

CITY OF ALAMEDA ORDINANCE NO. \_\_\_\_\_  
New Series

INTRODUCTION OF ORDINANCE AMENDING ALAMEDA MUNICIPAL CODE SECTION 6-62 (THIRD-PARTY FOOD DELIVERY SERVICES) OF ARTICLE XVIII (FAIR HOUSING AND TENANT PROTECTIONS) OF CHAPTER VI (BUSINESSES, OCCUPATIONS AND INDUSTRIES) TO CONTINUE PLACING LIMITS ON CHARGES IMPOSED BY THIRD-PARTY DELIVERY SERVICES; DEFINE CORE PRODUCT OFFERING TO MEAN A SERVICE; AND OTHER AMENDMENTS

WHEREAS, the County of Alameda has more than 1,200 full-service restaurants, more per capita than the State average, and the City of Alameda is home to a diverse and vibrant food and beverage scene; and

WHEREAS, restaurants are vital to the character that makes Alameda such a special place; and

WHEREAS, restaurants are a critical component of the U.S. food supply chain and during the COVID-19 pandemic, restaurants were restricted to takeout or delivery offerings and continue to have limited dining with decreased capacity. This has placed a sudden and severe financial strain on these local businesses, particularly those that already operate on thin margins, adding to financial pressures in the industry that predate the COVID-19 crisis; and

WHEREAS, customers ordering takeout or delivery from Alameda restaurants frequently do so via third-party food delivery service platforms and these third-party platforms charge restaurants fees and surcharges for use of their services; and

WHEREAS, service agreements between some restaurants and third-party platforms provide for the payment of fees and charges that can range, in jurisdictions where no caps are in place, from 15% of the purchase price per order to up to 30% of the purchase price per order; and

WHEREAS, while some restaurants negotiated such fees and surcharges prior to the COVID-19 pandemic, the pandemic and the ensuing emergency has made deliveries a principal means of restaurant operations; and

WHEREAS, research indicates that restaurants were among the most hard-hit businesses during the height of the pandemic, and continue to experience challenges as the economy recovers including, but not limited to, chronic understaffing, inflationary pressures, and supply chain; and

WHEREAS, restaurants report that despite improvements in business activity compared to the early months of the COVID-19 pandemic, they continue to struggle with ongoing concerns related to the COVID-19 pandemic such as the apprehension of customers to return to in-person dining at pre-pandemic levels; and

WHEREAS, for many Alameda restaurants, and particularly for those which do not have large areas available for outdoor dining, delivery and take-out services have become a primary source of income; and

WHEREAS, the number of consumers using food delivery platforms to place orders with restaurants has increased significantly and is expected to continue at higher levels in the coming years; and

WHEREAS, as restaurants must rely on food delivery platforms to meet consumer demand, it is anticipated that delivery platforms will continue to play an increasing role in the restaurant industry going forward; and

WHEREAS, restaurants have expressed a desire to maintain the services they are currently being provided at current pricing levels; and

WHEREAS, if Alameda restaurants close as a result of high fees from third-party delivery services, their workers will lose employment and vulnerable customers will lose essential services, thereby affecting their ability to provide for their families and to remain safe during the COVID-19 pandemic; and

WHEREAS, other cities have adopted limits on delivery service fees, and in response online platforms have fought back by increasing fees to consumers and reduced delivery radius thereby frustrating local regulation adopted to address impacts to consumers who are sheltering in place and restaurant workers; and

WHEREAS, any such end-run actions by third-party food delivery companies and restaurant closures due to exorbitant delivery fees will also further limit food options for residents, could place vulnerable residents in untenable positions of not being able to obtain life sustaining food, and further disrupt US food supply chain; and

WHEREAS, restaurants report that were it not for the delivery fee cap within the City established by ordinance, they would no longer be in business; and

WHEREAS, adopting a combined cap on per-order fees charged to consumers and restaurants at 15% will accomplish the legitimate public purpose of easing the financial burden on struggling restaurants, their employees, and consumers, and maintain reliability regarding the cost of third-party food delivery services, while safeguarding their health and welfare, and that of their employees and consumers, during this emergency and not unduly burdening third-party platforms; and

WHEREAS, food service delivery programs will likely continue to be used by City residents because some form of social distancing, masking, and other health measures, all of which reduce in-person service capacity, are expected to continue for the foreseeable future, given the ever-present prevalence of respiratory pathogens, including variants and subvariants of the COVID-19 virus, Respiratory Syncytial Virus (RSV), Influenza, etc.; and

WHEREAS, by the staff report, testimony, and documentary evidence presented at the March 7, 2023 City Council meeting, the City Council has been provided with additional information upon which the findings and actions set forth in this ordinance are based.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF ALAMEDA as follows:

Section 1: Alameda Municipal Code Section 6-62 (Third-Party Delivery Services) is hereby amended to read as follows:

## 6-62 Third-Party Food Delivery Services

### 6-62.1 Definitions

*City* means the City of Alameda.

*Core Product Offering* means a service that (1) lists a Retail Food Establishment, and makes the Retail Food Establishment discoverable, with reasonable effort, on all modalities or platforms offered by a Third-Party Food Delivery Service, including but not limited to any website, mobile application, or other internet service where a Third-Party Food Delivery Service lists Retail Food Establishments; and (2) facilitates and/or performs the delivery (through the Third-Party Food Delivery Service, Retail Food Establishments, or any other means) of food and/or beverages from Retail Food Establishments to customers. The purpose of this definition is to ensure that Retail Food Establishments have an affordable means of obtaining basic services from Third-Party Food Delivery Services while preserving their freedom to contract for more services at a higher rate. Accordingly, Core Product Offering does not include any other service that may be provided by a Third-Party Food Delivery Service to a Retail Food Establishment, including but not limited to advertising services, search engine optimization, business consulting, or payment processing.

*Consumer Price Index* means the Consumer Price Index for All Urban Consumers ("CPI-U") for the San Francisco-Oakland-Hayward, CA Region, published by the U.S. Department of Labor, Bureau of Labor Statistics.

*Service Fee* means any fee charged by a Third-Party Food Delivery Service to a Retail Food Establishment for providing a the Retail Food Establishment with a service that delivers or assists the purchase of food and beverages from such establishment to customers.

*Online Order* means an a food and/or beverage order placed by a customer through or with the assistance of a platform provided by a Third-Party Food Delivery Service, including a telephone or software- or application-based order, for delivery or pick-up within the City.

*Purchase Price* means the price, as listed on the menu, for the items contained in an online order. This definition does not include taxes or gratuities that may make up the total amount charged to the customer of an online order.~~the menu price of an Online Order,~~ 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 a customer of for an online order.

*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.

*Third-party Food Delivery Service* means an online business that acts as an intermediary between consumers and multiple food facilities to submit food orders from a consumer to a participating food facility, and to arrange for the delivery of the order from the food facility to the consumer.~~means any website, mobile application, or other electronic or internet service that offers or arranges for the sale of food and beverages prepared by a Retail Food Establishment, and the same-day delivery or pick-up of food and beverages.~~

## 6-62.2 Prohibitions

- a. It shall be unlawful for a ~~T~~third-~~P~~party ~~F~~food ~~D~~elivery ~~S~~ervice to charge a ~~R~~etail ~~F~~ood ~~E~~stablishment a ~~S~~ervice ~~F~~ee that totals more than fifteen ~~(15%)~~ percent (15%) of the ~~P~~urchase ~~P~~rice of each ~~O~~nline ~~O~~order, except as otherwise provided for in this Article.
- b. It shall be unlawful for a ~~T~~third-~~P~~party ~~F~~food ~~D~~elivery ~~S~~ervice to increase any fee, cost, or commission, or establish any new fee, cost or commission, with respect to customers beyond those established on September 3, 2020, except that with respect to flat fees (i.e., non-percentage fees), such fees may be adjusted annually from 2020 onward by the percentage change in the Consumer Price Index for the twelve (12) month period ending April of each year and rounded to the nearest one-tenth of a percent.
- c. It shall be unlawful for a ~~T~~third-~~P~~party ~~F~~Food ~~D~~elivery ~~S~~ervice to charge a customer any ~~p~~urchase ~~P~~rice for a food or beverage item that is higher than the price set by the ~~R~~etail ~~F~~ood ~~E~~stablishment on the ~~T~~third-~~P~~party ~~F~~ood ~~D~~elivery ~~S~~ervice or, ~~if no price is set by the R~~etail ~~F~~ood ~~E~~stablishment on the ~~T~~third-~~P~~party ~~F~~ood ~~D~~elivery ~~S~~ervice, the price listed on the ~~R~~etail ~~F~~ood ~~E~~stablishment's own menu. at the time of the order.
- d. It shall be unlawful for a ~~T~~third-~~P~~party ~~F~~food ~~D~~elivery ~~S~~ervice to retain any portion of amounts designated as a tip or gratuity infor any Online Order. Any tip or gratuity shall be paid by the ~~T~~third-~~P~~Party ~~D~~elivery ~~S~~ervice, in its entirety, to the person

delivering the food and/or beverages.

e. It shall be unlawful for a Third-Party Food Delivery Service to collect any fee from a Retail Food service establishment or its customers for a telephone order if a telephone call between such establishment and a customer made to place the order does not result in an actual transaction.

f. Beginning on March 1, 2023, the fee limit in subsection (a) of this Section 6-62.2 shall not apply to a Third-Party Food Delivery Service that does both of the following:

(1) offers all Retail Food Establishments the option to obtain or restore Core Product Offering for a total fee, commission, or charge not to exceed 15% of the purchase price of the online order, without requiring the purchase of additional services; and

(2) notifies any affected Retail Food Establishment in writing of the ability of the option described in subsection (e)(1), and obtain a written waiver from the Retail Food Establishment of their rights under subsection (a) of this Section 6-62.2. Retail Food Establishments shall have the right to rescind any such waiver, in writing, at any time.

g. Contracts between a Third-Party Food Delivery Service and a Retail Food Establishment shall clearly define the fees, commissions, or charges associated with contracted services.

### 6-62.3 Disclosure Requirements

a. Upon a request by a customer, the a Third-party Food Delivery Service shall disclose to the customer an accurate, clearly identified, and itemized cost breakdown of each transaction between the customer and a Retail Food Establishment that occurred through or was otherwise facilitated by the Third-Party Food Delivery Service, including but not limited to the following:

1. The Purchase Price of the food and beverage~~The Purchase Price of the food and beverages at the cost listed on the Retail Food Establishment's menu;~~

2. A notice, if applicable, that the Third-Party Food Delivery Service charges a fee, commission, or cost to the Retail Food Establishment. All fees, costs, or commissions charged to the Retail Food Establishment for delivery services, unless the Retail Food Establishment directs that the Third-Party Food Delivery Service disclose to customers the delivery fee charged to the Retail Food Establishment and each fee, commission, or cost charged to the Retail Food Establishment;

3. All fees, costs, or commissions charged to the customer by the Third-

~~P~~arty ~~F~~ood ~~D~~elivery ~~S~~ervice; and

~~4. Any tip or gratuity that will be paid to the person delivering the food or beverages.~~

b. The Third-Party Food Delivery Service shall annually disclose to the City a current breakdown of the proportion of businesses within the City electing to maintain Core Product Offering in comparison to those electing to purchase additional marketing services.

#### 6-62.4 Enforcement

- a. Any person who violates any provision of this article shall be guilty of an infraction which shall be punishable by a fine not exceeding two hundred fifty (\$250.00) dollars, or a misdemeanor, which shall be punishable by a fine not exceeding one thousand (\$1,000.00) dollars, or by imprisonment in the County Jail for a period not exceeding six (6) months, or by both such fine and imprisonment.
- b. Any person who violates any provision of this article may be subject to administrative citations issued pursuant to Article 1-7 of this Code.
- c. The City Attorney, pursuant to Section ~~18-23.91-5.3~~ of this Code, or any aggrieved private party, may enforce, and seek to enjoin any violation of, this Article by means of a civil action. The burden of proof in such cases shall be preponderance of the evidence. As part of any civil action brought by the City to enforce this article, a court shall assess a civil penalty in an amount up to one thousand (\$1,000.00) dollars per violation, against any person who commits, continues to commit, operates, allows or maintains any violation of this article.
- d. Any person convicted of violating any provision of this article in a criminal case or found to be in violation of this article in a civil or administrative case brought by a law enforcement agency, including but not limited to the City of Alameda, shall be ordered to reimburse the City and other participating law enforcement agencies their full investigative costs.
- e. Any civil action initiated by a private party alleging a violation of any provision of this ~~aa~~Article shall commence only after the following requirements have been met:
  1. Written notice is provided to the ~~T~~hird-~~P~~arty ~~F~~ood ~~D~~elivery ~~S~~ervice of the provisions of the ~~A~~article alleged to have been violated and the facts to support the alleged violation; and
  2. The ~~T~~hird-~~p~~Party ~~F~~ood ~~D~~elivery ~~S~~ervice is provided fifteen (15) days from the date of the written notice to cure any alleged violation.
- f. This ~~A~~article is not intended to, and does not, create any rights or benefits,

substantive or procedural, enforceable at law or in equity, against the City of Alameda, its departments, officers, or employees.

- g. The remedies provided in this Aarticle are cumulative, and nothing in this Aarticle shall preclude any person from seeking any other remedies, penalties or procedures provided by law.

#### 6-62.6       Exception

- a. Nothing in this aArticle shall be construed as imposing a limitation on Third-Party Food Delivery Service if doing so would be in violation of the Constitution of the United States, ~~or~~ the Constitution of the State of California, or any applicable California state or federal law, as determined by an independent City hearing officer pursuant to this Section. Accordingly, the requirements of this article shall not apply or shall be limited to an extent to avoid any unconstitutional or unlawful deprivation of the Third-Party Food Delivery Service's ~~constitutional~~ rights.
- b. Notwithstanding the limitations set forth in Section 1-8.01(a) of this Code, any Third-Party Food Delivery Service seeking an exception from the requirements of this Article shall file an application with the City that includes each and every contested issue or basis for the application, along with relevant evidence in support thereof, which shall be reviewed by a City hearing officer and constitute the City's final decision on the matter.
- c. The burden of establishing by satisfactory factual proof of a constitutional deprivation, by a preponderance of the evidence, shall be on the Third-Party Food Delivery Service.
- d. No exception or limit shall be granted pursuant to this section unless a finding is made, based on satisfactory factual proof provided by the Third-Party Food Delivery Service, of a constitutional or applicable statutory deprivation.

#### 6-62.7           Implementing Regulations

The City Manager, or his/her designee, shall have the authority to adopt all necessary guidelines, procedures, and regulations to implement the requirements and fulfill the policies and purposes of this Article.

#### 6-62.8           Sunset

This article shall sunset and be of no further force or effect after May 1, 2025, unless otherwise extended by successor legislation. ~~upon the City Council taking affirmative action to terminate the local state of emergency due to the COVID-19 pandemic or when businesses may restore in-person service to one hundred (100%) percent capacity, whichever is later.~~

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Section 2: IMPLIED REPEAL

Any provision of the AMC inconsistent with this Ordinance, to the extent of such inconsistencies and no further, is hereby repealed or modified to the extent necessary to effectuate this Ordinance.

Section 3: CEQA DETERMINATION

The City Council finds and determines that the adoption of this ordinance does not constitute a "project" as defined in California Environmental Quality Act (CEQA) Guidelines Section 15378 and therefore no further CEQA analysis is required.

Section 4: SEVERABILITY

If any provision of this Ordinance is held by a court of competent jurisdiction to be invalid, this invalidity shall not affect other provisions of this Ordinance that can be given effect without the invalid provision and therefore the provisions of this Ordinance are severable. The City Council declares that it would have enacted each section, subsection, paragraph, subparagraph and sentence notwithstanding the invalidity of any other section, subsection, paragraph, subparagraph or sentence.

Section 5: EFFECTIVE DATE

This Ordinance shall be in full force and effect from and after the expiration of thirty (30) days from the date of its final passage.

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Presiding Officer of the City Council

Attest:

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Lara Weisiger, City Clerk



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I, the undersigned, hereby certify that the foregoing Ordinance was duly and regularly adopted and passed by the Council of the City of Alameda in a regular meeting assembled on the \_\_\_\_ day of \_\_\_\_\_, 2023, by the following vote to wit:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said City this \_\_\_\_ day of \_\_\_\_\_, 2023.

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Lara Weisiger, City Clerk  
City of Alameda

Approved as to form:

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Yibin Shen, City Attorney  
City of Alameda