

Agenda Report

July 20, 2020

TO: Honorable Mayor and City Council

THROUGH: Economic Development & Technology Committee (July 15, 2020)

FROM: City Manager

SUBJECT: RESOLUTION RATIFYING SIXTH SUPPLEMENT TO DECLARATION OF LOCAL EMERGENCY PLACING A TEMPORARY CAP ON COMMISSIONS CHARGED BY THIRD-PARTY DELIVERY SERVICE PROVIDERS

RECOMMENDATION:

It is recommended that the City Council:

1. Find that the proposed action is exempt from the California Environmental Quality Act ("CEQA") pursuant to State CEQA Guidelines Section 15061(b)(3), the common sense exemption (formerly the "general rule") that CEQA only applies to projects which have the potential for causing a significant effect on the environment;
2. Direct the City Manager to place a temporary cap on commission fees charged by third-party delivery service providers on retail food establishments in Pasadena; and
3. Adopt a resolution ratifying the Sixth Supplement to Declaration of Local Emergency Placing a Temporary Cap on Commissions Charged by Third-Party Delivery Service Providers.

EXECUTIVE SUMMARY:

This staff report provides information regarding potential efforts that the City can take to support local restaurants who rely on third-party delivery services to fulfill delivery orders during COVID-19. Local restaurants have been severely impacted throughout the pandemic, and the recent rollback of dine-in service will no doubt reduce profit margins even further for businesses that are in peril of financial collapse.

BACKGROUND:

Third-party delivery services such as Grubhub, Postmates, DoorDash and UberEats charge restaurants commission fees that can reach up to 30 percent or more per order, including delivery, subscription, and processing fees, potentially eliminating any profit that a restaurant might realize through an online order. While fees for the use of these services have not increased to existing restaurant customers during the pandemic, restaurants, especially small independently-owned businesses, are increasingly reliant on their services to maintain take-out and delivery options during safer-at-home orders. Restaurants who are new to the use of third party delivery services are likely onboarded at higher rates than early adopters to the applications.

The core components of third-party delivery service fees can include:

Fees/Commissions Paid by the Restaurant to the Third-Party Delivery Service:

- *Menu Fee*- This represents the actual charge for food on the order that can be marked up in combination with the delivery fee by the service provider to achieve a predetermined overall charge.
- *Commission Fee*- This represents a fee charged by the service provider to the restaurant for use of the application and in most instances, credit card processing as well.
- *Pick-Up/Takeout Fee*- Paid as a commission from the restaurant to the service provider for any takeout/pick-up orders placed via a mobile app.
- *Marketing Fee*- This is an optional, add-on fee to increase a restaurant's visibility within search listings on mobile apps.

Fees/Commissions Paid by the Consumer to the Third-Party Delivery Service:

- *Service Fee*- This represents a fee charged by the service provider to the customer that captures the sale from the consumer via their mobile app. It can also include other charges such as a fraud protection fee when transactions occur via credit card.
- *Delivery Fee*- This represents the charge to the customer for having the food delivered by the service provider.
- *Gratuity*- Optional, and earmarked for the person who delivers the food on behalf of the service provider. Gratuities collected via third party delivery services are not pooled or split with other restaurant staff.
- *Taxes*- This represents applicable sales taxes on orders.

Each third party delivery service provider has a different fee structure comprised of any of the core component fees listed above. Fee structures and commission percentages vary between corporate chains and smaller, independently owned restaurants who typically have less bargaining power for more competitive rates. Typically, a restaurant pays a combination of commissions & other fees ranging from 25-30% directly to the delivery service, and then the consumer pays service, delivery, taxes, and gratuities directly to the third-party delivery service.

Comparison of Municipal Approaches to Establishing Commission Caps:

A number of cities across the country have enacted emergency food delivery fee caps since the start of the pandemic. With restaurants operating on already thin margins, COVID-19 safer-at-home orders have only added to the financial pressures that the restaurant industry must now contend. In the Los Angeles region and throughout the state of California, several cities have recently passed ordinances, resolutions and amended executive orders to institute temporary caps on commissions charged by third-party delivery services. Examples of those actions are summarized below:

Municipality	Commission Cap	Details
<i>Cities in California</i>		
Berkeley	15 % Cap on Delivery Fees charged to restaurant; 5% Cap on All Other commission, fees, charges to restaurant	<ul style="list-style-type: none"> - Will remain in place until 90 days after the emergency order ends
Glendale	15% Cap on all Fees charged to restaurant	<ul style="list-style-type: none"> - Unlawful to charge restaurant fees totaling more than 15%, including service fees, delivery fees and other processing fees - Requires itemized receipts to consumers - Option to direct gratuities to restaurants (and paid to restaurants when other payments are transferred)
Los Angeles (City)	15 % Cap on Delivery Fees charged to restaurant; 5% Cap on All Other commission, fees, charges to restaurant	<ul style="list-style-type: none"> - Unlawful to charge a customer a higher price than the price set by the restaurant - Unlawful for third party delivery service to retain any portion of a tip or gratuity - Requires third party delivery service to provide an itemized receipt of menu items (as listed on restaurant menu); delivery fee charged to retail food establishment; each fee, commission or cost other than delivery fee, charged to the

		customer; any tip or gratuity paid to the driver.
Los Angeles (County)		- The report back to the Board of Supervisors on the proposed ordinance is scheduled to occur on July 21, 2020.
San Francisco	15% Fee Cap	- Cap applies to both delivery and customer pick-up orders that are captured by the service provider
Santa Cruz	15% Fee Cap	- Cap applies to both delivery and customer pick-up orders that are captured by the service provider
Santa Monica	15% Cap on Delivery Fees charged to restaurant, 5% all other commissions, fees or charges to restaurant	- Caps apply to both delivery and customer pick-up orders that are captured by the service provider
Cities Across the United States		
Cambridge, MA	10% Fee Cap	
Chicago, Il	No Cap	- Mayor has instead opted for a transparency requirement on receipts to ensure fair business practices while maintaining innovation within the industry
Cincinnati, Oh	15% Fee Cap	
District of Columbia	15% Fee Cap	
State of New Jersey	20% Fee Cap	
New York City, NY	15% Fee Cap	
Portland, OR	10% Fee Cap	
Philadelphia, PA	15% Fee Cap	
Seattle, WA	15% Fee Cap	- 100% of tips/gratuities go to delivery drivers - Provisions of the emergency ordinance make it unlawful for third party delivery services to

		reduce driver compensation rates as a result of this action
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Options & Alternatives for Third-Party Commission Caps:

In each of the examples above, the cap on third-party commissions was approached differently, giving consideration to the core components that comprise service fees. In considering an approach that supports struggling restaurants while not unduly burdening third-party platforms, the following options are consistent with ordinances, resolutions and executive orders enacted by other municipalities.

- **Level of Cap (Percentage)** - This approach would require a percentage cap on third-party delivery service fees.
- **Determine Applicable Fees Subject to a Cap** – This approach would require a cap on delivery service fees in addition to a cap on all other service or processing fees incurred through a transaction.
- **Length of Order** – Most, if not all, of the ordinances, resolutions and executive orders have sunset provisions that end when the state of local emergency ends, when dine-in restaurant service resumes, or is post-dated by a set number of days following the conclusion of the stay-at-home orders.
- **Protection of Gratuities** -This approach would take into consideration protections for wages and tips of gig workers employed by third-party delivery service providers. In addition, consideration could be given for the protection of gratuities to restaurants workers at retail food establishments.

Survey of Pasadena Restaurants

City staff conducted an anonymous survey of Pasadena restaurateurs to collect feedback on their use of third party delivery services. The survey was available for 72 hours and was emailed out to all retail food establishments with an email address on file with the city. The survey findings are summarized below:

- 66 Respondents
- 89% of respondents utilize a third-party delivery service
- Majority of respondents utilize Postmates, Grubhub, DoorDash (several other smaller services were also mentioned)
- Commission fees paid by the restaurant to the service provider ranged from 16% - 31%, with a majority of the Respondents paying commissions between 25-30%
 - Customer pays a service & delivery fee directly to the service provider
 - Restaurant pays an additional commission of 10-17% on orders captured from the app for take-out/pick-up orders
- 92% of Respondents support a temporary cap on commissions paid to third-party service providers

The survey also allowed restaurants to provide additional comments for consideration and to give context to their answers. The following comments and anecdotes were shared in the survey:

- “Please enact a permanent cap on commissions as delivery service fees are significantly impacting our revenues on take-out orders. In some cases we lose money on delivery orders, however we cannot raise our menu prices to adjust because then our prices would be too high. We do not have the infrastructure or ability to provide our own delivery.”
- “Lots of businesses on Colorado Blvd. are dependent on corporate customers who are working remotely. As a result, we have lost 70% of normal business. We need a cap to find new customers at affordable rates. A cap would help small restaurants who have little negotiating power and we know that rates vary a great deal from restaurant to restaurant.”
- “After a (third party delivery service) takes their commission, and our overhead is paid, we do not make enough of a profit. A cap is necessary for us to continue utilizing a third party delivery service, and given current operating conditions, it is imperative that we are able to offer delivery as an option.”
- “With third party delivery services, restaurant workers aren’t tipped, as the customer tip only goes to the driver.”
- In addition to comments regarding a temporary cap, one restaurateur indicated that the city should not enact any regulations on third party delivery services while another restaurateur asked that a permanent cap be considered.

RECOMMENDATION:

It is recommended that the City Council direct the City Manager to issue a local emergency supplement placing a temporary cap of 15 percent on commissions charged by third party delivery services to retail food establishments in Pasadena. Given the variety of options available, a 15 percentage cap would be the easiest to monitor, and enforce as needed. However, to remain consistent with the City of Los Angeles, the Council could also establish a cap for any other combination of fees, commissions or costs incurred by the service provider and passed through to the retail food establishment. To improve transparency, the recommendation could include a requirement that third-party delivery services disclose to the customer each fee charged through a transaction totaling no more than the allowable percentage cap. In addition, the Council could require that the drivers receive the entire gratuity, if paid by the customer.

COUNCIL POLICY CONSIDERATION:

The proposed action is consistent with the City Council’s strategic goal to ensure public safety by sustaining and enhancing the City’s ongoing response to COVID-19 to protect the health and safety of all those who reside, visit or work within the City of Pasadena.

ENVIRONMENTAL ANALYSIS:

The action proposed herein is exempt from review pursuant to the California Environmental Quality Act by State CEQA Guidelines Section 15061(b)(3), the common sense exemption (formerly 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. The proposed resolution ratification does not involve any direct physical changes in the environment. Therefore, the actions proposed herein are exempt from CEQA per Section 15061(b)(3) (common sense exemption).

FISCAL IMPACT:

The actual fiscal impact associated with enforcement of the proposed regulations is currently unknown, but is not expected to be significant. The total costs of responding to COVID-19 are unknown at this time due to evolving conditions. With the California state declaration of a health emergency, local COVID-19 response efforts may be eligible for state or federal reimbursement. All COVID-related expenditures will continue to be recorded and tracked in the General Fund using existing appropriations.

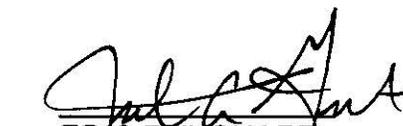
Respectfully submitted,


STEVE MERMELL
City Manager

Prepared by:


for MICHELLE GARRETT
Project Manager

Approved by:


for ERIC DUYSHART
Economic Development Manager