

**FIRST AMENDED ORDER OF THE DIRECTOR OF EMERGENCY SERVICES
FOR THE CITY OF LIVERMORE PROHIBITING THIRD-PARTY FOOD DELIVERY SERVICE
PROVIDERS FROM CHARGING COVERED ESTABLISHMENTS A FEE PER ONLINE
ORDER FOR THE USE OF ITS SERVICES THAT TOTALS MORE THAN 15 PERCENT OF
THE PURCHASE PRICE OF SUCH ONLINE ORDER DURING THE LOCALLY DECLARED
STATE OF EMERGENCY RELATED TO COVID-19**

On March 4, 2020, California Governor Gavin Newsom declared a state of emergency in response to the spread of COVID-19.

On March 13, 2020, under the authority contained in California Government Code section 8634 and City of Livermore Municipal Code sections 2.56.050 and 2.56.060, I declared the existence of a local emergency in the City of Livermore.

On March 16, 2020, the City Council of the City of Livermore adopted a resolution ratifying the proclamation of the existence of a local emergency in the City of Livermore.

On March 16, 2020, Alameda County joined San Francisco, Contra Costa, Marin, San Mateo and Santa Clara Counties and the City of Berkeley in issuing a legal order directing their respective residents to shelter at home for three weeks beginning March 17, 2020 (the "Shelter-in-Place Order"). The Shelter in Place Order also requires all non-essential businesses to cease operations within the County, including shuttering indoor, sit-down restaurant dining.

The Health Officer of Alameda County has issued subsequent orders extending the Shelter-in-Place Order and placing further restrictions on large gatherings, including indoor dining.

On June 8, 2020, and July 27, 2020 the City Council of the City of Livermore extended the local emergency, finding that emergency conditions were still present in the City as a result of the COVID-19 pandemic.

On July 13, 2020, the State Public Health Officer issued an Order closing all indoor restaurant dining statewide, among other indoor operations.

On September 22, 2020, the State Public Health Officer announced that Alameda County had met the criteria to move from the most restrictive Purple Tier to the less restrictive Red Tier on the color-coded four tier Blueprint for a Safer Economy, which would allow indoor dining at 25 percent of capacity.

Also on September 22, 2020, the Health Officer of Alameda County issued a press release stating that the County would use the period through October 6, 2020 to continue to evaluate these criteria and would not make changes to permitted or prohibited activities within Alameda County beforehand.

Restaurants in California Counties that have moved to more permissive Blueprint for a Safer Economy tiers generally report less than allowable capacity indoors as patrons continue to prefer outdoor dining, takeout and delivery.

As a result of the public health emergency and the precautions recommended by the health authorities, therefore, restaurants in the City of Livermore continue to rely takeout and delivery offerings plus limited outdoor dining often with reduced capacity. This has led to a continued and severe income loss for Livermore restaurants, especially those who operated on thin margins even before COVID-19 and those who did not have robust takeout and delivery infrastructure or significant outdoor seating capacity.

Many consumers use third-party applications and websites to place orders with restaurants for delivery and takeout and these applications and websites charge the restaurants between ten and 30 percent of the purchase price of the order.

Restaurants have limited bargaining power to negotiate lower fees with third-party platforms, given the high market saturation of third-party platforms and the dire financial straits restaurants are facing in this COVID-19 emergency.

State anti-gouging laws and State of California Executive Order N-44-20 provide protections against profiteering and unscrupulous business practices but do not provide any protections in the market for food delivery services.

If retail food providers raise their costs or close as a result of high fees from third-party delivery services, their workers will lose employment, thereby affecting their ability to provide for their families, and the community will lose access to essential food services for its residents.

Several Northern California jurisdictions, including San Francisco, Oakland, Berkeley, Fremont, San Leandro, and Marin County have experienced significant increases in delivery fees from third-party delivery services that also operate in Livermore and have recently enacted similar measures to cap the fees they may charge at 15 percent.

City staff has surveyed local businesses who attest to increasing delivery fees from third-party delivery services looking to leverage their position during the COVID-19 emergency.

In light of the economic impacts of the public health emergency on local restaurants and the necessity to preserve access to essential services and protect public health and safety in Livermore, I believe it is necessary to cap the per-order fee third-party applications and websites can charge restaurants during the term of this emergency.

Under California Government Code section 8634 and Livermore Municipal Code section 2.56.060.B.1, I am empowered upon the proclamation of a local emergency to make and issue orders and regulations on matters reasonably related to the protection of life and property as

affected by such local emergency. These orders and regulations are to be confirmed by the City Council at the earliest practicable time.

THEREFORE, I, Marc Roberts, as Director of Emergency Services, order the following:

1. It shall be unlawful for a Third-Party Food Delivery Service to charge a Covered Establishment a fee per online order for the use of its services that totals more than 15 percent of the purchase price of such online order.
2. For purposes of this Section, 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 Livermore city limits.
 - b. "Online order" means an order placed by a customer through a platform provided by a third-party food delivery service for delivery or pickup within the Livermore city limits.
 - c. "Purchase price" means the menu price of an online order. Such term therefore excludes taxes, gratuities, and any other fees that may make up the total cost to the customer of the online order.
 - d. "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, Covered Establishments.
3. The City Manager, or designee, is authorized to implement this Section and issue any necessary guidance or rules consistent with this Section.
4. Each receipt generated by the Third-Party Food Delivery Service for either the customer or the Covered Establishment shall clearly state the fees charged, the gratuities paid, and any discounts offered by the Covered Establishment.
5. This order will become effective immediately although a Third-Party Food Delivery Service shall not be found in violation of this Section if within one week of signing this Order it imposes a fee per online order for the use of its services that totals more than 15 percent of the purchase price of such online order, provided it refunds the portion of the fee that exceeds 15 percent of the purchase price to the Covered Establishment prior to the end of this one week period or by August 15, 2020 whichever is sooner.
6. This Order shall terminate automatically upon the restoration of indoor dining at 100% capacity in Alameda County.

7. Enforcement and Violations.

- a. If a Third-Party Food Delivery Service charges a Covered Establishment fees that violate this order, the Covered Establishment shall provide written notice to the Third-Party Food Delivery Service requesting a refund within seven days. If the Third-Party Food Delivery Service does not provide the refund requested after seven days or the Third-Party Food Delivery Service continues to charge fees in violation of this order after the initial notice and seven-day cure period, a Covered Establishment may enforce this order 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.
- b. Violations of this Order constitute a public nuisance.
- c. This Order 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 Livermore, its departments, officers, or employees.

Under Title 14 of the California Code of Regulations, Section 15061(b)(3) and Section 15378(b), each as a separate and independent basis this order is exempt from the requirements of the California Environmental Quality Act (CEQA) in that it is not a Project which has the potential for causing a significant effect on the environment.

If any section, subsection, sentence, clause or phrase of this Order is for any reason held by a court of competent jurisdiction to be invalid, such a decision shall not affect the validity of the remaining portions of this Order. The Director of Emergency Services hereby declares that he would have issued this Emergency Order and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

This order shall go into effect immediately and be in effect until the restoration of indoor dining at one hundred percent (100%) capacity in Alameda County, unless it is superseded by a duly enacted Ordinance of the City Council of the City of Livermore or a superseding order issued by a duly authorized person or agency. This Order may be extended or supplemented in response to subsequent Executive Orders by the Governor of the State of California on this subject, or orders or ordinances issued or adopted by Alameda County.

Dated: 9/28/20



Marc Roberts
Director of Emergency Services