

CITY COUNCIL AGENDA REPORT

August 17, 2021
Economic Development

TITLE: INTRODUCTION OF AN ORDINANCE EXTENDING THE PROVISIONS OF URGENCY ORDINANCE NO. 2211 ESTABLISHING A TEMPORARY 15 PERCENT CAP ON COMMISSION CHARGES BY THIRD-PARTY FOOD DELIVERY SERVICES ON PLEASANTON RESTAURANTS DURING THE COVID-19 PANDEMIC FOR A PERIOD OF ONE YEAR

SUMMARY

The City Council adopted an urgency ordinance on October 6, 2020, establishing a temporary 15 percent cap on commission charges by third-party food delivery services on Pleasanton restaurants during the declared local emergency due to COVID-19. The fee cap on delivery charges aimed to help restaurants manage costs during the local emergency when indoor dining was temporarily restricted, and take-out and delivery services were prevalent. The urgency ordinance is set to expire one year from the effective date – on October 6, 2021 – or upon termination of the local state of emergency, whichever comes first; or as otherwise terminated, modified, or extended by the City Council.

As Alameda County moved to less restrictive tiers in California's Blueprint for a Safer Economy, restaurants were allowed to reopen indoors at reduced capacities. On June 15, 2021, California reopened allowing restaurants to fully open for indoor dining. Although diners are welcomed back indoors, food delivery from local restaurants continues to be a substantial portion of restaurants' business. As restaurants and other businesses work to return to pre-pandemic business activity, City staff has received input from local restaurateurs that an extension of the fee cap on commission charges will assist them as they recover from losses due to the pandemic.

STAFF RECOMMENDATION

Introduce an ordinance extending the provisions of Urgency Ordinance No. 2211 establishing a temporary 15 percent cap on commission charges by third-party food delivery services on Pleasanton restaurants during the COVID-19 pandemic for a period of one year.

FINANCIAL STATEMENT

There is no financial impact to the City.

BACKGROUND

Prior to COVID-19, most restaurants that focused their operating model on in-person dining did not have the needed infrastructure to support a delivery service model that became essential during the pandemic. Restaurants become reliant on third-party food delivery companies which in some cases charged up to 30 percent of the purchase price of items ordered, thereby reducing their ability to maintain profitable levels when indoor and outdoor dining were restricted. After hearing from restaurateurs about the increasing delivery fees from third-party food delivery companies and seeing that other cities in Alameda County and the Alameda County Board of Supervisors (for unincorporated areas of the county) were taking similar actions to cap delivery fees, City staff recommended the City Council adopt an urgency ordinance to cap all commission fees to 15 percent. By unanimous vote, the urgency order was adopted, and the fee cap went into effect immediately on October 6, 2020 (Attachment 2). The urgency ordinance also prohibits a third-party food delivery service from reducing the compensation, including any tip or gratuity, paid to any of its workers or the restaurant because of the cap.

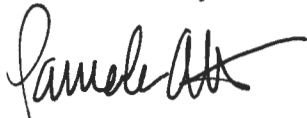
DISCUSSION

Since adoption of Urgency Ordinance No. 2211, third-party food delivery services are adhering to the 15 percent cap on delivery fees. More recently, on June 15, 2021, State and County capacity restrictions were lifted and restaurants are allowed to return to serving customers indoors at full capacity. Notwithstanding this reopening, several Pleasanton restaurateurs have expressed their support of an extension of the fee cap for another year, citing the need to recover from drastic losses due to the pandemic. Additionally, City staff solicited input from the Pleasanton Chamber of Commerce which has expressed support for an extension.

As proposed, the one-year extension (Attachment 1) would cap food delivery service fees at 15 percent per order. It would also prohibit a third-party food delivery service from reducing the compensation, including any tip or gratuity, paid to any of its workers or the restaurant because of the cap. Third-party food delivery companies and restaurants may work out marketing fees in a separate contract if a restaurant wishes to choose a level of marketing support.

Following adoption of the extension by the City Council, the ordinance will go into effect on October 7, 2021, and remain in effect until one year from effective date or as otherwise terminated or modified by the City Council.

Submitted by:


Pamela Ott
Deputy City Manager

Fiscal Review:


Tina Olson
Director of Finance

Approved by:


Nelson Fialino
City Manager

Attachments:

1. Ordinance Extending the Provisions of Urgency Ordinance No. 2211 Establishing a Temporary 15 Percent Cap on Commission Charges by Third-Party Food Delivery Services on Pleasanton Restaurants During the COVID-19 Pandemic for a Period of One Year
2. Urgency Ordinance No. 2211

ORDINANCE _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PLEASANTON EXTENDING THE PROVISIONS OF URGENCY ORDINANCE NO. 2211 ESTABLISHING A TEMPORARY 15 PERCENT CAP ON COMMISSION CHARGES BY THIRD-PARTY FOOD DELIVERY SERVICES ON PLEASANTON RESTAURANTS DURING THE COVID-19 PANDEMIC FOR A PERIOD OF ONE YEAR

WHEREAS, the City Council of the City of Pleasanton finds and declares that:

A. On October 6, 2020, the City Council adopted Urgency Ordinance No. 2211 establishing a temporary 15 percent cap on commission charges by third-party food delivery services on Pleasanton restaurants during the Covid-19 pandemic.

B. Urgency Ordinance No. 2211 expires one (1) year from its effective date, or upon the termination of the local state of emergency, whichever occurs first; or as otherwise terminated, modified or extended by the Pleasanton City Council.

C. The City Council wished to extend the provisions of Urgency Ordinance No. 2211 for a period of one year.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF PLEASANTON DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. The provisions of Urgency Ordinance No. 2211 are extended for a period of one year from the effective date of this Ordinance.

Section 2. A summary of this Ordinance shall be published once within fifteen (15) days after its adoption in "The Valley Times," a newspaper of general circulation, and the complete Ordinance shall be posted for fifteen (15) days in the City Clerk's office within fifteen (15) days after its adoption.

Section 3. This Ordinance shall be effective thirty (30) days after its passage and adoption.

The foregoing Ordinance was introduced at a regular meeting of the City Council of the City of Pleasanton on August 17, 2021 and adopted on September 7, 2021 by the following vote:

Ayes:
Noes:
Absent:
Abstain:

Karla Brown, Mayor

ATTEST:

Jocelyn Kwong, Acting City Clerk

APPROVED AS TO FORM:

Daniel G. Sodergren, City Attorney

URGENCY ORDINANCE NO. 2211

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PLEASANTON ESTABLISHING A TEMPORARY 15 PERCENT CAP ON COMMISSION CHARGES BY THIRD-PARTY FOOD DELIVERY SERVICES ON PLEASANTON RESTAURANTS DURING THE COVID-19 PANDEMIC

WHEREAS, on March 1, 2020, the Alameda County Health Officer declared a public health emergency because of the Novel Coronavirus Disease (COVID-19) outbreak; and

WHEREAS, on March 4, 2020, California Governor Gavin Newsom issued a State of Emergency Proclamation for the State of California; and

WHEREAS, on March 13, 2020, the federal government adopted a Proclamation on Declaring a National Emergency Concerning COVID-19; and

WHEREAS, on March 16, 2020, the Alameda County Health Officer issued an order directing all individuals living in the County to shelter at their place of residence, subject to certain exceptions; and

WHEREAS, on March 17, 2020, under the authority contained in California Government Code section 8634 and Chapter 2.44 of the Pleasanton Municipal Code, the City Manager, acting as Director of Emergency Services, declared the existence of a local emergency in the City of Pleasanton ("City"); and

WHEREAS, on March 23, 2020, the City Council of the City of Pleasanton adopted a resolution ratifying the proclamation of the existence of a local emergency in the City (Resolution No. 20-1139); and

WHEREAS, on March 19, 2020, the Governor of California issued a stay-at-home order to protect the health and well-being of all Californians and slow the spread of COVID-19; and

WHEREAS, the Alameda County Health Officer issued subsequent revised Shelter In Place Orders, including on March 31, 2020, April 29, 2020, May 18, 2020, and June 5, 2020, which included extending restrictions on activities and requiring individuals to shelter at home and allowing for certain specified activities; and

WHEREAS, on June 18, 2020, the Alameda County Health Officer revised the June 5, 2020 Order, effective June 19, 2020, to allow outdoor restaurant dining as well as other specified activities, but not allowing for any indoor dining; and

WHEREAS, on July 13, 2020, the State Public Health Order issued an Order closing all indoor restaurant dining statewide, among other indoor operations; and

WHEREAS, as a result of the public health emergency and the orders issued by health authorities, restaurants in the city have been limited to takeout and delivery offerings (plus limited outdoor dining if available but often with reduced capacity) which has led to a sudden and severe income loss and financial strain for Pleasanton's restaurants, particularly those who operated on thin margins before the pandemic and those who did not have robust takeout and delivery infrastructure or outdoor seating capacity; and

WHEREAS, many consumers use third-party applications and websites to place orders with restaurants for delivery and takeout and these applications and websites typically charge the restaurants between 10 and 30 percent of the purchase price of the order as a commission; and

WHEREAS, 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 straits restaurants are facing in this COVID-19 emergency; and

WHEREAS, state anti-gouging laws and State of California Executive Order N-44-20 provide protections against profiteering and unscrupulous business practices but do not provide any protections in the market for food delivery services; and

WHEREAS, if retail food providers raise their costs or close as a result of high fees from third-party delivery services, their workers will lose employment, thereby affecting their ability to provide for their families, and the community will lose access to essential food services for its residents; and

WHEREAS, continuity of operations among the city's restaurants is critical for the delivery of essential food services to the residents of Pleasanton and to sustain these sources of employment and neighborhood vitality within the city; and

WHEREAS, several Bay Area jurisdictions, including San Francisco, Oakland, Berkeley, Fremont, San Leandro, Dublin, and Livermore have experienced significant increases in delivery fees from third-party delivery services that also operate in Pleasanton and have recently enacted similar measures to cap the fees they may charge at 15 percent; and

WHEREAS, the City has heard from local businesses who attest to increasing delivery fees from third-party delivery services looking to leverage their position during the COVID-19 emergency; and

WHEREAS, capping delivery service fees at 15 percent per order, 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 and cities nationwide that have already adopted 15 percent fee ceilings or similar caps as reasonable emergency regulations; and

WHEREAS, the California Constitution, Article XI, Section 7, provides cities with the authority to enact Ordinances to protect the health, safety, and general welfare of their citizens; and

WHEREAS, California Government Code Section 36937 authorizes the City Council to introduce and adopt an Ordinance it declares to be necessary as an emergency measure to preserve the public peace, health and safety at one and the same meeting if passed by at least a four-fifths affirmative vote; and

WHEREAS, in light of the economic impacts of the public health emergency on local restaurants and the necessity to preserve access to essential services and protect public health and safety in Pleasanton, the City Council finds and determines there is an immediate need to preserve public health, safety and welfare by enacting an Ordinance to cap the per-order fee third-party applications and websites can charge restaurants during the term of this emergency; and

WHEREAS, it is in the public interest to take action to ensure the delivery of essential food services to residents of Pleasanton and to maximize restaurant revenue from the takeout and delivery orders that, with the exception of limited dining operations, are currently one of the primary sources of revenue for these businesses to enable restaurants to survive this crisis and remain as sources of employment and neighborhood vitality in the city; and

WHEREAS, as restaurants return to modified, lower capacity restaurant service, it is unclear how restaurants will fare, as restaurants must create new, physically distanced dining areas and implement increased training and sanitation measures; and

WHEREAS, it is unclear how quickly restaurant patrons will return to restaurant dining and restaurants may continue to see a significant loss of revenue for an ongoing period of time; and

WHEREAS, this Urgency 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, safety, and public welfare and ensuring jobs and economic vitality within the city, while also preventing further spread of the virus.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF PLEASANTON DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. The recitals above are true and correct and are incorporated by reference.

Section 2. The City Council finds and declares that there is a current and immediate threat to public health, safety and/or welfare, and this Urgency Ordinance must be adopted as an urgency matter necessary for the immediate preservation of the public peace, health, and safety. This finding is based upon the facts set forth and referenced herein, including the recitals above, the staff report, any oral and written testimony at the October 6, 2020, City Council meeting, and the entirety of the record before the City Council.

Based on such findings, facts and circumstances, the City Council finds that this Urgency Ordinance should be adopted as an urgency measure for the immediate preservation of the public peace, health and safety, and that this Urgency Ordinance is an emergency response measure aimed at ensuring the vitality and return of the restaurant industry after closure and limited operations, and should go into effect immediately as described below.

Section 3. Food Service Delivery Commissions Cap and Prohibitions.

1. It shall be unlawful for a third party food delivery service to charge a covered establishment a fee or commission per online order for the use of its services that totals more than fifteen percent (15%) of the purchase price of such online order.

2. A third party food delivery service shall offer customers the option to, as a part of an online order for delivery, authorize a tip or gratuity to be paid to food delivery service workers and any covered establishment from which the customer places an order through the third-party food delivery service. It shall be unlawful for a third-party food delivery service to reduce the compensation, including any tip or gratuity, paid to any food delivery service worker, or to reduce any tip or gratuity authorized by a customer to be paid to any covered establishment as a result of the prohibitions stated in this Ordinance.

3. For purposes of this Ordinance, the following definitions apply:

a. "Covered establishment" means a restaurant, eating or drinking establishment, or similar food facility that offers, in a single commercial transaction over the internet, 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. "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.

c. "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 online order.

d. "Third party food delivery service" means any individual, firm, association, corporation or entity through 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 restaurant, eating or drinking establishment, or similar food facility located within the City.

4. Each receipt generated by a third-party food delivery service for either the customer or the covered establishment shall clearly itemize the fees charged, the tips or gratuities paid, and any discounts offered by the covered establishment.

5. A covered establishment or food delivery service worker claiming a violation of this Ordinance shall first provide written notice to the third party food delivery service of the specific section of this Ordinance which is alleged to have been violated and the facts to support the alleged violation. The third party food delivery service shall have seven (7) calendar days from the date of receipt of the written notice to cure any alleged violation including but not limited to providing a refund of any charges exceeding the caps imposed herein.

6. If, after written notice is provided pursuant to section 5 above and the third party food delivery service fails to cure the alleged violation, including failing to provide a refund or continuing to charge fees in violation of this Ordinance, the person or entity claiming a violation of this Ordinance may bring a civil action seeking damages and injunctive relief. The prevailing party in any such action shall be entitled to an award of reasonable attorney's fees.

7. This Ordinance is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the City, its elected and appointed officials, its departments, officers, or employees.

Section 4. If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, the remainder of this Ordinance and the application of such provision to other persons or circumstances shall not be affected thereby.

Section 5. This Ordinance shall become effective immediately upon its adoption pursuant to California Government Code section 36937, however a third party food delivery service shall not be found to be in violation of this ordinance if within one week of the effective date of this ordinance it imposes a fee per online order for the use of its services that totals more than 15 percent of the purchase price of such online order, provided it refunds the portion of that fee that exceeds 15 percent of the purchase price to the covered establishment within five

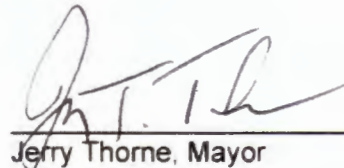
business days. This ordinance shall expire one (1) year from the effective date, or upon the termination of the local state of emergency, whichever occurs first; or as otherwise terminated, modified, or extended by the Pleasanton City Council.

Section 6. The adoption of this Ordinance is exempt from the California Environmental Quality Act ("CEQA") pursuant to Section 21080(b)(4) of the California Public Resources Code and Section 15269(c) of the State CEQA Guidelines because adoption of this Ordinance is to mitigate an emergency and under Section 15061(b)(3) of the State CEQA Guidelines because it can be seen with certainty that there is no possibility that the adoption of this Ordinance may have a significant effect on the environment.

Section 7. A summary of this Ordinance shall be published once within fifteen (15) days after its adoption in "The Valley Times," a newspaper of general circulation, and the complete Ordinance shall be posted for fifteen (15) days in the City Clerk's office within fifteen (15) days after its adoption.

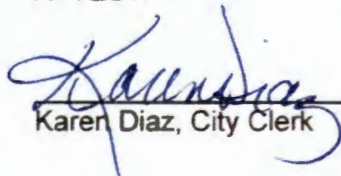
The foregoing Ordinance was adopted as an Urgency Ordinance at a regular meeting of the City Council of the City of Pleasanton on October 6, 2020, by the following vote:

Ayes: Councilmembers Brown, Pentin, Testa, Vice-Mayor Narum
Noes: None
Absent: Mayor Thorne
Abstain: None



Jerry Thorne, Mayor

ATTEST:



Karen Diaz, City Clerk

APPROVED AS TO FORM:



Daniel G. Sodergren, City Attorney