

HAYWARD CITY COUNCIL

ORDINANCE NO. 20-

AN EMERGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF HAYWARD ESTABLISHING A TEMPORARY 15 PERCENT LIMIT ON FEES OF FOOD DELIVERY SERVICE PROVIDERS TO SUPPORT RESTAURANTS IN HAYWARD DURING THE COVID-19 PANDEMIC

THE CITY COUNCIL OF THE CITY OF HAYWARD DOES ORDAIN AS FOLLOWS:

Section 1. Findings and Statement of Urgency.

- A. Pursuant to Article XI, Sections 5 and 7 of the California Constitution, Government Code Sections 36934 and 36937, and section 617 of the Charter of the City of Hayward, the City may make and enforce all regulations and ordinances using its police powers to regulate municipal affairs and may enact emergency ordinances for the immediate preservation of the public peace, health, or safety.
- B. Due to the spread of COVID-19 (coronavirus) within the State, on March 4, 2020 Governor Gavin Newsom declared a public health emergency.
- C. On March 11, 2020, the City Manager, in her capacity as Director of Emergency Services, declared a Local Emergency in the City of Hayward due to the COVID-19 pandemic, which the Hayward City Council affirmed on March 17, 2020.
- D. On March 13, 2020, the President of the United States declared a National Emergency due to the COVID-19 pandemic.
- E. On March 16, 2020, the Health Officer of Alameda County issued an order directing all individuals to shelter in their homes in an effort to slow the progression of the COVID19 pandemic (hereinafter, "Shelter-In-Place order"). The order allowed restaurants to operate only for delivery and takeout options.
- F. The Health Officer of the County of Alameda has issued revised Shelter-In-Place Orders on March 31, 2020, May 18, 2020, June 5, 2020, June 18, 2020, July 15, 2020, and August 20, 2020, extending restrictions on activities, and requiring individuals to shelter at home.
- G. Restricting restaurants to takeout and delivery offerings 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.
- H. 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 in order to enable restaurants to survive this crisis and remain as sources of employment and neighborhood vitality in the City.

- I. Restricting restaurants to takeout and delivery options has resulted in restaurants' increasing reliance on third-party delivery service providers
- J. In Hayward, 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 up to 30 percent of an order amount.
- K. Restaurants 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 strains small business restaurants are facing in this COVID-19 emergency.
- L. Limiting the per-order fees at 15 percent will achieve the public purpose of ensuring the continued operation of local restaurants and third-party platforms during the period of emergency; the 15 percent cap is based on the findings and experience of other California cities that have already adopted 15 percent fee ceilings as reasonable emergency regulations in collaboration with food delivery companies. This Ordinance is temporary in nature and only intended to promote stability and safe and healthy operations within the restaurant and food markets in the City during the COVID-19 pandemic outbreak, and to prevent avoidable business closures thereby serving the public peace, health and safety, and public welfare and ensuring jobs and economic vitality within the City, while also preventing further spread of the virus.
- M. Based upon the above-described facts and circumstances, and for these same reasons, the City Council finds that this ordinance is necessary as an emergency measure for preserving the public peace, health and safety, and public welfare, and therefore it may be introduced and adopted at one and the same meeting, and shall become effective immediately upon its adoption by five (5) or more affirmative votes of the Hayward City Council.

Section 2. Definitions. For purposes of this Ordinance, the following definitions apply:

- A. "Covered Establishment" means a restaurant that offers, in a single commercial transaction over the internet, such as Online Order, or over the telephone, such as a Telephone Order, 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.
- B. "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 a Covered Establishment.
- C. "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.

- D. "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 for delivery or pickup within the City.
- E. "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 order.

Section 3. Temporary Limit on Third Party Food Delivery Service Charges.

- A. Fee Limit. It shall be unlawful for a Third-Party Food Delivery Service to charge a Covered Establishment a fee that totals more than 15 percent of the purchase price of an Online or Telephone Order for the use of its services.

Section 4. Enforcement

- A. A Third-Party Food Delivery Service shall not be found in violation of this Ordinance if between the Effective Date of this Ordinance and October 6, 2020, it imposes a fee per Online or Telephone Order for the use of its services that totals more than 15 percent of the purchase price of such order, provided it refunds the portion of the fee that exceeds the fee percentage set forth in this Ordinance to Covered Establishment no later than 15 days after the purchase.
- B. If a Third-Party Food Delivery Service charges a Covered Establishment fees that violates this Ordinance, the Covered Establishment shall, within seven calendar days, provide written notice to the Third-Party Food Delivery Service requesting a refund; the refund shall be paid within seven calendar 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 Ordinance after the initial notice, a Covered Establishment may enforce this Ordinance 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. Violations of this Ordinance shall be punishable as set forth in section 623 of the Charter of the City of Hayward.

Section 5. Guidance and rules

- A. The City Administrator, or her designee, is authorized to implement this Ordinance and issue any necessary guidance or rules consistent with this Chapter and this Code.

Section 6. Effective Date and Expiration Date

- A. This Ordinance shall become effective immediately upon its adoption by five (5) or more affirmative votes of the Hayward City Council and shall terminate ninety calendar (90) days after such time that the Hayward City Council terminates the declared local emergency, as affirmed by the Council on March 17, 2020.

Section 7. Severability.

Should any part of this Ordinance be declared by a final decision by a court or tribunal of competent jurisdiction to be unconstitutional, invalid, or beyond the authority of the City, such decision shall not affect the validity of the remainder of this Ordinance, which shall continue in full force and effect, provided that the remainder of the Ordinance, absent the unexcised portion, can be reasonably interpreted to give effect to the intentions of the City Council.

Section 7. CEQA.

California Environmental Quality Act (CEQA) The City Council independently finds and determines that this action is exempt from CEQA pursuant to Public Resources Code section 21065, based on the finding that this Ordinance is not a “project” within the meaning of Section 15378 of the CEQA Guidelines. The City Council further independently finds and determines that this action is exempt from CEQA pursuant to Section 15061(b)(3) of the CEQA Guidelines, as an activity that is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. The general exemption applies in this instance because it can be seen with certainty that there is no possibility that the proposed amendments could have a significant effect on the environment, and thus are not subject to CEQA. Thus, it can be seen with certainty that the proposed project would not have a significant effect on the environment.

ADOPTED at a regular meeting of the City Council of the City of Hayward, held the ___ day of September 2020, upon motion of _____ and by the following votes of members of the City Council:

AYES: COUNCIL MEMBERS:
MAYOR:

NOES: COUNCIL MEMBERS:

ABSTAIN: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

APPROVED: _____
Mayor of the City of Hayward

DATE: _____

ATTEST: _____
City Clerk of the City of Hayward

APPROVED AS TO FORM:

City Attorney of the City of Hayward