

CERTIFICATION OF CITY CLERK
URGENCY ORDINANCE NO. 307

I, Mary Lavelle, City Clerk of the City of Milpitas, do hereby certify that the attached Urgency Ordinance is a true and correct copy of Urgency Ordinance No. 307 of the City of Milpitas, that said Ordinance was duly enacted and adopted by the City Council of the City of Milpitas at a meeting of said City Council held on the 20th day of October, 2020, and that said Ordinance has been published and/or posted in the manner required by law.

WITNESS my hand and the Official Seal of the City of Milpitas, California, this 23rd day of October, 2020.



Mary Lavelle
City Clerk

URGENCY

NUMBER: 307

TITLE: AN UNCODIFIED URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS ESTABLISHING A TEMPORARY LIMIT ON FEES CHARGED BY THIRD-PARTY FOOD DELIVERY SERVICES ON COVERED ESTABLISHMENTS DURING THE COVID-19 EMERGENCY

HISTORY: This Ordinance was adopted by the City Council by a four-fifths (4/5) vote in order to protect the public health, safety and welfare at its meeting of October 20, 2020, upon motion by Councilmember Montano. Said Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES: (5) Mayor Tran, Vice Mayor Nuñez, Councilmembers Dominguez, Montano, and Phan

NOES: (0) None


ABSENT: (0) None

ABSTAIN: (0) None

ATTEST:




Mary Lavelle, City Clerk



Rich Tran, Mayor

APPROVED AS TO FORM:



Christopher J. Diaz, City Attorney

WHEREAS, pursuant to Article XI, Section 7 of the California Constitution, the City of Milpitas may make and enforce all regulations and ordinances using its police powers; 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 four-fifths affirmative votes; and

WHEREAS, 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”); 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 11, 2020, the World Health Organization declared the COVID-19 outbreak a pandemic; and

WHEREAS, on March 12, 2020, the City Manager, in his capacity as Director of Emergency Services, declared a local emergency in the City of Milpitas due to the COVID-19 pandemic, which the City Council affirmed on March 17, 2020; and

WHEREAS, on March 13, 2020, the President of the United States 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 of and addressing the effects of COVID-19; and

WHEREAS, on March 16, 2020, the County of Santa Clara joined Contra Costa, Marin, San Francisco, San Mateo counties and the City of Berkeley on a legal order directing their respective residents to shelter at home for three weeks beginning March 17, 2020 (“Shelter-in-Place Order”). The Shelter-in-Place Order also requires all businesses except essential businesses as described in the Order to cease all activities at facilities located within the County except minimum basic operations and prohibits all public and private gatherings of any number of people except for limited purposes as well as all non-essential travel; and

WHEREAS, the County of Santa Clara’s Public Health Officer has issued subsequent orders that continue to restrict movement and public and private gatherings as set forth in the Health Officer Risk Reduction Order; including restrictions on restaurant dining; and

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

WHEREAS, on October 5, 2020, the County of Santa Clara’s Public Health Officer issued a Revised Risk Reduction Order in compliance with the State Public Health Department’s promotion of the County into the Orange Tier as of October 13, 2020. While the County enters a new phase of allowed business activity, the County will keep indoor dining levels in the Red Tier, which limits restaurants to 25 percent capacity or 100 customers, whichever is fewer; and

WHEREAS, with modified capacity, many restaurants are seeing an increase in carry-out and delivery offerings, placing a sudden and severe financial strain on the industry, particularly on restaurants that are small businesses, a category of businesses which typically already operate on thin margins; and

WHEREAS, as of the date of this Ordinance, many restaurant and food establishments have begun to reopen, and it is critical they operate in a safe manner where social distancing can be maintained in accordance with guidance from the State of California and local health officials; and

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

WHEREAS, in Milpitas, 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; and

WHEREAS, restaurants, and particularly restaurants that are small businesses, 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; and

WHEREAS, given that only a few companies in the marketplace provide such delivery services, small restaurants that do not operate their own delivery service resort to contracting with third-party delivery service providers as a means to compete in the marketplace; and

WHEREAS, capping delivery service per-order fees at 15 percent and non-delivery services at 10 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 and 10 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 in collaboration with food delivery companies; and

WHEREAS, 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; 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 and Chapter 1 of Title V of the Milpitas Municipal Code to protect the peace, health, and safety of the public. The City Council finds that this Ordinance is necessary for the preservation of the public peace, health, and safety of residents living within the City and finds urgency to approve this Ordinance immediately based on the facts described herein and detailed in the staff report. Under Government Code Section 8634, this Ordinance is necessary to provide for the protection of life and property.

NOW, THEREFORE, the City Council of the City of Milpitas does ordain as follows:

SECTION 1. RECORD AND BASIS FOR ACTION

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

SECTION 2. FINDINGS

The City Council hereby finds, determines, and declares that this Urgency Ordinance is necessary for the immediate preservation of the public peace, health, and safety because:

- A. Social distancing and Risk Reduction Health Orders are expected to remain in force for the foreseeable future, threatening loss of employment to more residents and loss of income.
- B. Continuity of operations among the City's restaurants is critical for the delivery of essential food services to the residents of Milpitas and to sustain these sources of employment and neighborhood vitality within the City. As state anti-gouging laws do not provide any protections in the market for food delivery services, this Ordinance is necessary to enable the City to ensure continuity of essential food services for its residents and to protect against predatory activity during the period of emergency. Recent history also shows that the risk of price gouging increases with a sustained state of emergency, and news outlets have already reported

incidents of unjustified increases in fees for food delivery services threatening the continued viability of local restaurants.

- C. Failure to adopt this Urgency Ordinance would result in the avoidable displacement or exposure to COVID-19 of the City's small businesses and to the amplification of the factors that lead to the spread of the virus, as described in the foregoing recitals.

SECTION 3. URGENT NEED

Based on the foregoing recitals and findings, all of which are deemed true and correct, this Ordinance is urgently needed for the immediate preservation of the public peace, health, and safety. This Ordinance shall take effect immediately upon adoption and shall terminate at such time as the Milpitas City Council terminates the declared local emergency, as affirmed by the City Council on March 17, 2020.

SECTION 4. DEFINITIONS

For purposes of this Ordinance, the following definitions shall apply:

- A. "City" means the City of Milpitas.
- B. "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.
- 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. "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.
- E. "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.
- F. "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.

SECTION 5. TEMPORARY LIMIT ON THIRD-PARTY FOOD DELIVERY SERVICE CHARGES

- A. 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 delivery services and more than 10 percent of the purchase price of an online or telephone order for non-delivery services. The provisions of this subsection shall not be construed to limit the ability of any covered establishment to choose to pay up to 10 percent of the purchase price of an online or telephone order to access additional advertising or other products and services offered by any third-party food delivery service. However, any covered establishment that chooses to pay a fee that is greater than the fee set forth in the provisions of this subsection shall be required to affirmatively elect to pay that fee regardless of any contract that is in effect on the effective date of this Ordinance.

- B. Notwithstanding subsection A of this section, a third-party food delivery service may charge a covered establishment a separate fee of up to 3 percent of the purchase price per online or telephone order for the purpose of passing through any credit card convenience fee or surcharge resulting from that transaction. Such fee shall be itemized separately in any agreement, invoice, receipt, or other written statement of charges to a covered establishment, and shall not be considered in determining whether a third-party food delivery service has reached or exceeded the caps imposed herein.
- C. It shall be unlawful for a third-party food delivery service to reduce the compensation rates paid to the delivery service driver or 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.

SECTION 6. DISCLOSURES

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

SECTION 7. ENFORCEMENT

A violation of this Ordinance shall subject the violator to the following:

- A. An action in the Superior Court of the State of California to recover all actual damages resulting from a violation of this Ordinance.
- B. Reasonable attorneys' fees and costs awarded by a court to a plaintiff that prevails in an action against a third-party food delivery service.
- C. A civil action alleging a violation of any provision of this article shall commence only after the following requirements have been met:
 - 1. Written notice is provided by the covered establishment to the third-party food delivery service of the provisions of the Ordinance alleged to have been violated and the facts to support the alleged violation; and
 - 2. The third-party food delivery service is provided 7 business days from the date of the written notice to cure any alleged violation.
- D. Notwithstanding any provision of the Milpitas Municipal Code, or any other ordinance to the contrary, no criminal penalties shall attach for violation of this Ordinance.
- E. A third-party food delivery service shall not be found in violation of this Ordinance if between October 20, 2020 and October 27, 2020, it imposes a fee per online or telephone order for delivery services that totals more than 15 percent of the purchase price of such order, or for non-delivery services that totals more than 10 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 the covered establishment prior to November 3, 2020.

SECTION 8. CALIFORNIA ENVIRONMENTAL QUALITY ACT

This Ordinance is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act ("CEQA") Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. The City Council further finds, under Title 14 of the California Code of Regulations, Section 15061(b)(3), that this Ordinance is nonetheless exempt from the requirements of CEQA in that the activity is covered by the general rule that CEQA applies only

to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

SECTION 9. SEVERABILITY

If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance for any reason is held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

SECTION 10. CERTIFICATION

The City Clerk shall certify as to the adoption of this Urgency Ordinance and shall cause it to be published within fifteen (15) days of the adoption and shall post a certified copy of this Urgency Ordinance, including the vote for and against the same, in the Office of the City Clerk, in accordance with California Government Code Section 36933.