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Item No. 19

JAN 20 2021

City of South Gate  
CITY COUNCIL

CITY OF SOUTH GATE  
OFFICE OF THE CITY MANAGER

1:20pm

AGENDA BILL

For the Regular Meeting of: January 26, 2021

Originating Department: Administration

Management Assistant: Giselle Mares<sup>1/26</sup> Interim City Manager: Chris Jeffers

**SUBJECT: INTERIM URGENCY ORDINANCE ESTABLISHING A TEMPORARY LIMIT ON THE CHARGES IMPOSED BY THIRD-PARTY FOOD DELIVERY SERVICES DURING THE COVID-19 PANDEMIC**

**PURPOSE:** This item was added to the Agenda at the request of Council Member Denise Diaz to provide some relief to restaurants experiencing financial hardships during the ongoing COVID-19 pandemic.

**RECOMMENDED ACTION:** Adopt Interim Urgency Ordinance adopting new Section 2.10.380 (COVID-19 Restrictions – Food Delivery Charges), to Chapter 2.10 (Business Regulation), to Title 2 (Licenses – Business Regulations), of the South Gate Municipal Code establishing a temporary limit on the charges imposed by third-party food delivery services on local restaurants during the ongoing COVID-19 pandemic, effective immediately.

**FISCAL IMPACT:** None.

**ANALYSIS:** Many consumers in the City are eager to support local restaurants and use third-party food delivery services, especially during the COVID-19 pandemic, as restaurants are prohibited from offering on-premises dining. As a result, restaurants and customers have experienced financial hardships, while third-party food delivery services have experienced an increase in profitable margins. Third-party food delivery services utilize various commission models that can charge a restaurant up to thirty-percent or more per order, including delivery, marketing and promotion, subscription, and processing fees. Restaurants, and particularly small family-owned restaurants with few locations, have limited bargaining power to negotiate lower commission fees with third-party food delivery services. Given that only a few restaurants in the marketplace provide their own food delivery services, small restaurants that do not operate their own food delivery service resort to contracting with third-party food delivery service providers as a means to keep afloat during these challenging times. Many small enterprises face dire financial circumstances, and take-out and delivery are essential to maintaining their restaurant operations for the foreseeable future during the ongoing COVID-19 pandemic.

**BACKGROUND:** At the January 12, 2021, regularly scheduled City Council Meeting, Council Member Diaz requested this item to be considered by the City Council to consider the adoption of an ordinance temporarily limiting the fees charged by third-party food delivery services.

As a result of the declarations and ensuing Federal, State and County orders, restaurants and similar businesses have been prohibited from offering on-premises dining and are only allowed to sell food and beverages to customers for delivery and pick-up in an attempt to limit and control the spread of COVID-19.

The Los Angeles County Public Health Department has adopted a similar order that was challenged in court, but is still subject to appeal. If the court action is successfully appealed, it is likely that the order restricting restaurants would extend beyond the State order.

Takeout and delivery only options for restaurants severely strain their viability. Many restaurants rely on third party delivery services that charge fees that further jeopardize the continued operation of those restaurants. Further negative impacts of such circumstances are set forth in the recitals of the proposed Interim Urgency Ordinance attached. If adopted, the attached Interim Urgency Ordinance will impose a temporary limit on the delivery fees that can be charged by a third-party food delivery service to civil liability, enforceable via court action by any restaurant aggrieved by the failure to comply with the ordinance. The proposed Interim Urgency Ordinance will become effective immediately upon its adoption by a four-fifths (4/5) vote of the City Council and shall be of no further force or effect forty-five (45) days from the date of adoption, unless extended following a public hearing, as provided in Government Code Section 65858.

Similar ordinances have been adopted by surrounding communities, including Alhambra, South Pasadena, and Los Angeles.

**ATTACHMENT:** Proposed Interim Urgency Ordinance

**INTERIM URGENCY ORDINANCE NO. \_\_\_\_\_**

**CITY OF SOUTH GATE  
LOS ANGELES COUNTY, CALIFORNIA**

**INTERIM URGENCY ORDINANCE OF THE CITY COUNCIL  
OF THE CITY OF SOUTH GATE, CALIFORNIA, ADOPTING NEW  
SECTION 2.10.380 (COVID-19 RESTRICTIONS – FOOD DELIVERY  
CHARGES), TO CHAPTER 2.10 (BUSINESS REGULATION), TO TITLE 2  
(LICENSES – BUSINESS REGULATIONS), OF THE SOUTH GATE  
MUNICIPAL CODE ESTABLISHING A TEMPORARY LIMIT ON THE  
CHARGES IMPOSED BY THIRD-PARTY FOOD DELIVERY SERVICES  
ON LOCAL RESTAURANTS DURING THE ONGOING COVID-19  
PANDEMIC, EFFECTIVE IMMEDIATELY**

**WHEREAS**, on March 4, 2020, Governor Gavin Newsom proclaimed a state of emergency within the State of California ("State") due to the threat posed by the Coronavirus Disease 2019 ("COVID-19"); the Los Angeles County Health Officer issued a Declaration of Local Health Emergency due to the COVID-19 cases in Los Angeles County; and the Los Angeles County Board of Supervisors ("Board") concurred and issued a Proclamation ("Proclamation") declaring a local emergency within the County of Los Angeles regarding the imminent spread of COVID-19;

**WHEREAS**, pursuant to California Government Code Section 8630(c), a governing body shall declare a local emergency and shall review the need for continuing the local emergency at least once every 60 days until the governing body terminates the local emergency;

**WHEREAS**, on March 18, 2020, in his role as the Director of Emergency Services, the City Manager of the City of South Gate proclaimed the existence of a local emergency within the City ("Local Emergency") to ensure authority to take measures necessary to protect and preserve public health and safety, including seeking aid from state and federal authorities as necessary;

**WHEREAS**, thereafter on March 24, 2020, the City Council adopted Resolution No. 2020-07-CC ratifying the declaration of the existence of a Local Emergency by the Director of Emergency Services on March 18, 2020;

**WHEREAS**, on March 19, 2020, Governor Newsom issued an Executive Order requiring all persons to remain at home to the extent possible and required all non-essential businesses to be closed, and on March 21, 2020, the Los Angeles County Department of Public Health issued a clarifying Safer at Home Order, requiring all persons to remain at home to the extent possible, unless engaged in essential business;

**WHEREAS**, as a result of those declarations and ensuing orders, restaurants and similar businesses have been prohibited from offering on-premises dining and are only allowed to sell food and beverages to customers for delivery and pick-up;

**WHEREAS**, limiting restaurants to only takeout and delivery service has placed a sudden and severe financial strain on many restaurants, particularly those that are small businesses that already operate on limited resources, adds financial pressures with the increased cost of acquiring ingredients and supplies due to the ongoing COVID-19 surges;

**WHEREAS**, many restaurants use third-party food and beverage delivery services and persons living and working in South Gate rely on these delivery services, must experience the high fees charged by third-party delivery services (ranging between 12 and 30 percent);

**WHEREAS**, many restaurants and similar businesses operating in South Gate are small businesses with few locations, which have limited bargaining power to negotiate lower fees with third-party food delivery services and no ability to independently provide such delivery services, may be unable to continue operating;

**WHEREAS**, capping delivery fees charged by third-party food delivery service providers will accomplish the legitimate public purpose of easing the financial burden on struggling restaurants during the ongoing COVID-19 pandemic will not unduly burden the third-party food delivery services, as the cap proposed by this ordinance is reasonable and will allow the third-party food delivery services to continue to be profitable;

**WHEREAS**, the need to cap such fees will likely continue beyond the expiration of the State and County emergency declarations, as it is unclear how quickly thereafter restaurant patrons will return to in-restaurant dining, and restaurants may continue to see a significant loss of revenue for an ongoing period of time thereafter;

**WHEREAS**, California Government Code Sections 8634, 36934 and 36937 authorize the City Council to take action by ordinance to take effect immediately for the preservation of the public peace, health or safety when adopted by a four-fifths vote of the City Council; and

**WHEREAS**, during the ongoing COVID-19 pandemic when dining is restricted, for the reasons set forth above, it is in the interest of protecting the public health and safety to limit charges imposed by third-party food delivery services and to do so immediately, given the strains on restaurants and customers, as well as the likelihood that dining limitations are likely to extend beyond the time that many restaurants can remain in business.

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SOUTH GATE DOES HEREBY ORDAIN AS FOLLOWS:**

**SECTION 1.** The City Council does hereby declare that the above recitals are true and correct and incorporated herein by reference. Based on these findings, the City Council determines the public health, safety and general welfare of the City, its residents and businesses, to limit third-party food delivery services effective immediately.

**SECTION 2.** The City Council does hereby adopt new Section 2.10.380 (COVID-19 Restrictions – Food Delivery Charges), to Chapter 2.10 (Business Regulation), to Title 2 (Licenses – Business Regulations), of the South Gate Municipal Code in its entirety to read as follows:

**TITLE 2 (LICENSES – BUSINESS REGULATIONS)**  
**Chapter 2.10 (BUSINESS REGULATION)**  
**SECTION 2.10.380 (COVID-19 RESTRICTIONS – FOOD DELIVERY CHARGES)**

**Sections: 2.10.380**

- A. Purpose and intent.**
- B. Definitions.**
- C. Fee Limits.**
- D. Protection of Gratuities.**
- E. Identification of Fees.**
- F. Grace Period.**
- G. Penalties and Enforcement.**

**A. Purpose and intent.**

This Section of the South Gate Municipal Code (“Section”) is in the interest of protecting the public health and safety by limiting charges imposed by third-party food delivery services, given the strains on restaurants and customers, as well as the likelihood that dining limitations are likely to extend beyond the time that many restaurants can remain in business as a result of the ongoing Coronavirus Disease 2019 (COVID-19) pandemic.

**B. Definitions.**

For purposes of this chapter the following terms shall have the meanings indicated:

1. “Covered establishment” means a retail food establishment that offers, in a single commercial transaction over the internet, whether directly or through third-party food delivery services, the sale and same-day delivery of food to customers from one or more retail locations within the City
2. "Customer" means any person, firm, or association who makes use of a third-party food delivery service for the purpose of obtaining food from a retail food establishment.
3. "Delivery fee" means a fee charged by a third-party food delivery service for providing a retail food establishment with a service that delivers food from such establishment to customers. The term does not include any other fee that may be charged by a third-party food delivery service to a food service establishment, such as fees for listing or advertising the food service establishment on the third-party food delivery service platform or fees related to processing the online order, including but not limited to, service fees, fees for facilitating customer pick-up, and credit card processing fees.
4. “Delivery person” means any person delivering food or beverages on behalf of the third-party food delivery services, whether as an employee, independent contractor or otherwise.

5. "Food" means all articles and substances used for food and drink, confectionary or condiment whether simple or compound, and all ingredients and components used in the preparation thereof.
6. "Online order" means any order placed by a customer through or with the assistance of a platform provided by a third-party food delivery service, including a telephone order.
7. "Purchase price" means the total price of the items contained in an online order that are listed on the menu of the retail food establishment where such order is placed. Such term does not include taxes, gratuities and any other fees that may make up the total cost to the customer of an online order.
8. "Retail food establishment" means and includes any restaurant, delicatessen, bakery, coffee shop, or other eat-in or carry-out service of processed or prepared raw and ready-to-eat food or beverages.
9. "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, no fewer than 20 food service establishments located in the city that are owned and operated by different persons.
10. "Worker" means any person working for a third-party food delivery service.

**C. Fee Limits.**

It shall be unlawful for a third-party food delivery service to charge a covered establishment:

1. Any combination of fees, commissions or costs which, together with the delivery fee, totals more than twenty percent (20%) of the purchase price of the online order;
2. A delivery fee that totals more than fifteen percent (15%) of the purchase price of an online order;
3. Any amount designated as a delivery fee for an online order that does not involve the delivery of food or beverages;
4. Any purchase price for a food or beverage item that is higher than the price listed on the retail food establishment's own menu; or
5. Any fee, commission, or cost other than as permitted in subdivisions (1), (2), (3) and (4) above.

**D. Protection of Gratuities.**

It shall be unlawful for a third-party food delivery service to reduce the compensation, including any tip or gratuity, paid to any workers as a result of the prohibitions in this

Ordinance. Any tip or gratuity shall be paid by the third-party food delivery service, in its entirety, to the person delivering the food or beverages.

**E. Identification of Fees.**

The third-party delivery service must deliver to the customer and the retail food establishment a receipt which clearly and accurately itemizes the cost components of the online order, which at a minimum shall show the following:

1. The purchase price of the food and beverages at the cost listed on the retail food establishment's menu;
2. Each delivery fee, as well as each and every other fee, commission, or cost, charged by the third-party food delivery service to the retail food establishment;
3. Each delivery fee, as well as each and every other fee, commission, or cost, charged by the third-party food delivery service to the customer;
4. Any tip or gratuity that will be paid to the delivery person; and
5. Any tip or gratuity that will be paid to the retail food establishment.

None of the prices, fees, commissions, costs or gratuities in subsections (1) through (5) above shall be combined on the receipt, except that a total of the foregoing amounts may be shown separately in addition to, and not instead of, the itemized amounts.

**F. Grace Period.**

A third-party food delivery service shall not be found in violation of this Ordinance for the first seven (7) days after its effective date, if it imposes a fee in excess of the fee limit in Section C., provided it refunds the excess fee to the covered establishment no later than fourteen (14) days after the effective date of this Ordinance.

**G. Penalties and Enforcement.**

1. Any customer or retail food establishment who is charged a fee by a third-party food delivery service in excess of that permitted by this Ordinance, and any delivery person or retail food establishment who's gratuities are withheld or diminished in violation of this Ordinance, may enforce this Ordinance by means of a civil action against the third-party food delivery service seeking damages and injunctive relief, subject to the provisions of this Section H.
2. Prior to filing any such action, the customer, delivery person or retail food establishment shall first provide written notice to the third-party food delivery service requesting that the excess fee and/or unpaid gratuity be refunded or paid within seven (7) days of the notice. If the third-party food delivery service fails to deliver the refund or make the payment within that period – or if the third-party food delivery service continues after that initial seven-day notice and cure period to charge fees or withhold gratuities in violation of this Ordinance – then the customer, delivery person or retail food establishment may thereafter file the action.
3. The prevailing party in any such action shall be entitled to an award of reasonable attorneys' fees.

4. Violations of this Ordinance shall accrue on a daily basis for each day and for each customer, delivery person or retail food establishment charged a fee or denied a gratuity in violation of this Ordinance.
5. No criminal penalties shall attach for violation of this Ordinance.
6. Nothing in this Section H. shall prevent the City from enforcing compliance with this Ordinance by whatever means available to the City.
7. Notwithstanding subsection (6) above, this Ordinance is not intended to, and shall not, create a mandatory duty on the part of the City to protect persons or property from a violation of the provisions of this Ordinance. This Ordinance is not intended to, and shall not, create any rights or benefits (substantive or procedural, enforceable at law or equity) against the City.

**SECTION 3.** This Interim Urgency Ordinance shall become effective immediately upon its adoption by a four-fifths (4/5) vote of the City Council due to the immediate need to protect the public health, safety and welfare. It shall be of no further force or effect forty-five (45) days from the date of adoption unless extended following a public hearing, as provided in Government Code Section 65858.

**SECTION 4.** The City Manager/Interim City Manager and the City Attorney shall undertake all actions legally necessary to extend this Interim Urgency Ordinance in the event: (1) the studies and reports desired by this City Council will not be concluded, to allow restaurants to offer dine-in service, without limitation, or (2) upon the termination of the COVID-19 Local Emergency, whichever comes first, on or before the forty-fifth (45<sup>th</sup>) day subsequent to the adoption of this Interim Urgency Ordinance.

[Remainder of page left blank intentionally.]

**SECTION 5.** If any provision of this Ordinance is found to be unconstitutional or otherwise invalid by any court of competent jurisdiction, that invalidity shall not affect the remaining provisions of this Ordinance which can be implemented without the invalid provisions, and to this end, the provisions of this Ordinance are declared to be severable. This Ordinance would have been adopted and each provision thereof irrespective of whether any one or more provisions are found invalid, unconstitutional or otherwise unenforceable.

**SECTION 6.** The City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published as required by law.

**PASSED, APPROVED and ADOPTED** this 26<sup>th</sup> day of **January, 2021**.

**CITY OF SOUTH GATE:**

By: \_\_\_\_\_  
Maria Davila, Mayor

**ATTESTED:**

By: \_\_\_\_\_  
Carmen Avalos, City Clerk  
(SEAL)

**APPROVED AS TO FORM:**

By:  \_\_\_\_\_  
Raul F. Salinas, City Attorney