Continuing Limits on Charges Imposed by Third-Party Food Delivery Services: Introduction of Ordinance Amending Alameda Municipal Code Section 6-62

March 7, 2023

Presentation Overview

- **Purpose:**
  - Introduction of an ordinance amending Municipal Code Section 6-62 to:
    1. Continue limits on fees charged to restaurants by Third-Party Delivery Services at 15%, while allowing restaurants to pay for additional marketing services at a higher cost if desired;
    2. Limit the addition of new customer fees, but allow for the increase of existing fees by the rate of inflation; and
    3. Extend the Ordinance for two years to evaluate effectiveness.

Presentation Overview

- **Tonight's presentation:**
  - Background
  - Outreach
  - Potential Impacts
  - Staff Recommendation

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Key Events Affecting Delivery Service Ordinance

- **September 2020** City Council unanimously approves ordinance capping Third-Party Delivery Service charges imposed on restaurants and limiting fees imposed on consumers
- **October 2021** California Legislature adopts AB 286
- **September 2022** Discussion facilitated by former Councilmember Knox White with Restaurant Coalition, Chamber, BIAs and City staff
- **October/November 2022** City Council lifts the City's local state of emergency; Council directed staff to extend ordinance duration until the State of California's State of Emergency is rescinded; City Council approves modification
- **February 2023** California ends emergency declaration

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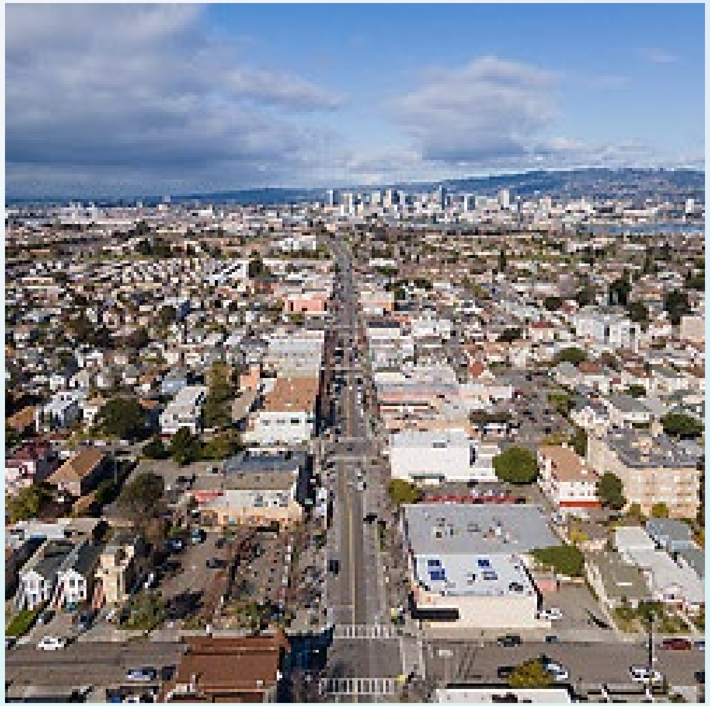
Pre-Ordinance (2020) Context for Delivery Services

- Delivery companies played an important role in helping restaurants to quickly scale up their food delivery services and residents/consumers to access critical food needs
- Alameda restaurants reported paying fees as high as 31% and customers reported paying fees as high as 30% of the purchase price; upper end of fee levels infeasible for businesses and members of the community with limited income
- Council approved 2020 ordinance to limit restaurant closures, maintain a vibrant restaurant industry in Alameda, and protect the vulnerable members of the community



Unique Elements of 2020 Ordinance vs AB 286

- **Differences from AB 286/Unique Elements**
  - Limit fees charged to restaurants by Third-Party Delivery Services at 15%, while permitting voluntary added charges for additional services; and
  - Limit increase to customer fees charged by Third-Party Delivery Services.
- **Alignment with AB 286**
  - Customers cannot be charged more for a menu item than the price set by the restaurant;
  - All tips or gratuity must go to the person delivery the food;
  - Prohibition of fees for telephone orders that do not result in transaction; and
  - Customers must receive itemized breakdown for transaction.

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Current Context for Delivery Services

- Take-out/delivery services continue to be a critical source of income for restaurants
- Consumer demand for delivery has increased significantly and is expected to continue to increase in the coming years
- Vulnerable populations depend on delivery services for life-sustaining meals
- Delivery services have demonstrated ability to successfully conduct business under current limits

Additional Context

- One in five (19%) of those previously infected with COVID currently still have symptoms of "long COVID." Women and Hispanic adults are among the groups more impacted by long COVID. (CDC, 2022).
- Seen through a COVID-19 lens, about 3% of the population in the United States is considered moderately-to-severely immunocompromised, making them more at risk for serious illness if they contract COVID-19, even after vaccination. (Yale School of Medicine, 2022).
- One in five adults reported experiencing household food insecurity in the summer of 2022 (Urban Institute, 2022).
- One in five Californians is experiencing hunger, with a disproportionate impact experienced in Black and Hispanic communities. (California Association of Food Banks, 2023)
- Based on judicially recognized finding in the SF litigation, 15% cap is "a reasonable step to protect restaurants from financial collapse without unduly constraining third-party food delivery services' businesses" because "leading third-party food delivery services companies currently charge a 10% per-order fee for the most resource-intensive aspect of their business—delivery services—and these companies report high profit margins from all aspects of their business operation".

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Outreach to Restaurants and Third-Party Food Delivery Services

- Facilitated discussions in October and November 2022
- Survey to restaurants in January 2023
- Discussions with DoorDash, GrubHub and Uber in February 2023

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Potential Impacts on Restaurants and Delivery Service Companies

- **Impacts on restaurants**: Limits on charges provides predictable and transparent costs related to delivery services.

- **Impacts on delivery services**: Limited impact as demonstrated ability to operate with existing limitations.

Staff Recommendation

1. Limit delivery fees charged to restaurants at 15%, while allowing restaurants to pay for additional marketing services at a higher cost if desired;
2. Continue limiting establishment of new, flat fees, costs or commissions charged to consumers beyond those in the 2020 ordinance; permit increase of existing fees/costs/ commissions charged to consumers by rate of inflation (CPI);
3. Largely maintain current prohibitions, disclosure requirements, and enforcement mechanisms; and
4. Extend sunset to May 1, 2025.

Thank you!

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Reserved Q & A Slides

Alameda v. San Francisco Ordinance Comparison

Item	San Francisco (Litigation Ordinance)	San Francisco (Settlement Ordinance)	Alameda Proposed Ordinance
Restaurant Side	15% hard cap	15% limit, permit voluntary agreement to beyond 15% for additional services (e.g. marketing)	15% limit, permit voluntary agreement to beyond 15% for additional services (e.g. marketing)
Consumer Side	No limitation, No protection	No limitation, No protection	Limited to 2020 levels with CPI increases (Alameda was first & only in the nation to protect residents and remains so)
Administrative Hearing Safety Valve	None	None	Permit Third-Party Delivery Operators to demonstrate constitutional necessity to move beyond Ordinance limits based on an Administrative Hearing
Duration	Permanent	Permanent	2 years, subject to potential further extension at Council direction

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San Francisco Litigation

District Court Dismissed Doordash and Grubhub’s claims for

- Contract Clause
- Police Power
- Equal Protection
- First Amendment

“When the government is not a contracting party, like this case, the Supreme Court has held that “courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.” Energy Rsrvs., 459 U.S. at 412–13. The Supreme Court has explained, in a decision after Pension Benefit, that courts must “refuse to second-guess” the government’s identification of “the most appropriate ways of dealing with the problem” at issue. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1987).

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San Francisco Litigation

District Court Permitted two remain claims to continue because factual development was necessary

- Takings
- Confiscatory Due Process

The court's concerns are potentially alleviated in the proposed Alameda Ordinance because:

- Alameda Ordinance provides an administrative hearing process for operators to demonstrate constitutional necessity
- Alameda Ordinance permits voluntary agreements to go beyond the 15% limitation

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