

ORDINANCE NO. 2021-05

AN URGENCY ORDINANCE ESTABLISHING A TEMPORARY CAP ON FEES CHARGED BY THIRD-PARTY DELIVERY SERVICES FOR FOOD ORDERS AND DELIVERIES FROM RESTAURANTS WITHIN CONTRA COSTA COUNTY

The Contra Costa County Board of Supervisors ordains as follows:

Section 1. Findings.

- A. On January 30, 2020, the World Health Organization declared the outbreak of a novel coronavirus that causes the disease named coronavirus disease 2019 (“COVID-19”), a public health emergency of international concern.
- B. On January 31, 2020, as the result of confirmed cases of COVID-19, the U.S. Secretary of Health and Human Services declared a public health emergency nationwide.
- C. On March 3, 2020, Contra Costa Health Services announced the first case of local transmission of the virus causing COVID-19 in Contra Costa County.
- D. On March 4, 2020, Governor Gavin Newsom proclaimed the existence of a state of emergency in California under the California Emergency Services Act (Gov. Code, § 8550 et seq.).
- E. On March 10, 2020, the Board of Supervisors found that due to the introduction of COVID-19 in the County, conditions of disaster or extreme peril to the safety of persons and property had arisen, commencing on March 3, 2020. Based on these conditions, under Government Code section 8630, the Board adopted Resolution No. 2020/92, proclaiming the existence of a local emergency throughout the County.
- F. The legislative bodies of a number of cities in Contra Costa County have also adopted local emergency proclamations due to COVID-19 under Government Code section 8630.
- G. The COVID-19 pandemic has had a detrimental impact on restaurants in Contra Costa County and throughout the state. According to the National Restaurant Association, restaurant employment in California as of November 2020 is at least 20% lower than restaurant employment in February 2020. Restaurants nationally also continued to see job losses between October and November 2020. Restaurant sales fell four percent nationally between October 2020 and November 2020, and sales remain more than 20% below February 2020 levels. Overall total restaurant and food service sales nationally were down \$240 billion from expected levels in 2020. [<https://restaurant.org/management-restaurant/business-operations/covid19/research/economic-analysis>]
- H. As of December 31, 2020, dozens of restaurants in the Bay Area have permanently closed because of the economic impacts connected with COVID-19. Restaurants in Contra Costa County also have experienced revenue losses as a result of the pandemic.

Restaurants in some areas of Contra Costa County also have had to significantly reduce staffing due to pandemic-related public health restrictions.

- I. Contra Costa County is currently in the widespread (purple) tier of the State’s Blueprint for a Safer Economy. In this tier, indoor dining at restaurants is prohibited and outdoor dining is allowed only with modifications. Under these restrictions, restaurants in Contra Costa County rely heavily on carry-out and delivery orders.
- J. The continued vitality of restaurants in Contra Costa County is critical to ensuring the availability of essential food services to the public, sustaining employment among restaurant workers, and preserving the vitality of the local economy and the vitality of neighborhoods and communities.
- K. Some residents in Contra Costa County are unable to prepare food themselves and rely on deliveries of prepared food, including food from restaurants, for their meals.
- L. Many restaurant customers rely on third-party food delivery companies that operate applications or web-based platforms to place orders with restaurants for delivery and takeout. These companies rely on employees or third-party independent contractors to pick up and deliver food from restaurants. These companies charge restaurants a range of fees for orders, deliveries, and marketing services. Some of these fees are charged at high rates that threaten the profitability and ongoing vitality of restaurants in the County, particularly small and family-owned restaurants that are vital contributors to the employment of County residents, commerce in the County, and the identity of neighborhoods and communities in the County. Restaurants in Contra Costa County have a limited ability to negotiate these fees because only a small number of these third-party food delivery companies operate within Contra Costa County.
- M. There is an urgent need for the County to place limits on the fees that third-party firms operating food delivery platforms may charge restaurants. These limits are necessary to preserve the health, safety, and public welfare of residents in Contra Costa County by ensuring the availability of prepared food in Contra Costa County.

Section 2. Definitions. For purposes of this ordinance, the following words and phrases have the following meanings:

- (a) “Customer” means any person, firm, association, or entity that is located in Contra Costa County and places an online order from a restaurant.
- (b) “Delivery firm” means any person, firm, association, or entity that, using a platform, offers or arranges for the sale of food and beverages from a restaurant for same-day delivery or same-day pickup.
- (c) “Fee” means any fee, charge, cost, or other amount.

- (d) “Listing services” means services offered by a delivery firm to make it possible for a customer to place an online order at a restaurant, including (i) listing the restaurant’s information or menu, (ii) processing online orders, and (iii) arranging payment for online orders, including paying any credit card processing fees.
- (e) “Online order” means a customer’s order of food or beverage items from a restaurant that is placed through, or facilitated by, a platform operated by a delivery firm.
- (f) “Platform” means any website, mobile application, or other internet-based service.
- (g) “Promotional services” means services offered by a delivery firm to a restaurant for the purposes of promoting, advertising, or that are otherwise intended to strengthen the business or performance of, the restaurant, and that are independent of order and delivery services or listing services.
- (h) “Purchase price” means the gross price of food or beverage items set by a restaurant and listed on the restaurant’s menu, excluding all taxes, tips, gratuities, and fees imposed by the restaurant or by the delivery service.
- (i) “Restaurant” means any “food facility,” as defined in Health and Safety Code section 113789, that is located in Contra Costa County.

Section 3. Cap on Fees Charged to Restaurants and Required Disclosures.

- (a) Maximum Fees Charged to Restaurants.
 - (1) A delivery firm shall not impose upon a restaurant any fee, or combination of fees, that is more than 15 percent of the purchase price for the order and delivery of an online order.
 - (2) A delivery firm shall not impose on a restaurant any fee, or combination of fees, for non-delivery services, including listing services, that, in total, constitute more than 10 percent of the purchase price for order and delivery of an online order. For purposes of this section 3(a)(2), non-delivery services do not include promotional services.
 - (3) Nothing in section 4(a)(1) or 4(a)(2) prohibits a delivery firm from selling promotional services to a restaurant at prices negotiated between the restaurant and the delivery firm. A delivery firm shall not make the provision of services in section 4(a)(1) or 4(a)(2) contingent upon the restaurant’s purchase of promotional services.
 - (4) A delivery firm shall not, directly or indirectly, influence, limit, impede, or impair a restaurant’s determination or calculation of any purchase price of food or beverage that it sells.

(b) Disclosures.

- (1) Upon written request by a restaurant, a delivery firm shall promptly provide the restaurant a written invoice specifying, in reasonable detail, all fees charged to the restaurant for online orders, for listing services, and for promotional services. A delivery firm shall ensure that the invoice separately lists, and does not combine, fees charged for online orders, fees for listing services, and fees for promotional services.
- (2) A delivery firm shall not list, or cause to list, any restaurant, or the menu of the restaurant, on any mobile application or other Internet service, without the written permission of the restaurant.

Section 4. Enforcement.

- (a) Notice and Refund Request. A restaurant claiming a delivery firm is in violation of this ordinance must provide, within 60 days after the date of the claimed violation, written notice to the delivery firm stating the specific provisions of this ordinance that the restaurant claims the delivery firm violated and the facts known to the restaurant to support the claim of violation. Within 10 days after the date the restaurant gives the delivery firm a written notice of violation, the delivery firm shall respond to the restaurant in writing indicating what, if any, remedial action the delivery firm will take in response to the claimed violation. If the remedial action includes reimbursement of any fees or other amount, reimbursement shall be made to the restaurant within 30 days after the delivery firm's written response.
- (b) Civil Action. A restaurant may pursue all remedies available to the restaurant in superior court or otherwise if the restaurant gives the written notice required by section 5(a) and either (i) the delivery firm fails to timely respond to the notice, or (ii) the restaurant is dissatisfied with the delivery firm's response.

Section 5. Severability. If any provision or clause of this ordinance or the application thereof to any person or circumstance is held to be unconstitutional or to be otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other ordinance provisions or clauses or applications thereof that can be implemented without the invalid provision or clause or application, and to this end the provisions and clauses are declared to be severable. The Board of Supervisors hereby declares that it would have adopted this ordinance and each provision thereof irrespective of whether any one or more provisions are found invalid, unconstitutional, or otherwise unenforceable.

Section 6. Applicability. Government Code section 8634 authorizes the Board of Supervisors to promulgate countywide orders and regulations necessary to provide for the protection of life and property during a local emergency. Pursuant to Government Code section 8634, the regulations in this ordinance shall apply to cities within Contra Costa County and unincorporated Contra Costa County. To the extent that the governing body of a city enacts an ordinance or adopts a regulation that governs the subject matter of this ordinance, that city ordinance or regulation shall supersede this ordinance within that jurisdiction.

Section 7. Declaration of Urgency. This ordinance is hereby declared to be an urgency ordinance necessary for the immediate preservation of the public peace, health, and safety of the County. The facts constituting the urgency of this ordinance's adoption are set forth in Section 1.

Section 8. Effective Date. This ordinance becomes effective immediately upon passage by four-fifths vote of the Board of Supervisors. Unless earlier repealed, modified, or extended by the Board of Supervisors, this ordinance shall expire and be repealed on the date when all applicable public health orders allow all restaurants in the County to seat customers at their indoor dining at 100 percent capacity.

Section 9. Publication. Within 15 days after passage, this ordinance shall be published once with the names of the supervisors voting for and against it in the East Bay Times, a newspaper published in this County.

PASSED ON February 2, 2021, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST: MONICA NINO,
Clerk of the Board of Supervisors
and County Administrator

Board Chair

By: _____
Deputy

[SEAL]

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