

DRAFT

§APPROVED AS TO FORM AND LEGALITY

INTRODUCED BY COUNCILMEMBER DAN KALB

CITY ATTORNEY'S OFFICE

OAKLAND CITY COUNCIL

ORDINANCE NO. _____ C.M.S.

**EMERGENCY ORDINANCE CAPPING THE COMMISSIONS,
CHARGES, AND FEES OF FOOD DELIVERY SERVICE PROVIDERS
DURING THE COVID-19 PANDEMIC EMERGENCY**

WHEREAS, due to the spread of COVID-19 (coronavirus) within the state, on March 1, 2020 the Alameda County Public Health Department, and on March 4, 2020, Governor Gavin Newsom, declared local and state public health emergencies due to the spread of COVID-19 locally and within the state, pursuant to Health & Safety Code section 101080 and Government Code section 8625, respectively; and

WHEREAS, on March 7, 2020, the City Administrator in her capacity as the Director of the Emergency Operations Center (EOC), issued a proclamation of local emergency due to the spread of COVID-19 in Oakland, and on March 12, the City Council passed Resolution No. 88075 C.M.S. confirming the existence of the local emergency proclaimed by the City Administrator pursuant to her power under Oakland Municipal Code section 8.50.050(C) to proclaim a local emergency provided that the local emergency proclamation shall remain in effect only if the City Council confirms the existence of the emergency within seven days; and

WHEREAS, on March 12, 2020, Governor Newsom pursuant to his authority under Government Code section 8630, issued Executive Order N-25-50, which waived several Brown Act provisions applicable to government agency public and closed meetings conducted by teleconference; and

WHEREAS, on March 18, 2020 Governor Newsom, issued Executive Order N-29-20 which withdrew and superseded Executive Order N-25-20's provisions pertaining to meetings via teleconference, authorizing local legislative bodies to hold public meetings via teleconferencing and to make public meetings accessible telephonically or otherwise electronically to all members of the public seeking to observe and address the local legislative body when the body complies with the notice and accessibility requirements set forth in the order; and

WHEREAS, the City Administrator in her/his capacity as the Director of the EOC has authority “to promulgate orders, rules, and regulations on matters reasonably related to the protection of life and property and the preservation of public peace and order, in accordance with Article 14 of the California Emergency Services Act, [and such] rules and regulations must be confirmed at the earliest practicable time by the governing body as required by law; and

WHEREAS, to the extent that the City’s emergency proclamation and/or the Emergency Services Ordinance codified at Oakland Municipal Code Chapter 8.50.050 do not expressly or impliedly suspend or waive the following provisions of the City’s laws, policies or procedures, the City Administrator in her/his capacity as the Director of the EOC may and has promulgated orders, rules and regulations as a result of the COVID-19 pandemic emergency;

WHEREAS, on March 31, 2020, under the authority of California Health and Safety Code Sections 101040, 101085, and 120175, the Health Officer of the County of Alameda (“Health Officer”) directed all individuals to shelter in and ordered social distancing to place to reduce the rate of transmission of the COVID-19 virus.

WHEREAS, on April 29, 2020, the Alameda County Health Officer superseded the March 31, 2020 to amend, clarify, and extend certain terms of the prior Order to ensure shelter-in-place and continued social distancing and limit person-to-person contact to reduce the rate of transmission of COVID-19. The amended Order continues to restrict most activity, travel, and governmental and business functions.

WHEREAS, there are currently more than 9,000 confirmed cases of COVID-19 within the County of Alameda and there have been more than 170 COVID-19-related deaths in the County; there are more than 420,000 confirmed cases in California, and there have been more than 8,000 COVID-19-related deaths in California; and

WHEREAS, the above Proclamations, Orders and subsequent orders and regulations by the County of Alameda and the City of Oakland have all been issued during the COVID-19 pandemic emergency because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time; and

WHEREAS, to reduce the spread of the virus and protect the public health, the Stay Safe At Home Order prohibits restaurants in the City from offering dine-in service, limiting restaurants to delivery and takeout offerings only; and

WHEREAS, restricting restaurants to takeout and delivery offerings only has placed a sudden and severe financial strain on many restaurants, particularly those that are small businesses that already operate on thin margins, adding to financial pressures in the industry that predate the COVID-19 crisis; 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 these small businesses to enable restaurants to survive this crisis and remain as sources of employment and neighborhood vitality in the City; and

WHEREAS, restricting restaurants to takeout and delivery options has resulted in the number of takeout orders for some restaurants to double and in some cases increased their reliance on third-party delivery service providers; and

WHEREAS, many consumers use third-party applications and websites to place orders with restaurants for delivery and takeout, and these third-party platforms and food delivery service providers charge restaurants fees, and service agreements between some restaurants and third-party platforms provide that the platform charges the restaurant more than 20% of the purchase price per order; and

WHEREAS, restaurants, and particularly restaurants that are small businesses with few locations, have limited bargaining power to negotiate lower fees with third-party platforms, given the high market saturation of third-party platforms, and the dire financial straits small business restaurants are facing in this COVID-19 emergency; and

WHEREAS, California Penal Code (“PC”) section §396 (1) prohibits price-gouging during an emergency, (2) does *not* preempt local legislative bodies *by ordinance* from prohibiting the same or similar conduct or imposing more severe penalties for the same conduct; (3) which term of the prohibition may be extended for additional 30 day periods as needed if deemed necessary to protect the lives, property, or welfare of the citizens, and (3) the California Legislature intended that PC section 396 be liberally construed so that its beneficial purposes may be served; and

WHEREAS, limiting the per-order fees by a cap at 15% will accomplish the legitimate public purpose of easing the financial burden on struggling restaurants during this emergency while not unduly burdening third-party platforms, as this fee is recognized as reasonable, and third-party platforms continue to earn significant profits.

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

SECTION 1.

Title 5-Business Taxes, Permits And Regulations, Chapter 5, of the Oakland Municipal Code is hereby amended to add new Chapter 5.94, limiting fees charged by third-party food delivery services and related telephone charges and to be entitled:

“Chapter-5.94 CAP ON THE COMMISSIONS, CHARGES, AND FEES OF FOOD DELIVERY SERVICE PROVIDERS DURING THE COVID-19 PANDEMIC EMERGENCY”

SECTION 2.

5.94.010 Definitions

For the purposes of this Chapter, the following definitions will apply:

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"Covered establishment" means a restaurant that offers, in a single commercial transaction over the internet, 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.

“Formula Retail Restaurant” means any restaurant having a standardized name, décor, logo, façade, color scheme, trademark, employee uniforms, merchandise, and signage, throughout their locations and which have 20 or more employees in Oakland and at least 40 restaurants worldwide.

"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.

"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 online order.

"Restaurant" shall have the meaning provided in Section 8.07.020 of this Code.

“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.

"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, no fewer than 20 separately owned and operated food service establishments.

5.94.020 Limit on Online Food Delivery Commissions, Charges and Fees

- A. Delivery Fees. It shall be unlawful for a third-party food delivery service to charge a covered establishment a fee per online order for the use of its services that totals more than 15% of the purchase price of such online order.
- B. Telephone orders. No third-party food delivery service may charge any fee from a food service establishment for a telephone order if a telephone call between such establishment and a customer does not result in an actual transaction during such telephone call.
- C. Other costs. In addition to the delivery fees, it shall be unlawful for a third-party food delivery service to charge a covered establishment for any other fee other than the actual cost incurred for credit card processing.
- D. Term of Cap. The requirements of this section apply only during a declared emergency and for a period of 90 days after the end of a declared emergency.
- E. Cap Not Applicable to Formula Retail Restaurants. The Cap will not apply to any “Formula Retail Restaurant” as defined in Section 5.94.010 of this Code

5.94.020 -City Administrator May Promulgate Guidance and Rules

The City Administrator, or his designee, is authorized to implement this ordinance and issue any necessary guidance or rules consistent with this Chapter and this Code.

5.94.030-Term of Cap on Commissions, Charges and Fees

This ordinance shall take effect on shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption and shall be 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.

5.94.040-Enforcement and Penalty For Violation

- A. A third-party food delivery service shall not be found in violation of this order if between the Effective Date of this Ordinance and August 31, 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, provided it refunds the portion of the fee that exceeds 15% of the purchase price to the covered establishment no later than 15 days after the purchase.
- B. If a third-party food delivery service charges a covered establishment fees that violate this order, the covered establishment shall provide written notice to the third-party food delivery service requesting a refund within seven 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 order after the initial notice and seven-day cure period, a covered establishment may enforce this order 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. Any person that violates any provision of this Chapter or any rule promulgated pursuant thereto shall be subject to a civil penalty that shall not exceed ~~\$1,000 per violation~~ \$500 for the first violation. Any person that violates any provision of this section or any rule promulgated pursuant thereto shall be subject to a civil penalty that shall not exceed ~~\$500 per violation~~ \$1000 for any subsequent violations. Violations under this subchapter shall accrue on a daily basis for each day and for each food service establishment charged a fee in violation of this subchapter or any rule promulgated pursuant to this section. A proceeding to recover any civil penalty authorized pursuant to this section may be brought by the City Administrator pursuant to Section 1.28.010 of this Code.

SECTION 3. Severability. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the Chapter. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, clause or phrase thereof irrespective of the fact that one or more other sections, subsections, clauses or phrases may be declared invalid or unconstitutional

SECTION 4. Effective Date. This ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - FORTUNATO BAS, GALLO, GIBSON MCELHANEY, KALB, REID,
TAYLOR, THAO AND PRESIDENT KAPLAN

NOES –

ABSENT –

ABSTENTION –

ATTEST: _____
LATONDA SIMMONS
City Clerk and Clerk of the Council of the City of
Oakland, California

Date of Attestation: _____

NOTICE AND DIGEST

ORDINANCE TITLE (Indent half inch both sides and justified)

ORDINANCE CAPPING THE COMMISSIONS, CHARGES, AND FEES OF FOOD DELIVERY SERVICE PROVIDERS DURING THE COVID-19 PANDEMIC EMERGENCY

Because of the COVID-19 Pandemic, restaurant have been restricted to takeout and delivery options has resulted in the number of takeout orders for some restaurants to double and in some cases increased their reliance on third-party delivery service providers. This ordinance limits the per-order fees by a cap at 15% for commissions, charges, and fees of food delivery service providers during the COVID-19 Pandemic and limits additional charges to actual cost of credit card processing incurred.