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Staff Report for Consideration of a Temporary Limit on Fees Charged by Third Party Food Delivery Companies to Support Restaurants in San Leandro during the COVID-19 Pandemic

### SUMMARY AND RECOMMENDATIONS

Staff requests that the City Council provide comments and direction on a temporary cap on the fees charged by third-party food delivery companies. Based on such comments and feedback, the City Manager, acting as the City's Director of Emergency Services, may issue a declaration establishing rules and regulations under his emergency powers to enact such a limit. The benefits and risks of such a declaration are discussed further below.

In addition, Economic Development staff will continue conversations with the food delivery companies about proactive measures they can take to assist San Leandro restaurants. Staff will also continue to work in a variety of ways to help restaurants and food businesses to reopen, better connect with their customers, access resources, and be more sustainable and successful long-term.

### BACKGROUND

Since the initiation of the Alameda County Shelter-in-Place order on March 17, 2020, many San Leandro businesses, including restaurants, cafés, and other food and beverage businesses, have been closed, or limited to pick up service only, in order to protect employees and customers and limit the spread of the COVID-19 virus. The orders' restrictions have devastated local businesses, particularly small service, food and other direct customer serving businesses.

During this time, online ordering and delivery of food has become a critical lifeline to many restaurants and food businesses. In order to assist with the ordering and delivery process, many food businesses utilize third party food delivery companies, such as DoorDash, GrubHub, Postmates,

and UberEats. These companies generally provide a means for businesses to market themselves, list their menu, receive orders online, and arrange for delivery or pickup, allowing the businesses to offset the direct staff costs associated with these tasks. These food delivery services are vital to our residents and businesses alike and the City wishes to encourage their expansion. Even after in-restaurant dining is allowed to resume, it is expected that many patrons will continue to rely on food delivery services due to individual comfort level and safety concerns.

There are several fees associated with using the food delivery services, some paid by the restaurant, and others paid directly by the consumer. These fees vary by company and a number of different factors, including the service package that the business signed, whether the order is placed on the delivery company or individual business' website, whether delivery or pick up is selected, the distance of delivery, and whether the restaurant is receiving additional promotion or services. Total fees paid by restaurants typically range from 20%-30%.

Fees that companies charge restaurants typically include:

- Service Fee (sometimes called marketing or commission fee) - average 15%
  - o Sometimes called a marketing or commission fee, this is the fee that the delivery company charges for the service of the transaction. This is typically a percentage of the sale, which is utilized to cover the company's direct costs, overhead, and profit. If a restaurant selects a package with additional marketing or data sharing, their fee will be higher.
- Delivery Fee - average 10%
  - o Both the restaurant and customer pay a delivery fee to go towards drivers' wages; these vary based on delivery length and order size.
- Credit Card Fee - average 3%
  - o Fee to cover credit card company's processing fee and delivery company's fraud/loss protection

Fees that customers pay include taxes and delivery fees, as well as optional gratuity.

## ANALYSIS

In response to the high service fees and resulting impact on local restaurants, cities in California and the United States have put limits on the fees that food delivery companies may charge in an effort to ease the burden on restaurants and other food businesses.

The City Attorney reviewed the matter and determined that the City, during the local emergency because of the novel coronavirus pandemic, may place a temporary limit on the fees charged by third-party food delivery companies. Under California Government Code Section 8634 and San Leandro Municipal Code Section 3-4-130(a), the City Manager, acting as Director of Emergency Services, is empowered upon the proclamation of a local emergency to make and issue rules and regulations on matters reasonably related to the protection of life and property affected by such emergency.

Clearly, San Leandro residents who are in the specific risk groups (persons 65 years of age or older, immunocompromised, or who have specific health risks such as respiratory disease, asthma, or heart conditions) currently and will most likely in the future rely upon food delivery, not to mention those who care for such individuals, or do not want to contract the virus. Therefore, based on the City Manager's broad authority during a local emergency, the precedence set by other jurisdictions, the desultory threats of litigation from the food delivery app industry, and San Leandro's market size, the

threat of legal challenge to such a policy is low. However, based on staff conversations with the food delivery app businesses, if such a fee extended into when public health orders removed prohibitions on indoor dining, legal risks would increase. There is an obvious balance of such risks against continuing harm to local businesses wrought by high fees.

City and San Leandro Chamber of Commerce staff have reached out to restaurant and other food businesses to gain feedback on their experience with food delivery companies and their fees. The businesses find that the delivery company fees are onerous and make it hard for them to make a profit. However, they also find that the delivery service is valuable and are generally not considering cancelling. Many find the delivery companies to be a necessary part of doing business and keeping their business alive during the shelter-in-place. Some also noted that they understand that part of what they are paying for is the marketing of their businesses and keeping customers ordering, with the hope that delivery customers will come to dining rooms once they are able to reopen. Others noted that they recoup the delivery fees by raising their prices.

City staff also reached out to several of the food delivery companies to learn more about how and why their fees are charged, the impact of a fee cap, and what they are doing to assist businesses during these difficult times. The companies shared that they are struggling with the fee limits that have been placed in other cities, with some alleging that they are not legal. They generally stated that the fees are high in order to cover their costs and overhead, and on driver pay, with one company citing that they are operating at a 40% loss under a 15% fee limit.

The food delivery companies noted that they offset reduced fees by passing more delivery costs on to the customer, providing less marketing to restaurants, stopping service to harder-to-reach delivery areas, reducing their own workforce and reducing driver pay. They also noted that when they do pass more delivery costs to customers, they see fewer overall orders and/or smaller orders, which in turn reduces the take-home pay for drivers, with one company noting a 10% reduction in pay to drivers in San Francisco.

In response to the challenges that restaurants are facing, the delivery companies have provided various fee reductions and other forms of assistance. This includes no cost to sign up for service, no fees for pickup orders, assistance in creating restaurant pages, and providing daily payout of order proceeds (rather than weekly/monthly). Support activities for drivers including providing personal protective equipment, paid sick/quarantine leave, and in some cases, limited medical benefits. They are also doing various marketing programs and promotions to help increase restaurant orders, such as no delivery fees on Saturdays, reduced delivery fees for local restaurants and Black--owned restaurants, and helping restaurants to optimize their options to include what customers most want. Some are also providing means for customers to donate to restaurants, or are creating funds to assist restaurants and drivers.

Several food delivery companies are also actively working with cities and Chambers where they operate, such as San Jose and Oakland, to develop specific programs for restaurants in that community. The companies have expressed openness to continued conversations about how they can work to assist restaurants in San Leandro and City staff will be continuing these discussions in the coming weeks.

City staff have surveyed other communities in the area, and have found that while some cities have enacted a fee limit, others have considered it and decided not to impose a cap, and others have not

had a formal discussion on the matter at this time.

- California jurisdictions that have imposed a limit include:
  - o San Francisco, Los Angeles, Marin County (unincorporated areas), Santa Cruz, Santa Monica, Glendale
- California jurisdictions that have considered a limit but have not implemented one include:
  - o San Jose, Sacramento, Oakland

*(Note these lists are based on information staff have been able to gather and are not exhaustive)*

The following are typical fee limit terms in the Bay Area:

1. Fee Limit - Typically ranges from 10-20% of the total order cost, with most at 15%. *May also be able to specify which types of fees are limited, such as service fees rather than delivery fees.*
2. Applicability - For many cities, the fee limit only applies to small food establishments (with 5 or fewer locations).
3. Timeframe - The fee limits typically end when restaurants are permitted to offer dine-in service. *Note - this may occur within a month in Alameda County.*
4. Enforcement - Typically a civil matter, with restaurants providing written notice to the delivery company and a request for reduction in charges if their fees are not being appropriately limited.

## NEXT STEPS

Staff requests that the City Council provide comment and feedback as to whether and how they would like to require a temporary limit on the fees charged by third-party food delivery companies. Based on this, the City Manager, acting as Director of Emergency Services, may issue a declaration under his emergency powers to enact such a limit. The new requirement could then go into effect within a short timeframe, and staff would work to notify delivery companies and restaurants of the change.

In the coming weeks, City staff will continue conversations with the food delivery companies about how they can work to proactively assist restaurants in San Leandro, through additional fee reductions, more flexible/inclusionary agreement terms, technical assistance, and promotional programs.

On an ongoing basis, City staff works to assist restaurants and other food businesses and connect them with resources during these difficult times. Staff shares available resources through the San Leandro Next blog and City website and connects businesses with grant opportunities and organizations that can assist them, such as the Alameda County Small Business Development Center. City and Chamber staff are outreaching to businesses, using this time to establish and build relationships with small businesses across the City. Through outreach, staff gains valuable feedback on what resources City businesses are utilizing (with many successfully obtaining federal funds through programs such as the Paycheck Protection Program) and what programs it can develop to assist local businesses in meaningful ways.

The COVID-19 Relief Temporary Outdoor Facilities Program was developed to allow restaurants and other commercial businesses to utilize outdoor areas through a streamlined, no-cost registration process. The Chamber of Commerce's Keeping it Local Program, which the City has sponsored, is also available to promote restaurants and provide them free Chamber services, particularly as they

are reopening and offering outdoor dining. In the coming weeks, City and Chamber staff will be working with interns to do additional outreach to businesses, and will explore ways to help them promote themselves, including assistance in increasing their online presence and signing up for delivery services. Staff are also working to assist businesses impacted by civil unrest, including working with the Alameda County Office of Emergency Services to apply for an Emergency Declaration, which will make additional grants available for impacted businesses. These strategies assist small businesses to reopen, better connect with their customers, access resources, and be more successful long-term.

**PREPARED BY:** Katie Bowman, Economic Development Manager