



URGENT ITEM AGENDA MATERIAL

Government Code Section 54954.2(b)
Rules of Procedure Chapter III.C.5

THIS ITEM IS NOT YET AGENDIZED AND MAY OR MAY NOT BE ACCEPTED FOR THE AGENDA AS A LATE ITEM, SUBJECT TO THE CITY COUNCIL'S DISCRETION ACCORDING TO BROWN ACT RULES

Meeting Date: July 7, 2020

Item Description: Ordinance Limiting Third-Party Food Delivery Service Fees

This item is submitted pursuant to the provision checked below:

- X Emergency Situation (54954.2(b)(1) - majority vote required)
Determination by a majority vote of the legislative body that an emergency situation exists, as defined in Section 54956.5.
- Immediate Action Required (54954.2(b)(2) - two-thirds vote required)
There is a need to take immediate action and the need for action came to the attention of the local agency subsequent to the agenda for this meeting being posted.

Once the item is added to the agenda (Consent or Action) it must be passed by the standard required vote threshold (majority, two-thirds, or 7/9).

Facts supporting the addition of the item to the agenda under Section 54954.2(b) and Chapter III.C.5 of the Rules of Procedure:

Every day that passes during the pandemic is putting our local restaurants at greater risk of permanent closure. This ordinance is required for the immediate preservation of public health, peace and safety, and economic vitality for the following reason: the State of California and the City of Berkeley have declared a state of emergency due to the Covid-19 pandemic. Residents are subject to a "Shelter in Place" Order and restaurants are closed for indoor dining. As a result, many restaurants are forced to rely on third-party food delivery services, and due to the high fees imposed by these services, are struggling to survive. If these restaurants permanently close, their workers will lose employment, residents (particularly those at high risk of developing complications from Covid-19) will lose access to the availability of contactless delivery of meals through programs such as Great Plates Delivered, and the City will lose an important source of economic vitality. Restaurants require immediate relief under the emergency situation of the declared Covid-19 state of emergency, which can be achieved through this urgency item.



Rashi Kesarwani
Councilmember District 1

CONSENT CALENDAR
July 7, 2020

To: Honorable Mayor and Members of the City Council
From: Councilmember Rashi Kesarwani (Author), Councilmembers Kate Harrison and Rigel Robinson (Co-Sponsors)
Subject: Ordinance Limiting Third-Party Food Delivery Service Fees

RECOMMENDATION

Adopt an ordinance establishing a temporary limit on the charges imposed by third-party delivery services on retail food establishments to be in effect for the duration of the declared local state of emergency resulting from the Covid-19 pandemic.

FISCAL IMPACTS

Staff time to educate restaurants and third-party delivery services about the regulations imposed by the ordinance.

CURRENT SITUATION AND ITS EFFECTS

Third-Party Delivery Services Charge Excessive Fees to Local Restaurants. The experience of one restaurant in Downtown Berkeley—who did not want to be named out of fear of damaging its relationship with third-party delivery services—is indicative of the financial harm caused by the high fees charged by these delivery services. The restaurant has been in business for more than 30 years and employed more than 50 local residents pre-pandemic. The owner now reports that he has laid off 90 percent of his staff and is trying to stay afloat primarily through takeout orders. Similar to other restaurants that are experiencing a precipitous decline in revenue as a result of the pandemic, this downtown restaurant reports that sales have been less than 20 percent of normal, with a large share of limited sales coming from takeout orders. The restaurant reports that its only option is to use third-party delivery services, including UberEats/Postmates, DoorDash/Caviar, and GrubHub to sustain the takeout order volume.

Berkeley restaurants are caught in a bind in which their main source of revenue is takeout orders, but they are forced to accept unreasonably high fees from third-party delivery services in order to make most of these sales. In the case of the downtown restaurant we describe, UberEats takes 27.5 percent off the top on all sales through the service. Restaurants operate on thin margins with food and beverage costs running around 35 percent, meaning that a fee of 27.5 percent is creating an unsustainable situation: 62.5 cents of every dollar earned is taken off the top, leaving only 37.5 cents to cover all other expenses, including payroll, utilities, rent, insurance, etc. The downtown restaurant - in business for more than three decades - reports that it is

operating at a loss. In a forum with restaurants held by Councilmember Rashi Kesarwani and in outreach conducted by Visit Berkeley and the Downtown Berkeley Association, restaurant owners reported that a cap on third-party delivery service fees of 15 percent would help them weather the pandemic.

Numerous Other Cities are Capping Fees that Third-Party Delivery Services Can Charge to Support Local Restaurants During the Pandemic.

- San Francisco was the first City to impose a 15 percent cap on the fees that third-party delivery services can charge restaurants, by emergency order of the Mayor on April 10, sparking other cities to take similar action.
- Seattle was soon to follow on April 24, setting their cap on fees also at 15 percent, and specifying a prohibition against reducing compensation rates for drivers, or garnishing their gratuities.
- Jersey City soon followed suit on May 7, also prohibiting a reduction in compensation for drivers or garnishing tips, though setting their fee cap at 10 percent.
- Los Angeles, on May 26, not only imposed a 15 percent cap on third-party delivery service fees, but also set a limit of 5 percent on any additional user fees charged to the food establishments to prevent the third-party food delivery companies from shifting costs. Here, too, the City deemed it unlawful to retain any portion of the driver's gratuities, and required the third-party delivery service to itemize each receipt specifying charges for: purchase price of order, delivery fee, additional user fee, and gratuities to driver.
- New York City, having most recently established their limit on third-party delivery service fees on June 2, has also capped fees at 15 percent and similarly set limits on additional user fees at 5 percent.

All cities have set the duration of the cap on third-party food delivery service fees to be either the remainder of the local emergency after which dine-in services will resume, or until 90 days after the same.

While imposing a 15 percent cap on the fees that third-party delivery services can charge food establishments will provide some relief to restaurants, it should be noted that restaurants would benefit more from customers ordering directly from restaurants and picking up their own orders.

BACKGROUND

Global Pandemic Requires Safety Precautions to Promote Public Health. On March 11, 2020 the World Health Organization declared the Covid-19 outbreak to be a global pandemic. Shortly thereafter, on March 16, Berkeley's Public Health Officer, in tandem with public health officers from six Bay Area counties, issued the country's first Shelter in Place Order. This directive—currently still in effect (though loosened)—limits activity, travel, and business to only those that are deemed safe based on health indicators. The order defines essential activities as those necessary for the health and safety of individuals and their families. Included among them are outdoor activities that one can engage in that do not involve close contact with people outside one's household and

social bubble, and travel to and from work and to obtain services and supplies for one's household.

Shelter In Place Order Required Restaurants to Close Dining Rooms and Rely Exclusively on Takeout. Health precautions resulting from the Covid-19 pandemic have placed an extreme burden on our local restaurants, which have shuttered indoor dining since March 17. Many restaurant customers have shifted to ordering takeout, utilizing third-party delivery services like UberEats/Postmates, DoorDash/Caviar, and Grubhub for convenient contactless delivery of restaurant meals. Outdoor dining began on June 19; however, the limited availability of outdoor seating and dampened demand due to consumers' ongoing concerns about the spread of Covid-19 have made it so restaurants are continuing to rely on takeout orders.

ENVIRONMENTAL SUSTAINABILITY

There is no significant impact on environmental sustainability.

CONTACT PERSON

Rashi Kesarwani, Councilmember, District 1, (510) 981-7110

Attachments:

1: Ordinance

ORDINANCE NO. _____-N.S.

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

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Chapter 13.111 is added to read as follows:

13.111. 010. DEFINITIONS

For purposes of this ordinance, the following definitions apply:

- A. **“City”** means the City of Berkeley.
- B. **“Delivery Fee”** means a fee charged by a Third-Party Food Delivery Service for providing a Retail Food Establishment with a service that delivers food and beverages from such establishment to customers. The term does not include any other fee or cost that may be charged by a Third-Party Food Delivery Service to a Retail Food Establishment, such as fees for listing or advertising the Retail Food Establishment on the Third-Party Food Delivery Service platform or fees related to processing the online order, including, but not limited to, service fees, fees for facilitating Online Orders for pick-up, and credit card processing fees.
- C. **“Online Order”** means an order placed by a customer through or with the assistance of a platform provided by a Third-Party Food Delivery Service, including a telephone order, for delivery or pick-up within the City.
- D. **“Purchase Price”** means the price, as listed on the menu, for the items contained in an Online Order, minus any applicable coupon or promotional discount provided to the customer by the Retail Food Establishment through the Third-Party Food Delivery Service. This definition does not include taxes, gratuities, and any other fees or costs that may make up the total amount charged to the customer of an Online Order.
- E. **“Retail Food Establishment”** means a restaurant, delicatessen, bakery, coffee shop, or other eat-in or carry-out service of processed or prepared raw and ready-to-eat food or beverages.
- F. **“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 delivery or pick-up of food and beverages from, no fewer than 5 Retail Food Establishments located in the City that are each owned and operated by different persons.

13.111.020. PROHIBITIONS

- A. It shall be unlawful for a Third-Party Food Delivery Service to charge a Retail Food Establishment a Delivery Fee that totals more than 15 percent of the Purchase Price of each Online Order.
- B. It shall be unlawful for a Third-Party Food Delivery Service to charge a Retail Food Establishment any amount designated as a Delivery Fee for an Online Order that does not involve the delivery of food or beverages.
- C. It shall be unlawful for a Third-Party Food Delivery Service to charge a Retail Food Establishment any combination of fees, commissions, or costs for the Retail Food Establishment's use of the Third-Party Food Delivery Service that is greater than 5 percent of the Purchase Price of each Online Order. Fees, commissions, or costs do not include Delivery Fee.
- D. It shall be unlawful for a Third-Party Food Delivery Service to charge a Retail Food Establishment any fee, commission, or cost other than as permitted in Subsections A through C, above.
- E. It shall be unlawful for a Third-Party Food Delivery Service to charge a customer any Purchase Price for a food or beverage item that is higher than the price set by the Retail Food Establishment on the Third-Party Food Delivery Service or, if no price is set by the Retail Food Establishment on the Third-Party Food Delivery Service, the price listed on the Retail Food Establishment's own menu.
- F. It shall be unlawful for a Third-Party Food Delivery service to reduce the compensation rates paid to the delivery service driver or retain any portion of amounts designated as a tip or gratuity. Any tip or gratuity shall be paid by the Third-Party Delivery Service, in its entirety, to the person delivering the food or beverages.

13.111.030 DISCLOSURES

- A. The Third-Party Food Delivery Service shall disclose to the customer an accurate, clearly identified, and itemized cost breakdown of each transaction, including but not limited to the following:
 - 1. the Purchase Price of the food and beverages at the cost listed on the Retail Food Establishment's menu;
 - 2. the Delivery Fee charged to the Retail Food Establishment;
 - 3. each fee, commission, or cost, other than a Delivery Fee, charged to the Retail Food Establishment;
 - 4. each fee, commission, or cost, other than the Delivery Fee or the Purchase Price of the food, charged to the customer by the Third-Party Food Delivery Service;

5. any tip or gratuity that will be paid to the person delivering the food or beverages;

13.111.040. ENFORCEMENT

A. A violation of this article shall subject the violator to the following:

1. An action in the Superior Court of the State of California to recover all actual damages resulting from a violation of this article.
2. Reasonable attorneys' fees and costs awarded by a court to a plaintiff that prevails in an action against a Third-Party Food Delivery Service. If plaintiff fails to prevail against a Third-Party Food Delivery Service, a court may award reasonable attorneys' fees and costs to the Third-Party Food Delivery Service upon a determination by the court that the plaintiff's action was frivolous.
3. A civil action alleging a violation of any provision of this article shall commence only after the following requirements have been met:
 - a. Written notice is provided by the Retail Food Establishment to the Third-Party Food Delivery Service of the provisions of the article alleged to have been violated and the facts to support the alleged violation; and
 - b. The Third-Party Food Delivery Service is provided 15 days from the date of the written notice to cure any alleged violation.

B. Notwithstanding any provision of this Code, or any other ordinance to the contrary, no criminal penalties shall attach for violation of this article.

13.111.050. SUNSET

This article shall sunset once the declared local state of emergency is no longer in effect.

Section 2. Severability Clause. If any subsection, sentence, clause or phrase of this article is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this article. The City Council hereby declares that it would have adopted this article and each and every subsection, sentence, clause, and phrase thereof not declared invalid or unconstitutional, without regard to whether any portion of the article would be subsequently declared invalid or unconstitutional.

Section 3. Urgency Clause. The City Council finds and declares that this ordinance is required for the immediate preservation of public health, peace and safety for the following reason: The State of California and the City of Berkeley have declared a state of emergency due to the novel COVID-19 pandemic. Residents are subject to a "Shelter in Place" Order and Retail Food Establishments are closed for indoor dining. Many Retail Food Establishments use Third-Party Food Delivery Services, and due to the high fees imposed by Third-Party Food Delivery Services, must increase food prices to stay in business.

Residents who rely on food delivery may be not be able to absorb increased food prices. Also, some Retail Food Establishments being charged high fees struggle to remain financially viable. If these Retail Food Establishments close, their workers will lose employment, which affects their ability to feed and shelter their families. Based on the findings and evidence presented, the Council determines that this Ordinance is necessary for the immediate preservation of the public health, peace and safety in accordance with Article XIV Section 93 of the Charter of the City of Berkeley. This Ordinance shall go into effect immediately upon a seven-ninths vote of the City Council, in satisfaction of the Charter of the City of Berkeley.

