has 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, based on public input received by City staff, many restaurant and food establishments within the City have been relying on delivery and pick up to generate both revenue and new customers, and to serve existing customers, and it is critical they operate in a safe manner where social distancing can be maintained in accordance with guidance from the State of California and local health officials; and

WHEREAS, it is in the public interest to take action to ensure the delivery of essential food services to residents of Newark and to maximize restaurant revenue from the takeout and delivery orders that, with the exception of limited dining operations, are currently one of the primary sources of revenue for these businesses to enable restaurants to survive this crisis and remain as sources of employment and neighborhood vitality in the City; and

WHEREAS, Alameda County's reversion to the purple tier "widespread" status, coupled with an oncoming third wave of nationwide infections, further places a strain on Newark's local restaurants; and

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

WHEREAS, this Ordinance is temporary in nature and only intended to promote stability and safe and healthy operations within the restaurant and food markets in the City during the COVID-19 pandemic

outbreak, to assist local businesses in transitional and uncertain times, and to prevent avoidable business closures thereby serving the public peace, health, safety, and public welfare and ensuring jobs and economic vitality within the City, while also preventing further spread of the virus; and

WHEREAS, an urgency ordinance is 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 City Council hereby finds approval of this Ordinance is exempt from the California Environmental Quality Act (Public Resources Code §§ 21000 *et seq.*, “CEQA,” and 14 Cal. Code Reg. §§ 15000 *et seq.*, “CEQA Guidelines”) under Section 15061(b)(3) of the CEQA Guidelines. 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 is temporary. No impact to the physical environment will result.

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

SECTION 1. Findings

The City Council of the City of Newark finds that all of the above Recitals are true and correct and incorporated herein by reference.

SECTION 2. Urgency Findings

The City Council of the City of Newark hereby finds that 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 ordinance, which finding is based upon the facts stated in the recitals above, and in the staff report dated December 10, 2020 and considered during the December 10, 2020 City Council meeting as well as any oral and written testimony at the December 10, 2020 City Council meeting. 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 recovery and vitality 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 3. Ordinance

The City Council hereby makes the findings contained herein and hereby adopts the uncodified Ordinance to read as follows.

A Temporary Limit on Charges by Third-Party Food Delivery Services

Section 1. Definitions. For purposes of this Ordinance, the following definitions apply:

A. "Covered Establishment" means a restaurant that offers, in a single commercial transaction over the internet, such as Online Order, or over the telephone, such as a Telephone Order, whether directly or through a third-party food delivery service, the sale and same-day delivery of food to customers from one or more retail locations within the City.

B. "Third-party Food Delivery Service" means any website, mobile application or other internet service that offers or arranges for the sale of food and beverages prepared by, and the same-day delivery or same-day pickup of food and beverages from a Covered Establishment.

C. "Online Order" means an order placed by a customer through a platform provided by a Third-party Food Delivery Service for delivery or pickup within the City.

D. "Telephone Order" means an order placed by a customer to a food service establishment through a telephone call or the use of the third-party food delivery service providers' platform and/or on-line phone system, or via text for delivery or pickup within the City.

E. "Purchase Price" means the menu price of an online order. Such term therefore excludes taxes, gratuities, and any other fees that may make up the total cost to the customer of an order.

Section 2. Temporary Limit on Third Party Food Delivery Service Charges.

A. Fee Limit. It shall be unlawful for a Third-Party Food Delivery Service to charge a Covered Establishment a fee that totals more than 15 percent of the Purchase Price of an Online or Telephone Order for the use of its services.

Section 3. Enforcement.

A. A Third-Party Food Delivery Service shall not be found in violation of this Ordinance if between the Effective Date of this Ordinance and December 24, 2020, it imposes a fee per Online or Telephone Order for the use of its services that totals more than 15 percent of the Purchase Price of such order, provided it refunds the portion of the fee that exceeds the fee percentage set forth in this Ordinance to Covered Establishment no later than 15 days after the purchase.

B. If a Third-Party Food Delivery Service charges a Covered Establishment fees that violates this Ordinance, the Covered Establishment shall, within seven calendar days, provide written notice to the Third-Party Food Delivery Service requesting a refund; the refund shall be paid within seven calendar days. If the Third-Party Food Delivery Service does not provide the refund requested after seven days or the Third-Party Food Delivery Service continues to charge fees in violation of this Ordinance after the initial notice, a Covered Establishment 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.

C. Violations of this Ordinance shall constitute an infraction that can be enforced solely through an administrative citation pursuant to Chapter 7.18 of the Newark Municipal Code.

Section 4. Guidance and Rules.

A. The City Manager, or designee, is authorized to implement this Ordinance and issue any guidance or rules necessary to implement this Ordinance.

Section 5. Duration.

A. This Ordinance shall become effective immediately upon its adoption and remain in effect until such time as the Newark City Council terminates the declared local emergency, as affirmed by the Council on March 17, 2020.

SECTION 4. Severability

If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this Ordinance are severable. The City Council of the City of Newark hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

SECTION 5. Effective Date

Following adoption by at least a four-fifths vote of the City Council, this Ordinance shall be effective immediately upon adoption pursuant to Newark Municipal Code Section 2.08.180. The City Clerk shall certify as to the adoption of this Urgency Ordinance and shall cause it to be published within fifteen (15) days of the adoption and shall post a certified copy of this Urgency Ordinance, including the vote for and against the same, in the Office of the City Clerk, in accordance with California Government Code Section 36933.