

CITY OF ALAMEDA ORDINANCE NO. _____
New Series

AMENDING THE ALAMEDA MUNICIPAL CODE BY ADDING A NEW ARTICLE XXIV (THIRD-PARTY FOOD DELIVERY SERVICES) OF CHAPTER VI (BUSINESSES, OCCUPATIONS AND INDUSTRIES) ESTABLISHING A TEMPORARY LIMIT ON CHARGES IMPOSED BY THIRD-PARTY DELIVERY SERVICES DURING LOCALLY DECLARED STATE OF EMERGENCY RELATED TO COVID-19 PANDEMIC

WHEREAS, the Alameda Municipal Code (AMC) Chapter 2-24 defines a local emergency as “the actual or threaten existence of conditions of disaster or of extreme peril to the safety of persons and property within the jurisdiction”; and

WHEREAS, Government Code Section 8630 allows the City to declare a local emergency pursuant to an ordinance; and

WHEREAS, Government Code Section 8634 allows a city, including a charter city, during a local emergency, to promulgate orders and regulations necessary to provide for the protection of life and property; and

WHEREAS, conditions of extreme peril to the health, safety and welfare of persons have arisen in the world, the nation, the State, the County of Alameda and the City of Alameda (“City”) due to the following:

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 which has been named “coronavirus disease 2019,” abbreviated COVID-19 (“COVID-19”). The Center for Disease Control and Prevention (“CDC”) has stated that COVID-19 is a serious public health threat, based on current information. Cases of COVID-19 have been diagnosed throughout the world, the United States, the State of California, the County of Alameda and the City of Alameda.

The exact modes of transmission of COVID-19, the factors facilitating human to human transmission, the extent of asymptomatic viral shedding, the groups most at risk of serious illness, the attack rate, and the case fatality rate all remain active areas of investigation. The CDC believes, at this time, the symptoms appear two to fourteen days after exposure. Currently, there are no vaccine or specific anti-viral treatment for COVID-19.

Actions are being taken to protect public health and limit the spread of COVID-19 but whether those actions will be successful is unknown at this time.

WHEREAS, on March 1 and 5, 2020, the Alameda County Public Health Officer issued Declarations of Local Health Emergency, and on March 10, 2020, the Alameda County Board of Supervisors adopted a Resolution ratifying the Declarations of Local

Health Emergency, and on March 17, 2020, the Alameda County Board of Supervisors adopted a Resolution ratifying the Declaration of Local Emergency; and

WHEREAS, on March 4, 2020, the Governor of the State of California 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; 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 and addressing the effects of COVID-19; and

WHEREAS, the CDC, the California Department of Health, and the Alameda County Department of Public Health have all issued recommendations including but not limited to strict adherence to social distancing guidelines, canceling or postponing group events, working from home, and other precautions to protect public health and prevent transmission of this communicable virus. Other counties throughout the state have similar directives; and

WHEREAS, on March 16, 2020, the Alameda County Public Health Officer issued a countywide order that prohibits all public and private group gatherings and requires people to shelter at their place of residence with limited exceptions. The purpose of the Order was to restrict and limit gathering of persons and require closures of non-essential retail businesses in an effort to stem or slow the spread of the virus; and

WHEREAS, on March 17, 2020, the City Council made findings that due to the COVID-19 pandemic, conditions of extreme peril to the health, safety and welfare of persons have arisen in the City of Alameda and, based thereon, adopted an urgency ordinance (Ordinance No. 3267) declaring a local emergency exists in the City as a result of the COVID-19 pandemic, and on April 7, 2020, the City Council made findings that a local emergency continues to exist in the City as a result of the COVID-19 pandemic and, based thereon, adopted an urgency ordinance (Ordinance No. 3272) extending the declaration of the existence of a local emergency; and

WHEREAS, on March 19, 2020, the Governor of the State of California issued Executive Order N-33-20, an Order of the State Public Health Officer ordering all individuals living in California to stay home or at their place of residence except as needed to maintain continuity of operations of outlined federal critical infrastructure sectors ("State Shelter Order"); and

WHEREAS, effective July 13, 2020, the State Public Health Officer issued an order closing all indoor restaurant dining; and

WHEREAS, the Alameda County Health Officer has consistently maintained, since the inception of the pandemic, that indoor dining must remain prohibited to slow the spread of COVID-19; and

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, during the COVID-19 pandemic restaurants, a critical component of the US food supply chain, have been restricted to takeout or delivery offerings, and limited dining with decreased capacity, which 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, restaurants have had to pivot to and ramp up delivery and takeout options to continue to provide these essential services to the public; and

WHEREAS, even if indoor dining is authorized by law, many persons, especially persons with special vulnerabilities to COVID-19, such as the elderly or immunocompromised individuals, will continue to be precluded from engaging in indoor dining during the COVID-19 pandemic; and

WHEREAS, such vulnerable individuals are often also most unable to absorb price increases, especially when those increases relate to life sustaining materials such as food; and

WHEREAS, many consumers use third-party applications and websites to place food and beverage orders with these establishments for delivery and takeout; and many do so out of necessity because they lack the ability or capacity to obtain life sustaining food through any other means; and

WHEREAS, 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 from 15 percent of the purchase price per order to up to 31 percent 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, restaurants and residents report that these fees and surcharges are now unsustainable, given the dire financial straits these establishments now face, their limited bargaining power to negotiate a reduction with third party platforms and residents' similar inability to afford such surcharges for life sustaining food; 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 service 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, California Penal Code section §396 (1) prohibits price-gouging during an emergency, (2) does not preempt local legislative bodies from prohibiting by ordinance the same or similar conduct or imposing more severe penalties for the same conduct; and (3) the California Legislature explicitly intended that Penal Code section 396 be liberally construed so that its beneficial purposes may be served; and

WHEREAS, adopting a combined cap on per-order fees charged to consumers and restaurants at 15 percent will accomplish the legitimate public purpose of easing the financial burden on struggling restaurants, their employees, and consumers 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, the City Council determines that the City of Alameda must take immediate affirmative measures, including establishing a limit on fees and surcharges paid by restaurants and consumers to food service delivery platforms, as it is necessary for the immediate preservation of the public peace, health, and safety. Social distancing and stay-at-home orders, in addition to other health orders and directives, all of which reduce service capacity, are expected to remain in force for the foreseeable future. Essential workers who strengthen the US food supply chain by working in the restaurant industry will continue to be called upon to serve. It is unclear how quickly patrons of these businesses will return and restaurants when these orders and directives are ultimately lifted, thereby posing seemingly interminable threat of loss of employment to more employees and loss of income. As state anti-gouging laws do not provide any protections in the market for food delivery services, this order is necessary to enable the City of Alameda to ensure the continuity of essential food services for its residents, the economic viability of local businesses who employ essential workers, and to protect against predatory activity for the duration of the pandemic; and

WHEREAS, for the reasons set forth above, this Ordinance is declared by the City Council to be necessary for preserving the public welfare, health, or safety and to avoid

a current, immediate and direct threat to the health, safety or welfare of the community, and the recitals above taken together constitute the City Council's statements of the reasons constituting such necessity of such regulation; and

WHEREAS, this Ordinance is adopted pursuant to the City's police powers and powers afforded to the City in time of national, state, county and local emergency during an unprecedented health pandemic, such powers being afforded by the State Constitution, State law, the City Charter and the Alameda Municipal Code ("AMC") to protect the public welfare, health, and safety, and to protect life and property as affected by the emergency; and

WHEREAS, adoption of this ordinance is exempt from review under the California Environmental Quality Act ("CEQA") under CEQA Guidelines Sections 15378 (not a project) and 15061(b)(3) (no significant environmental impact); and

WHEREAS, by the staff report, testimony, and documentary evidence presented at the September 15, 2020 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 Article XVIV (Third-Party Delivery Services) is hereby added to read as follows:

6-62 Third-Party Food Delivery Services

6-62.1 Definitions

City means the City of Alameda.

Service Fee means any fee charged by a Third-Party Food Delivery Service for providing a 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 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, 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.

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 any website, mobile application, or other electronic or 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.

6-62.2 Prohibitions

- a. It shall be unlawful for a Third-Party Food Delivery Service to charge a Retail Food Establishment a Service 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 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.
- c. It shall be unlawful for a Third-Party Food Delivery Service to 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.
- d. It shall be unlawful for a Third-Party Food Delivery Service to collect any fee from a 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.

6-62.3 Disclosure Requirements

- a. Upon a request, 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. all fees, costs, or commissions charged to the Retail Food Establishment for delivery services;
 3. all fees, costs, or commissions to the customer by the Third-Party Food Delivery Service; and

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

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 \$250.00, or a misdemeanor, which shall be punishable by a fine not exceeding \$1,000.00, or by imprisonment in the County Jail for a period not exceeding 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 18-23.9 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 (\$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 Article shall commence only after the following requirements have been met:
 1. Written notice is provided 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
 2. The Third-Party Food Delivery Service is provided 15 days from the date of the written notice to cure any alleged violation.
- f. This 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 Article are cumulative, and nothing in this Article shall preclude any person from seeking any other remedies, penalties or

procedures provided by law.

6-62.6 Exception

- a. Nothing in this Article 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. Accordingly, the requirements of this Article shall not apply or shall be limited to an extent to avoid any unconstitutional 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 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 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 100% capacity, whichever is later.

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 is exempt from review under the California Environmental Quality Act (CEQA) pursuant to the following, each a separate and independent basis: CEQA Guidelines, Section 15378 (not a project) and Section 15061(b)(3) (no significant environmental impact).

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.

Presiding Officer of the City Council

Attest:

Lara Weisiger, City Clerk

* * * * *

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 _____, 2020, 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 _____, 2020.

Lara Weisiger, City Clerk
City of Alameda

Approved as to form:

Yibin Shen, City Attorney
City of Alameda