

**CITY OF FREMONT
DIRECTOR OF EMERGENCY SERVICES
EO 2020-07**

AN EXECUTIVE ORDER OF THE CITY MANAGER/DIRECTOR OF EMERGENCY SERVICES ESTABLISHING A TEMPORARY LIMIT OF 15 PERCENT ON FEES CHARGED BY THIRD-PARTY FOOD DELIVERY COMPANIES TO SUPPORT RESTAURANTS IN FREMONT DURING THE COVID-19 PANDEMIC

WHEREAS, international, national, state and local health and governmental authorities are responding on an urgent, emergency basis to an unprecedented outbreak of respiratory disease caused by as a novel coronavirus that emerged in 2019 (“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 broader spread of COVID-19; and

WHEREAS, on March 10, 2020, the County of Alameda (“County”) declared a public health emergency as a result of COVID-19; and

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

WHEREAS, on March 16, 2020, the County of Alameda joined Contra Costa, Marin, San Francisco, San Mateo, Santa Clara 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, on March 17, 2020, the Fremont City Council proclaimed the existence of a local emergency in response to the COVID-19 pandemic; and

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

WHEREAS, on July 13, 2020, the Statewide Public Health Officer issued an order closing all indoor restaurant dining; and

WHEREAS, restricting restaurants to takeout or delivery offerings, and limited indoor and outdoor dining with decreased capacity, has placed a sudden and severe financial strain on many restaurants, particularly those that already operate on thin margins, adding to financial pressures in the industry that predate the COVID-19 crisis; and



WHEREAS, it is in the public interest to take action 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, many consumers use third-party applications and websites to place orders with restaurants for delivery and takeout, and these third-party platforms charge restaurants fees; and

WHEREAS, service agreements between some restaurants and third-party platforms provide that the platform charges the restaurant 10 percent of the purchase price per order while others charge up to 30 percent of the purchase price per order; 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, if retail food providers 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

WHEREAS, capping the per-order fees at 15 percent will accomplish the legitimate public purpose of easing the financial burden on struggling restaurants during this emergency while not unduly burdening third-party platforms; and

WHEREAS, the adoption of this order is necessary for the immediate preservation of the public peace, health, and safety. Social distancing and stay-at-home orders are expected to remain in force for the foreseeable future, threatening loss of employment to more residents and loss of income. Recent history also shows that the risk of price gouging increases with a sustained state of emergency, and news outlets have reported incidents of unjustified increases in fees for food delivery services threatening the continued viability of local restaurants. As state anti-gouging laws do not provide any protections in the market for food delivery services, this order is necessary to enable the City to ensure the continuity of essential food services for its residents and to protect against predatory activity during the period of emergency.

NOW, THEREFORE, I HEREBY PROCLAIM AND ORDER, in my capacity as the City's Director of Emergency Services, the following rules and regulations, which shall apply to persons and places within the City of Fremont:

SECTION 1. Temporary Limit on Third Party Food Delivery Service Charges

1. It shall be unlawful for a Third-Party Food Delivery Service to charge a Covered Establishment 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.
2. For purposes of this Section, the following definitions apply:
 - a. "Covered Establishment" means a restaurant 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 Fremont city limits.
 - 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 Fremont city limits.
 - 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 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, Covered Establishments.
3. The City Manager, or designee, is authorized to implement this Section and issue any necessary guidance or rules consistent with this Section.
4. Each receipt generated by the Third-Party Food Delivery Service for either the customer or the Covered Establishment shall clearly state the fees charged, the gratuities paid, and any discounts offered by the Covered Establishment.
5. This order shall terminate automatically on the date that the City Council terminates the local emergency related to COVID-19. The restoration of dine-in restaurant service does not terminate this order.
6. A Third-Party Food Delivery Service shall not be found in violation of this Section if between July 23, 2020 and July 31, 2020, 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 the fee that exceeds 15 percent of the purchase price to the Covered Establishment prior August 7, 2020.
7. Enforcement and Violations.
 - a. If a Third-Party Food Delivery Service charges a Covered Establishment fees that violate this order, the Covered Establishment shall provide written notice to the Third-Party Food Delivery Service requesting a refund within seven 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 order after the initial notice and seven-day cure period, a Covered Establishment may enforce this order 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.

- b. Violations of this order shall be punishable as set forth in Chapters 1.15 and 1.20 of the Fremont Municipal Code.
- c. This order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the City of Fremont, its departments, officer, or employees.

SECTION 2. CEQA

Under Title 14 of the California Code of Regulations, Section 15061(b)(3) and Section 15378(b), each as a separate and independent basis this Order is exempt from the requirements of the California Environmental Quality Act (CEQA) in that it is not a Project which has the potential for causing a significant effect on the environment.

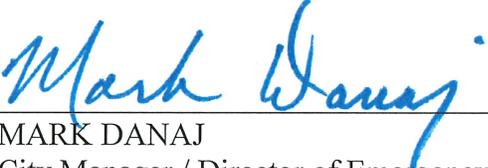
SECTION 3. Savings Clause`

If any section, subsection, sentence, clause or phrase of this Order is for any reason held by a court of competent jurisdiction to be invalid, such a decision shall not affect the validity of the remaining portions of this Order. The Director of Emergency Services hereby declares that he would have issued this Executive Order and each section or subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

SECTION 4. Notice

The City Clerk shall certify to the issuance of this Order and shall cause notice of it to be widely disseminated to the public.

APPROVED and ISSUED this 23rd day of July 2020.



MARK DANAJ
City Manager / Director of Emergency Services