

ORDINANCE NO. _____

**AN URGENCY ORDINANCE OF THE CITY OF SAN JOSE
ENACTING A FEE CAP ON THIRD PARTY FOOD
DELIVERY SERVICES, AND SETTING FORTH THE FACTS
CONSTITUTING SUCH URGENCY**

WHEREAS, conditions of extreme peril to the safety of persons and property have arisen within the City, based on the following:

1. A novel coronavirus (named "COVID-19") was first detected in Wuhan City, Hubei Province, China, in December 2019. The Centers for Disease Control and Prevention (CDC) considers the virus to be a very serious public health threat with outcomes ranging from mild sickness to severe illness and death. COVID-19 has spread globally to over 85 countries, infected more than 95,000 people, and killed more than 3,000 individuals.
2. On January 31, 2020, the United States Secretary of Health and Human Services declared a Public Health Emergency.
3. In February 2020, the number of cases of COVID-19 in Santa Clara County ("County") increased, causing the County to declare a local health emergency and proclaim a local emergency and the City to gradually increase its Pandemic Response Stage from 1 to 3.
4. By March 4, 2020, the number of confirmed cases of COVID-19 had increased to eleven (11) in the County with confirmed community spread. The California Department of Health Services reported its first death related to COVID-19 and the Governor of California declared a state of emergency.

5. On March 4, 2020, the City partially activated its Emergency Operations Center and began scaling up resources and response in preparation for event and facility closures, increased telecommuting/ work-from-home capacity for employees, augmentation of communication to employees and coordination with partner agencies, as well as other work-place and program modifications to ensure the continuity of City operations while protecting the safety of our employees, providing effective communication, and supporting the County.
6. By March 5, 2020, the number of confirmed cases of COVID-19 had increased to twenty (20) in the County, with strong evidence of increasing community spread. The County expanded its guidance and the City escalated its Pandemic Response Stage from 3 to 4.
7. On March 16, 2020, the Santa Clara County Public Health Officer issued a Shelter in Place Order.
8. On March 31, 2020, the Santa Clara County Public Health Officer issued another Order to Continue Sheltering in Place until May 3, 2020.
9. On April 13, 2020, the City began its planning efforts to shift out of Pandemic Response Stage 5, "Extremely High Response," and into Stage 6, "Initial Re-opening with No Vaccine."
10. On April 15, 2020, Governor Gavin Newsom released information on criteria that will determine when to lift the state's shelter-in-place.
11. On April 16, 2020, President Trump released guidelines for a 3 Phased Approach to Opening Up America Again.

12. On May 4, 2020, the Santa Clara County Public Health Officer extended the Shelter in Place Order to May 31, 2020, with some modifications, and Governor Gavin Newsom announced an update on California's progress toward Stage 2 reopening and updated industry guidance to help drive reopening for some sectors, including retail, manufacturing and logistics, with modifications, beginning May 8, 2020.
13. On May 5, 2020, the Santa Clara County Public Health Officer released information regarding COVID-19 indicators and next steps for reopening.
14. On May 7, 2020, health orders in Alameda, Contra Costa, Marin, San Francisco, San Mateo, and Santa Clara counties and the City of Berkeley loosened restrictions on construction as well as outdoor activities and businesses, beginning May 8, 2020.
15. On May 18, 2020, the Santa Clara County Public Health Officer announced amendments to the current Shelter in Place Order to allow some businesses to resume operating, with modifications based on significant progress in controlling the spread of COVID-19, and extending the Shelter in Place order until rescinded or modified.
16. On June 5, 2020, the Santa Clara County Public Health Officer issued an update to the Shelter in Place Order, allowing several new categories of businesses and activities to reopen, subject to conditions and limitations, while keeping key restrictions in place, requiring people to stay in their homes except when engaging in certain essential or allowed activities.

17. On July 2, 2020, the Santa Clara County Public Health Officer issued a new Risk Reduction Order that puts in place long-term risk reduction measures, allowing certain additional activities to resume, but also putting in place significant additional containment measures to control the spread of COVID-19, effective July 13, 2020.
18. On July 12, 2020, Santa Clara County was added to the State of California's ("State") Monitoring list, and on July 13, 2020, Governor Gavin Newsom announced that counties on the State's Monitoring List for three consecutive days must close some indoor business operations. In light of the Governor's announcement, Santa Clara County ordered appropriate businesses and operations to close effective July 15, 2020 at 12:01 a.m.
19. On August 28, 2020, Governor Gavin Newsom unveiled a new State framework to replace the former State County Monitoring List and Variance Processes effective Monday, August 31, 2020. This blueprint provided a new color coded four-tier framework, with different restrictions on activity for each tier.
20. On August 31, 2020, a new State framework went into effect with revised criteria for either loosening or tightening restrictions on business-related activities. This "Blueprint for a Safer Economy" creates a tiered system of COVID-19 restrictions that all counties in California must follow.
21. On September 8, 2020, Santa Clara County moved to Tier 2 (Red), per the State's Blueprint for a Safer Economy, which allows for personal care businesses to operate indoor and an increased capacity allotment for specific businesses.

22. On September 30, 2020, the State added a COVID-19 Equity requirement to its Blueprint for a Safer Economy framework. Under this new state requirement, counties with more than 106,000 residents must bring infections down in these places and invest heavily there in testing, contact tracing, outreach and providing means for infected people to isolate. The measure is designed to ensure that test positivity rates in the most disadvantaged neighborhoods do not significantly exceed a county's overall rate. Counties will not be permitted to reopen their economies further unless they reduce coronavirus infections in the hardest-hit places where the poor, African American, Latinos, Pacific Islanders, and essential workers live.

23. On October 13, 2020, as the County's COVID-19 case positivity rate continue to steadily decline, the State authorized the County to move to Tier Three (Orange Tier) of the State's Blueprint for a Safer Economy, the County revised its Public Health Order on October 14, 2020 to reflect the changes. All Santa Clara County residents and businesses must follow both the State and County Health Officer Orders, and where there is a conflict between the two, the stricter Order must be followed.

24. On December 3, 2020, the State issued a new Regional Stay at Home Order that creates five Regions within California and imposes tight restrictions on any Region in which ICU capacity drops below 15%.

25. Under the State's December 3, 2020 Regional Stay at Home Order and the County Health Officer's December 4, 2020 Mandatory Directive Implementing State's Stay At Home Order, all dining establishments (including restaurants, bars, wineries, and other food service facilities) and smoking lounges are temporarily prohibited from providing any on-site

service. Dining establishments and smoking lounges may provide only curbside pickup, takeaway, and/or delivery service.

26. The efforts required to prepare for, respond to, mitigate, and recover from the emergency conditions caused by COVID-19 have imposed and will continue to impose extraordinary requirements and expenses on the City.

WHEREAS, access to food is essential, and it is therefore necessary to take steps to support restaurants and other food providers so they may continue to perform an essential function of providing access to food via delivery and pick-up options and to address food insecurity to those who are unable to obtain food in other ways; and

WHEREAS, for the above stated reasons, it is necessary to take action to maximize restaurants' revenue from delivery and pick-up orders that are a lifeline and currently the sole source of revenue for the City's restaurant and food industry to enable these businesses to survive the impacts of the COVID-19 pandemic and continue supporting the workforce and contributing to the vitality of the City's economy; and

WHEREAS, many consumers are eager to support local restaurants by using third-party, app-based delivery platforms to place orders with those restaurants, and these third-party platforms charge commission fees based on the purchase price; and

WHEREAS, while the service agreement between restaurants and third-party delivery platforms vary, all of these agreements include delivery commission fees that can include commission fees of up to 30% or more of the purchase price, creating an economic hardship for these food providers; and

WHEREAS, capping the delivery commission fees on delivery or pick-up orders while restaurants are unable to provide unrestricted dine-in service will ease the economic

hardship for these essential service providers, while not unduly burdening third-party, app-based delivery platforms; and

WHEREAS, during this time of local economic shutdown and uncertainty caused by the COVID-19 pandemic, many vulnerable workers have found work as delivery drivers for these third-party delivery platforms to financially support themselves and their families, and may be economically impacted if third-party, app-based delivery platforms reduce compensation rates to these delivery drivers as a result of the cap on delivery commission fees, and therefore, it is necessary to take action to prevent such under-compensation; and

WHEREAS, pursuant to section 605 of the City Charter, this urgency ordinance must be "adopted as and declared by the Council to be an urgency measure necessary for the immediate preservation of the public peace, health or safety, containing a statement of the facts constituting such urgency"; and

WHEREAS, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code (collectively, "CEQA"), the Director of Planning, Building and Code Enforcement has determined that the provisions of this Ordinance do not constitute a project, under File No. PP17-008 (General Procedure and Policy Making resulting in no changes to the physical environment); and

WHEREAS, the City Council of the City of San José is the decision-making body for this Ordinance; and

WHEREAS, this Council has reviewed and considered the "not a project" determination under CEQA prior to taking any approval actions on this Ordinance;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Title

This Ordinance shall be known as the “Third Party Food Delivery Fee Cap Ordinance.”

SECTION 2. Policy and Purposes Declaration

This Ordinance is necessary for the immediate preservation of the public peace, health or safety for all of the reasons described herein. The limitations on Delivery fees and prohibition of reduction of compensation to Third Party Food Delivery Platform drivers imposed by this Ordinance are created pursuant to the City's general police powers to protect the health, safety, and welfare of its residents and exists in addition to any rights and obligations under state and federal law.

SECTION 3. Effective Date; Termination Date

This Ordinance shall be effective immediately upon adoption and shall remain in effect through the earlier of June 30, 2021 or upon the termination of the Proclamation of Local Emergency, and thereafter is repealed unless extended by Ordinance.

SECTION 4. Definitions

- A. “Covered establishment” means a restaurant, or a similar retail food establishment, that sells ready to eat food or beverages from one or more locations in the State. This term does not include grocery stores or convenience stores. This term does not include chain restaurants, except for franchisees that own or operate three or fewer restaurant locations within the City.

- B. “Delivery fee” means a commission fee charged by a third-party food delivery service for providing a covered establishment with a service that delivers food or beverages from the covered establishment to customers. The term does not include any other fee that may be charged by a third-party food delivery platform to a covered establishment, such as optional fees paid to obtain additional products or services, or fees related to processing the online order.
- C. “Online order” means an order placed by a customer through a platform provided by the third-party food delivery service, including a telephone order.
- D. “Purchase price” means the menu price of an online order, excluding taxes, gratuities or any other fees that may make up the total cost to the customer of an online order.
- E. “Third-party food delivery platform” means a website, mobile application, or other internet service that facilitates the sale and same-day delivery or same-day pickup of ready to eat food or beverages provided by covered establishments in the City.

SECTION 5. Fee Structure

- A. A Third-party food delivery platform shall not charge a Covered establishment a Delivery fee that totals more than 15% of the Purchase price of an Online order.

- B. A third-party food delivery platform shall not charge a Covered establishment a total fee amount for the use of their all services, including the Delivery fee, that totals more than 18% of the Purchase price of an Online order.

- C. A Covered establishment may agree to pay a Third-party food delivery platform a fee that exceeds the limits in sections 1 and 2 to obtain optional products or services, including, but not limited to, advertising, marketing, or access to customer subscription programs, in addition to delivery or pickup service.

SECTION 6. Compensation to Delivery Drivers

A Third Party platform shall not reduce compensation to food delivery drivers, including the reduction of any amount of tips provided to delivery drivers, that results from the restrictions on Delivery fees as set forth in this order.

SECTION 7. Refund Period

A Third party delivery platform that charges fees to Covered establishments in excess of the fees identified in this declaration shall have fourteen (14) days from the time the excess fees were charged to refund the excess fees.

SECTION 8. The City Council of the City of San José hereby finds that there is a current and immediate threat to the public health, safety and/or welfare and a need for immediate preservation of the public peace, health, or safety that warrants this urgency measure, which finding is based upon the facts stated above and in the memorandum to the Rules and Open Government Committee from Mayor Liccardo and Councilmember Diep dated December 3, 2020 as well as any oral or written testimony at the December 15, 2020 City Council meeting.

SECTION 9. This Ordinance is declared by the City Council to be an urgency measure necessary for the immediate preservation of the public peace, health or safety. The facts constituting such urgency are all of those certain facts set forth in Section 2 of this Ordinance.

ADOPTED this _____ day of _____, 2020, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI TABER, CMC
City Clerk