



CITY OF MILPITAS AGENDA REPORT (AR)

Item Title:	Receive Staff Report and Consider Adopting Uncodified Urgency Ordinance No. 307 to Temporarily Limit Fees Charged by Third-party Food Delivery Service Providers to Help Local Restaurants During the COVID-19 Emergency
Category:	Community Development
Meeting Date:	10/20/2020
Staff Contacts:	Alex Andrade, 408-584-4036 and Nicole Inamine, 408-586-3045
Recommendations:	<ol style="list-style-type: none">1. Receive staff report on temporarily limiting fees charged by third-party food delivery service providers to help local restaurants during the COVID-19 emergency.2. Following the City Attorney reading the title, move to waive the reading of Ordinance No. 307 and adopt Uncodified Urgency Ordinance No. 307 by a minimum 4/5 vote of the City Council, to be effective October 20, 2020.

Background:

To curb the spread of COVID-19, multiple Health Orders were issued by federal, state, and local governments to encourage residents to Shelter-in-Place and social distance. Milpitas City Manager, Steve McHarris, declared a State of Local Emergency in Milpitas due to COVID-19 on March 12, 2020. Effective March 16, 2020, Santa Clara County was among the first jurisdictions to enact a Shelter-in-Place Order, which prohibited many “non-essential” business operations from continuing, including indoor dining.

The City has undertaken various efforts to assist small businesses during the pandemic including, but not limited to, the Milpitas Microenterprise Grant Program, establishing a Virtual Business Assistance Center, Milpitas Small Business Spotlight Program, and using Constant Contact to inform business representatives of valuable business resources. The City also developed a Temporary Outdoor Dining Program consisting of registration and no-fee for restaurants to participate in outdoor dining.

Of the 225+ food establishments in Milpitas, approximately 75 have registered for the Temporary Outdoor Dining Program. On October 5, 2020, the County of Santa Clara issued a Revised Risk Reduction Order in compliance with the State of California’s Public Health Department’s promotion of the County into the Orange Tier as of October 13, 2020. While the County of Santa Clara enters a new phase of allowed business activity, the County will keep indoor dining levels in the Red Tier, which limits restaurants to 25% capacity or 100 customers, whichever is fewer. While restaurants are slowly expanding their services again, they have yet to return to pre-COVID-19 levels and are struggling to stay afloat. During the pandemic, restaurateurs have increased their use and reliance on third-party delivery services to remain viable during this difficult time. Restaurants partner with third-party food delivery services out of necessity to stay viable during COVID-19. This partnership can result in high fees that compromise the restaurants’ ability to retain sufficient profits.

Analysis:

For many restaurants prior to the COVID-19 pandemic, third-party delivery services had already been an established method for serving customers and as a supplemental revenue stream. The pandemic has forced restaurants to adapt to new restrictions placed on them, making thin margins even thinner. With the prohibition of indoor dining for the past seven months, until last week, and with approximately one-third of restaurants participating in the outdoor dining program, third-party food delivery services have become a significant source of

generating income. The most prominent third-party food delivery services are Uber Eats, Grubhub, and DoorDash. These companies charge varying fee structures to fund operational costs related to the following:

- Delivering food;
- Listing and marketing the restaurant on the third-party delivery service platform;
- Processing orders, including credit card processing fees; and
- General maintenance of the online platform.

Third-party food delivery service providers charge various rates for different options. For example, DoorDash has a variable commission rate depending on the various marketing services a restaurant may decide to utilize. In addition, Grubhub has charged 10% for listing restaurants on their website, 15% for delivery, and a range of prices for additional marketing services. Uber Eats has charged a flat rate commission of 30% that is inclusive of all three elements described above. Restaurateurs are often charged fees ranging from 20% to 30% per order, which is a considerable amount of a restaurant's profits. There are reports that some restaurants have experienced a net loss in profits because of high fees being charged. As such, the proposed temporary third-party food delivery service fee caps can protect restaurants during a time of heavy reliance and the pandemic.

Key Provisions of the Proposed Temporary Urgency Ordinance

Pursuant to Article XI, Section 7 of the California Constitution and California Government Code section 36937, the City Council has the authority to adopt an Urgency Ordinance as an emergency measure to promote stability and safe and healthy operations within the local restaurant sector during the pandemic. The adoption of the proposed Urgency Ordinance requires at least a four-fifths vote of the City Council. The proposed action will help to prevent avoidable business closures, ensure that jobs stay intact, and promote economic vitality within Milpitas. Furthermore, adoption of the Urgency Ordinance will help restaurants with limited bargaining power remain viable, enable the City to ensure continuity of essential food services for its residents, protect restaurants against predatory activity, and ensure that restaurants operate in a safe manner where social distancing can be maintained in accordance with guidance from the State and local health officials.

1) Why 15% and 10% specifically?

A 15% delivery fee cap was first enacted by the Cities of San Francisco and Santa Cruz in April 2020, followed by at least nine other Bay Area cities (Attachment B). Staff recommends a similar 15% fee cap on delivery orders to remain consistent with the precedent set by nearby cities, and the proposed cap would result in significantly less than the typical 30% fees currently charged to restaurants. In addition, the City of South San Francisco has enacted a 10% fee cap for non-delivery orders to further protect consumers. Staff proposes to add a similar 10% fee cap provision because non-delivery orders, defined as when the consumer places an order through a third-party app then picks up the food from the restaurant themselves, do not warrant the same level of service as delivery orders. Staff recognizes that third-party food delivery service providers must still cover operational and service costs, so 10% would be a reasonable middle ground for non-delivery orders.

2) Unlawful to Reduce Delivery Drivers' Compensation

The proposed Urgency Ordinance includes specific language prohibiting third-party service providers from shifting costs by reducing delivery drivers' compensation. Similar provisions have been included in other cities' ordinances and executive orders reviewed by staff.

3) Disclosure of All Charges

By receiving an itemized receipt for each order placed through a third-party service provider, restaurant owners can easily calculate that they have not been charged more than the 15% cap for delivery orders and 10% for non-delivery orders. If a restaurant finds that they have been overcharged, then they have recourse against the third-party food delivery service provider as explained in the following paragraph.

4) Enforcement

Under the proposed Urgency Ordinance, if a third-party food delivery service provider charges a fee greater than 15% of the online purchase order with delivery or greater than 10% of the online order for non-delivery, then the

restaurant owner may pursue civil action if the violation is not cured within 7 business days of the restaurant providing a written notice to the third-party delivery service provider. The restaurant may recover all actual damages resulting from a violation of the Ordinance and reasonable attorneys' fees and costs. Additionally, there is a grace period of 7 days, from October 20 to October 27, immediately following when the Urgency Ordinance takes effect, which allows third-party food delivery service providers the time to understand and make the necessary changes to their platforms to incorporate the terms of the Urgency Ordinance.

5) Temporary Urgency Ordinance

The proposed Urgency Ordinance will expire 90 days after the Milpitas City Council terminates the declared local emergency.

Third-party food delivery services continue to be an important platform for restaurants to remain open during the COVID-19 pandemic. However, high fees charged per order by third-party food delivery service providers make it even harder for restaurants to retain enough or any profits. The proposed temporary Urgency Ordinance will help local restaurants maximize their share of the profits and their chances of surviving this challenging time.

Policy Alternatives:

Alternative 1: The City Council could choose not to adopt the temporary Urgency Ordinance at this time.

Pros: Staff would continue to conduct research on other best practices on helping restaurants through the pandemic.

Cons: Restaurants would continue to struggle by paying high third-party food service delivery fees, which may negatively affect businesses and potentially result in permanent closures.

Reason not recommended: Restaurants would continue to pay high commissions and fees to third-party food delivery service providers during a time when business owners must rely on food delivery and online ordering to be financially viable and comply with COVID-19 Health Orders.

Alternative 2: Adopt more restrictive third-party food service delivery fees than the proposed recommendation.

Pros: Restaurants would be given a better opportunity to maximize their profits and maximize their chances of surviving the pandemic.

Cons: More restrictive fees may result in third-party food delivery service providers reducing marketing and delivery services, which could lead to reduced order volume. A more restrictive ceiling than what other Bay Area cities have already approved may also expose the City of Milpitas to legal liability.

Reasons not recommended: Third-party food delivery service providers have the right to participate in the open market and recoup service costs through fees in order to provide necessary marketing and delivery services to restaurants. The proposed recommendation aligns with actions approved by other Bay Area cities as a precedent has been set.

Staff Outreach

Staff intended to present the proposed Urgency Ordinance to the Economic Development and Trade Commission at its October 12, 2020 meeting; however, a quorum was not reached. Staff's review of similar ordinances included talking with representatives of other Bay Area cities including South San Francisco, Santa Clara, and Fremont. In addition, staff sent emails regarding the proposed Urgency Ordinance to third-party food delivery service providers such as Grubhub, DoorDash, and Uber Eats on October 13, 2020., DoorDash representatives have responded to staff's correspondence and a meeting is scheduled for Friday, October 16.

Fiscal Impact:

If the recommendation is approved by the City Council, staff will continue to dedicate time to educate local restaurateurs about the regulations imposed by the Urgency Ordinance. As the recommended action is in

response to COVID-19's negative economic impacts to local restaurants, staff will continue to record and track time associated with this effort for the potential of state and/or federal reimbursement.

California Environmental Quality Act:

By the definition provided in the California Environmental Quality Act (CEQA) Guidelines Section 15378, this action does not qualify as a "project" for the purpose of CEQA as this action has no potential to result in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.

Recommendations:

1. Receive staff report on temporarily limiting fees charged by third-party food delivery service providers to help local restaurants during the COVID-19 emergency.
2. Following the City Attorney reading the title, move to waive the reading of Ordinance No. 307 and adopt Uncodified Urgency Ordinance No. 307 by a minimum 4/5 vote of the City Council, to be effective October 20, 2020.

Attachments:

- A. Urgency Ordinance No. 307
- B. Bay Area Cities with Limitations on Third-Party Food Delivery Service Fees