



City of South San Francisco

P.O. Box 711 (City Hall,
400 Grand Avenue)
South San Francisco, CA

City Council

Ordinance: ORD 1603-2020

File Number: 20-563

Enactment Number: ORD 1603-2020

URGENCY ORDINANCE OF THE CITY OF SOUTH
SAN FRANCISCO TO ESTABLISH A TEMPORARY
CAP ON COMMISSION CHARGED BY
THIRD-PARTY FOOD DELIVERY SERVICES ON
LOCAL RESTAURANTS DURING THE COVID-19
PANDEMIC.

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 has been named "coronavirus disease 2019," abbreviated COVID-19, ("COVID-19"); and

WHEREAS, on January 30, 2020, the World Health Organization ("WHO") declared COVID-19 a Public Health Emergency of International Concern, and on January 31, 2020, the United States Secretary of Health and Human Services declared a Public Health Emergency; and

WHEREAS, on March 2, 2020, the County of San Mateo activated its Emergency Operations Center (EOC) to support the local County Health response to COVID-19; and

WHEREAS, on March 3, 2020, the County of San Mateo Director of Emergency Services issued a proclamation Declaring the Existence of a Local Emergency in the County and the County of San Mateo Health Officer issued a Declaration of Local Health Emergency Regarding Novel Coronavirus 2019 (COVID-19); and

WHEREAS, on March 4, 2020, California Governor Gavin Newsom 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. The proclamation comes as the number of positive California cases rises and following one official COVID-19 death; and

WHEREAS, on March 10, 2020, the Board of Supervisors of the County of San Mateo adopted a resolution Ratifying and Extending the Declaration of a Local Health Emergency; and

WHEREAS, on March 11, 2020, due to an escalating increase in the number of cases in San Mateo County, under South San Francisco Municipal Code Chapter 2.72, the City Council of the City of South San Francisco ("City") adopted a resolution proclaiming a local State of Emergency related to the Novel Coronavirus 2019 (COVID-19); and

WHEREAS, on March 11, 2020, the San Mateo County Health Officer issued a legal order barring unauthorized visitors and non-essential personnel from licensed skilled nursing facilities in the County; and

WHEREAS, on March 12, 2020, San Mateo County Health Officer issued an order prohibiting mass gatherings of 250 or more persons and as defined in the order, applicable to public and private gatherings and includes exceptions for houses of worship, museums, malls, hospital and medical facilities, and the normal operations of hotels and airports; and

WHEREAS, on March 13, 2020, the President of the United States of America 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 13, 2020, San Mateo County Health Officer issued a School Operations Modification Order requiring all schools to dismiss students from regular attendance; and

WHEREAS, on March 14, 2020, San Mateo County Health Officer issued an update regarding the legal order prohibiting mass gatherings, further limiting public or private gatherings of more than 50 persons as defined in the order; and

WHEREAS, on March 16, 2020, seven health officers within six Bay Area counties, including San Mateo County, took a unified step to slow the spread of novel coronavirus (COVID-19) and preserve critical health care capacity across the region by issuing a legal order directing their respective residents to shelter at home for three weeks beginning March 17, 2020 ("Shelter-in-Place Order"). The order limits activity, travel and business functions to only the most essential needs. The guidance comes after substantial input from the U.S. Centers for Disease Control and Prevention (CDC) and best practices from other health officials around the world; and

WHEREAS, on March 16, 2020, California Governor Gavin Newsom issued Executive Order N-28-20 ordering waiver of time limitations set forth in Penal Code section 396(f) concerning protections against residential evictions, and suspending any provision of state law that would preempt or otherwise restrict a local government's exercise of its police power to impose substantive limitations on residential or commercial evictions related to COVID-19. The order further suspended statutory causes of action for judicial foreclosure, including Code of Civil Procedure section 725a *et seq.*; the statutory cause of action for unlawful detainer, Code of Civil Procedure section 1161 *et seq.*; and any other statutory cause of action that could be used to evict or otherwise eject a residential or commercial tenant or occupant of residential real property after foreclosure; and

WHEREAS, on March 19, 2020, Governor Newsom issued Executive Order N- 3 33-20, which, imposed a State Shelter Order requiring individuals to remain in their places of residence except as needed to maintain continuity of operations of critical infrastructure, access necessities such as food, prescriptions and healthcare, or engage in other authorized activities; and

WHEREAS, the County of San Mateo previously requested and was approved for a variance allowing the County to re-open businesses and activities in accordance with the re-opening stages outlined in the State Resilience Roadmap for California; however, since the State and County began re-opening, the number of identified COVID-19 cases continues to grow; and

WHEREAS, on July 13, 2020, all counties statewide were mandated to shut down indoor activities such as museums, zoos, dining and theaters, and bars, both inside and outside, were also required to close, and the State Public Health Officer issued an order closing all indoor restaurant dining; and

WHEREAS, the State Department of Health is maintaining a watch list of counties that are being monitored for worsening COVID-19 trends, and if a county is on the watch list for three days or longer, the State will order them to further roll back reopening; and

WHEREAS, as of July 29, 2020, San Mateo County has been placed on the watch list, and if it remains on the watch list for three consecutive days, it will be required to roll back some of its re-opening steps; and

WHEREAS, as of July 30, 2020, there have been 5,306 confirmed COVID-19 cases, and 118 COVID-19 related deaths, within the County, and 488,000 confirmed COVID-19 cases, and 8,908 COVID-19 related deaths, State-wide; and

WHEREAS, both large and smaller events across the Bay Area and in South San Francisco are cancelling or being postponed due to the County's and State's Orders and recommendations at all levels of government to cancel large gatherings amid concerns over spread of the virus. These cancellations and postponements cause loss in revenue for the event, as well as surrounding local businesses including eating and drinking establishments that rely on such events to bring in patrons to their businesses; 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, 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, based on surveys conducted by City staff and the South San Francisco Chamber of Commerce as of the date of this ordinance, many restaurant and food establishments within the City have been relying on delivery and pick up to generate revenue, 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 South San Francisco and to sustain these sources of employment and neighborhood vitality within the City; 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; service agreements between some restaurants and third-party platforms provide that the platform charges the restaurant between five percent (5%) to thirty percent (30%) of the purchase price per order; and

WHEREAS, restaurants, eating and drinking establishments, and particularly those that are small businesses, have limited bargaining power to negotiate lower fees with third-party platforms given the market saturation of third-party platforms and the financial straits restaurants are facing during this period of 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% and non-delivery services at 10% 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% cap and 10% cap is based on the findings and experience of other California cities and cities nationwide that have already adopted 15% fee ceilings or similar caps as reasonable emergency regulations in collaboration with food delivery companies; and

WHEREAS, the California Constitution, Article XI, Section 7, provides cities and counties with the authority to enact ordinances to protect the health, safety, and general welfare, of their citizens; 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, the City Council finds and determines that there is an immediate need to preserve public health, safety and welfare given the negative economic impacts derived from the COVID-19 pandemic, and that regulating the relations between landlords and tenants is essential to preventing the spread of COVID-19 in the City and thereby serve the public peace, health, and safety; and

WHEREAS, it is in the public interest to take action to ensure the delivery of essential food services to residents of South San Francisco and 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, 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, safety, and public welfare and ensuring jobs and economic vitality within the City, while also preventing further spread of the virus; and

WHEREAS, an urgency ordinance that is effective immediately is necessary to avoid the continuing and immediate threat to public peace, health, and safety as 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 these Recitals.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SOUTH SAN FRANCISCO, DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. Findings

1. The City Council of the City of South San Francisco finds that all Recitals are true and correct and incorporated herein by reference.
2. The City Council of the City of South San Francisco 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 in the Recitals above, the accompanying staff report, and any oral and written testimony at the August 26, 2020 City Council meeting.
3. The City Council finds and declares that the adoption and implementation of this ordinance is an urgency measure necessary for the immediate preservation and protection of the public peace, health and safety as detailed above and as this ordinance is an emergency response measure aimed at ensuring the vitality and return of the restaurant industry after closure and limited operations. The facts constituting such urgency are all of those certain facts set forth and referenced in this Ordinance and the entirety of the record before the City Council.

SECTION 2. Food Service Delivery and Non-Delivery Commissions Cap

- A. Commissions Cap and Prohibitions. During the period of declared local emergency, and for one hundred and eighty (180) days thereafter, it shall be unlawful for any third-party food delivery service to do any of the following:
 1. Charge a restaurant, eating or drinking establishment, or similar food facility located within the City:
 - a. A fee, commission, or cost of more than fifteen percent (15%) of the purchase price per online order for delivery services; and
 - b. A fee, commission or cost of more than ten percent (10%) of the purchase price per online order for non-delivery services.
 - c. As used in this section, fee, commission or cost includes fees charged for listing, delivery, and marketing services, as defined herein.
 2. Limit or impede in any manner the ability for a restaurant, eating or drinking establishment, or similar food facility to otherwise determine the purchase price for food or beverage items listed in their respective menus.

3. List any restaurant, eating or drinking establishment, or similar food facility, or their respective menus in the delivery service's website, mobile application or other internet service, without the specific consent of the restaurant, establishment or facility.

B. Tips and Gratuities: no reduction of compensation.

1. A third-party food delivery service shall offer customers the option to, as a part of an online order for delivery or non-delivery service, authorize a tip or gratuity to be paid to food delivery service workers and any restaurant, eating or drinking establishment, or similar food facility from which the customer places an order through the third-party food delivery service.
2. It shall be unlawful for a third-party food delivery service to reduce the compensation, including any tip or gratuity, paid to any food delivery service worker, or to reduce any tip or gratuity authorized by a customer to be paid to any restaurant, eating or drinking establishment, or similar food facility, as a result of the prohibitions stated in this ordinance.

C. Enforcement.

1. A restaurant, eating or drinking establishment, or similar food facility, or food delivery service worker claiming a violation of this ordinance shall first provide written notice to the third-party food delivery service of the specific section of this ordinance which is alleged to have been violated and the facts to support the alleged violation. The third-party food delivery service shall have seven (7) business days from the date of receipt of the written notice to cure any alleged violation including but not limited to providing a refund of any charges exceeding the caps imposed herein.
2. If, after written notice is provided pursuant to subsection (D)(1) above and the third-party food delivery service fails to cure the alleged violation, including failing to provide a refund or continuing to charge fees in violation of this ordinance, the person or entity claiming a violation of this ordinance may bring a civil action seeking damages and injunctive relief. The prevailing party in any such action shall be entitled to an award of reasonable attorney's fees.
3. This ordinance 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 South San Francisco, its departments, officers, or employees.

D. Definitions. For the purposes of this ordinance, the following definitions shall apply:

1. "Customer" means any person, firm, or association who makes use of a third-party food delivery service for the purpose of obtaining food or beverage items from a restaurant, eating or drinking establishment, or similar food facility located within the City.

2. "Listing services" means services offered by a third-party food delivery service to list the information and/or menu of a restaurant, eating or drinking establishment, or similar food facility located within the City and processing online orders including paying any credit card processing fees.
3. "Marketing services" means services offered by a third-party food delivery service to a restaurant, eating or drinking establishment, or similar food facility located within the City for the purposes of promoting, advertising, or otherwise strengthening the business or performance of the restaurant, establishment or facility on the mobile application, website or other internet services of the third-party food delivery service.
4. "Online order" means an order for a consumer food item placed through a platform provided by a third-party food delivery service for delivery or pickup within the City.
5. "Purchase price" means the menu price of an online order, excluding taxes, gratuities, and any other fees which may contribute to the total cost to the customer of an online order.
6. "Third-party food delivery service" means any individual, firm, association, corporation or entity through website, mobile application or other internet service that offers or arranges for the sale of consumer food or beverage items for same-day delivery or same-day pickup from a restaurant, eating or drinking establishment, or similar food facility located within the City.

SECTION 3. Severability.

If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, the remainder of this Ordinance and the application of such provision to other persons or circumstances shall not be affected thereby.

SECTION 4. Effective Date and Term.

This Urgency Ordinance shall become effectively immediate upon its adoption pursuant to California Government Code Section 36937. This Urgency Ordinance shall expire one hundred and eighty (180) days from the date that the South San Francisco City Council terminates the local emergency proclaimed pursuant to Resolution No. 35-2020 related to COVID-19, unless such term is otherwise specifically amended by the City Council. The City Council shall review this ordinance prior to its expiration and determine whether to extend its provisions.

SECTION 5. Compliance with the California Environmental Quality Act.

The City Council hereby finds approval of this Ordinance is exempt from the California Environmental Quality Act (Public Resources Code §§ 21000 *et seq.*, "CEQA," and 14 Cal. Code Reg. §§ 15000 *et seq.*, "CEQA Guidelines") under Section 15061(b)(3) of the CEQA Guidelines. This is an emergency response measure aimed at capping delivery services fees for existing restaurants. No new development will result from the proposed action and the regulation temporary. No impact to the physical environment will result.

SECTION 6. Publication.

Pursuant to the provisions of Government Code Section 36933, a summary of this Ordinance shall be prepared by the City Attorney. Within fifteen (15) days after the adoption of this Ordinance, the City Clerk shall (1) publish the summary, and (2) post in the City Clerk's Office a certified copy of the full text of this Ordinance along with the names of those City Council members voting for and against this Ordinance or otherwise voting.


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Introduced and adopted at a regular meeting of the City Council of the City of South San Francisco held the 26th day of August 2020.

At a meeting of the City Council on 8/26/2020, a motion was made by Councilmember Matsumoto, seconded by Councilmember Nicolas, that this Ordinance be adopted. The motion passed.

Yes: 5 Mayor Garbarino, Vice Mayor Addiego, Councilmember Nagales, Councilmember Nicolas, and Councilmember Matsumoto

Attest by


Rosa Govea Acosta, City Clerk


Richard Garbarino, Mayor