

Eff.:

ORDINANCE NO. _____

AN UNCODIFIED ORDINANCE OF THE COUNCIL OF THE CITY OF BURBANK TO CAP COMMISSION RATES FOR FOOD DELIVERY AND NON-DELIVERY RELATED SERVICE FEES, TO ASSIST IN THE REOPENING OF BUSINESSES IMPACTED BY THE NOVEL CORONAVIRUS (COVID-19)

City Attorney's Synopsis

This uncodified ordinance caps third party delivery fees to restaurants at 15% of the online purchase price and 5% for additional services. This ordinance also requires detail receipts to the restaurant and end consumer, as well as prohibiting a decrease in compensation to a delivery person due to this cap. This ordinance is temporary and ends 90 days after the County's Health Officer Orders and the State Orders allow indoor dining and outdoor dining at 100% capacity unless terminated sooner or extended by the City Council.

THE COUNCIL OF THE CITY OF BURBANK FINDS:

A. On March 4, 2020, the State of California declared a State of Emergency, and the Los Angeles County Department of Public Health (LADPH) declared a Health Emergency due to the spread of COVID-19. On March 13, 2020, the City of Burbank declared a Local Emergency, which was ratified and has been extended by the City Council every sixty (60) days since.

B. Following the March 4, 2020, declarations, the State and LADPH have issued Health Orders and guidance to implement social distancing protocols, face covering requirements, and restrictions on activities and services that render in-person contact, as well as frameworks for the safe reopening of sectors. Since March 2020, these Health Orders have been revised on numerous occasions adding to the list of prohibited and allowed activities.

C. The City of Burbank falls under the jurisdiction of LADPH, and all businesses located in the City of Burbank must comply with the Los Angeles County Health Officer Order, which is in line with California's Order. If Los Angeles County's Order differs from the State's or a City's order, businesses are required to comply with whichever Order is stricter.

D. In March 2020, the health orders allowed restaurants to remain open as an essential business but only for pick-up or delivery. In early summer, restaurants and other businesses could reopen for indoor customers, as well as outdoor dining for restaurants. However, indoor dining was again prohibited beginning July 1, 2020.

E. Service business operations including restaurants must be conducted in accordance with the required Social (Physical) Distancing, reopening protocols, and other infection control protocols. "Social (Physical) Distancing" means, in part: maintaining at least six (6) feet of physical distance from individuals who are not members of the same household.

F. In November 2020, because of the increases in new COVID-19 cases, further State and Los Angeles County health orders were issued. Beginning on November 25, 2020, in-person indoor and outdoor dining at restaurants, breweries, and wineries was prohibited, but the same could remain open for take-out, delivery, and drive-thru services.

G. Starting on December 7, 2020, a more restrictive stay-at-home order by the State went into effect in the Southern California region, including Los Angeles County and the City of Burbank, and most personal service businesses were ordered closed and restaurants were closed to indoor and outdoor dining. On December 9 and December 30, 2020, Los Angeles County issued revised health orders that continued the prohibition on in-person indoor and outdoor dining at restaurants, breweries, and wineries, but permitted the same to remain open for take-out, delivery, and drive-thru services.

H. On January 29, 2021, after the State had lifted its stay-at-home order, Los Angeles County issued a revised health order that permitted outdoor dining with certain restrictions at restaurants, breweries, and wineries, as well as take-out, delivery, and drive-thru services, but continued to prohibit in-person indoor dining at those establishments.

I. Nationally, since imposition of stay at home orders, 80 percent of the businesses nationwide sought some type of financial assistance. A Chamber of Commerce survey conducted this summer showed approximately 70 percent of Burbank businesses responding sought some type of financial assistance from federal and state programs.

J. During this State of Emergency, the City must consider the welfare of its businesses while protecting the health and welfare of its citizens.

K. Although emergency authorization have been approved for three vaccines, it will take months for the vaccines to be widely distributed. As such, the pandemic will be a factor for at least another six months.

L. Based on economic indicators, the longer the emergency orders are in place, the more difficult it will be for restaurants to successfully reopen for the long term. Continuity of operations among the City's restaurants is critical for delivery of essential food service to the residents of Burbank and to sustain these sources of employment and neighborhood vitality in City of Burbank while protecting the public health.

M. Many consumers use third-party applications and website 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 provide that the platform charges the restaurant between five and thirty percent of the purchase price of

the order. Often the fees charged for the delivery service are not spelled out on receipts or are not easily understood. Requiring an explanation of all fees charged to the restaurant and the consumer protects consumers and guards against deceptive practices.

N. Many restaurants that do not operate their own delivery service resort to contracting with third-party delivery services as a means to compete in the marketplace.

O. Restaurants, and particularly restaurants 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.

P. A survey conducted by the City of Pasadena showed that 89 percent of 66 Pasadena restaurants that responded to the survey used Postmates, Grubhub, DoorDash and other third-party delivery services, and 92 percent supported a temporary cap on commissions paid.

Q. During normal times restaurants could more readily absorb the delivery service pricing because it was a small part of the restaurants overall business. Given the months of closure except for take-out and delivery and very limited outdoor dining options, many restaurants are beholden to third-party delivery services. Capping the per-order fees in the amount set forth herein will accomplish the legitimate public purpose of easing the financial burden on struggling restaurants during this emergency and while not unduly burdening third-party platforms.

R. The City Council hereby finds and determines that this Ordinance is not subject to the California Environmental Quality Act (Public Resources Code Section 21000 et seq.) (“CEQA”) pursuant to Sections 15060(c)(2), 15060(c)(3), and 15061(b)(3) of the State CEQA Guidelines because it will not result in a direct or reasonably foreseeable indirect physical change in the environment, because there is no possibility that it may have a significant effect on the environment, and because it is not a “project” as that term is defined in Section 15378 of the State CEQA Guidelines.

THE COUNCIL OF THE CITY OF BURBANK DOES ORDAIN AS FOLLOWS:

1. Definitions. For purposes of this Ordinance, 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 City of Burbank.
 - B. “Delivery Fee” means a fee charged by a third-party food delivery service for providing a Covered Establishment with a service that delivers food from the establishment to customers. The term does not include any other fee that may

be charged by a third-party food delivery service to such an establishment, such as fees for listing or advertising the establishment on the third-party food delivery service platform or fees related to processing the online order.

- C. "Online Order" means an order placed by a customer through or with the assistance of a platform provided by the third-party food delivery service, including a telephone order.
- D. "Other Fees" means a fee charged by a third-party food delivery service for providing a Covered Establishment with a service such as fees for listing or advertising the establishment on the third-party food delivery service platform or fees related to processing online orders.
- E. "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.
- F. "Restaurant" means and includes any full service, fast food, or counter service with limited seating eating establishment that that is prohibited or restricted from providing dine-in eating by Los Angeles County Department of Public Health Safe at Home orders and/or State Orders.
- G. "Third-party Food Delivery Service" ("Third-party Service") means any website, mobile application or other internet service that offers or arranges for the sale of consumer food items for same-day delivery or same-day pickup from a restaurant or food service establishment.

2. It shall be unlawful for a Third-party Service to charge a Covered Establishment:

- a. A Delivery Fee that totals more than 15 percent of the purchase price of the online order.
- b. Any Other Fees that totals more than 5 percent of the purchase price of the online order.
- c. Any fee, commission or cost other than permitted in subsection (a) and (b), including but not limited to a fee that the Covered Establishment has not voluntarily agreed to pay.

3. Reporting of Fees. Each receipt generated by the Third-party Service for either the customer or the Covered Establishment shall clearly state each and every fee charged for the price of the food and beverages, the gratuities paid to the delivery person and any discounts offered by the Covered Establishment.

4. Compensation. It shall be unlawful for a Third-party Delivery Service to reduce the compensation, including any tip or gratuity, paid to any worker or independent contractor, who delivers the food for the Third-party Delivery Service, as a result of the cap on fees required by the Ordinance.

5. Penalties and Enforcement.

a. A Covered Establishment injured by a Third-party Service that charges fees in violation of this Ordinance, provided that the Covered Establishment issues notice to the Third-party Service as required by this subsection, may bring an enforcement action for violation of this Ordinance. If a Third-party Service charges a Covered Establishment a fee that violates Section 2 of this Ordinance, the Covered Establishment shall provide written notice to the Third-party Service requesting a refund within seven days. If the Third-party Service does not provide the refund requested after seven days or the Third-party Service continues to charge fees in violation of this Ordinance after the initial notice and seven-day cure period, a Covered Establishment may enforce this Ordinance 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. For the purposes of clarity, the requirement of providing notice under this Subsection 6(a) does not apply to any enforcement action taken pursuant to Section 6(b) of this Ordinance.

b. Any worker or independent contractor, who delivers food for a Third-party Delivery Service, and believes Section 4 of this Uncodified Ordinance is being violated may enforce such violation through a private right of action against the Third-party Service. The prevailing party in any such action shall be entitled to an award of reasonable attorney fees.

c. Violations of the Ordinance may also be enforced by the provisions of the Burbank Municipal Code Section 1-1-105, 1-1-106 or 1-1-108.1 or through any other legal remedy available to the City.

6. This Ordinance shall sunset 90 days after the County's Health Officer Orders and the State Orders allow indoor dining and outdoor dining at 100% capacity unless terminated sooner or extended by the City Council.

7. If any provision of this Ordinance or its application is held invalid by a court of competent jurisdiction, such invalidity shall not affect other provisions, sections, or applications of the Ordinance which can be given effect without the invalid provision or application, and to this end each phrase, section, sentence, or word is declared to be severable.

8. This Ordinance shall become effective at 12:01 a.m. on the thirty-first (31st) day after the date of adoption.

PASSED AND ADOPTED this ____ day of March 2021.

Bob Frutos
Mayor

Attest:

Approved as to Form:
Office of the City Attorney

Zizette Mullins, MMC, City Clerk

By: _____
Amy Albano, City Attorney

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.
CITY OF BURBANK)

I, Zizette Mullins, MMC, City Clerk of the City of Burbank, do hereby certify that the foregoing Ordinance No. _____ was duly and regularly passed and adopted by the Council of the City of Burbank at its regular meeting held on the ____ day of March, 2021, by the following vote:

AYES:

NOES:

ABSENT:

I further certify that the City Attorney’s Synopsis was published as required by law in a newspaper of general circulation in the City of Burbank, California within 14 days following of the ordinance’s adoption on _____, 2021.

Zizette Mullins, MMC, City Clerk