



TOWN OF FAIRFAX

STAFF REPORT

July 1, 2020

TO: Mayor and Town Council

FROM: Garrett Toy, Town Manager

SUBJECT: Adopt a Resolution Establishing a Temporary Limit of 15% on Commissions Charged by Third Party Food Delivery Companies to Support Restaurants in Fairfax During the Covid-19 Pandemic

RECOMMENDATION

Adopt the Resolution Establishing a Temporary Limit of 15% on Commissions Charged by Third Party Food Delivery Companies to Support Restaurants in Fairfax During the Covid-19 Pandemic.

DISCUSSION

Councilmember Coler requested the attached resolution, based on the resolution adopted by the County of Marin on June 16, 2020, be considered by the Council.

The proposed resolution would limit the fees a third-party delivery service may charge a retail food establishment during the COVID-19 emergency. The limit would be in place until both (1) the Marin County public health officer has lifted the order prohibiting indoor dining, and (2) the Council has acted to rescind this resolution. We believe that even when the Marin County Public Health Officer allows indoor dining it will be severely restrictive and restaurants will still need to provide socially distanced outdoor dining to generate the business revenues necessary to economically survive the pandemic crisis.

The resolution prohibits a third-party delivery service from charging a restaurant a delivery fee that is more than 15% of the cost of the purchase price of an online order. Any violation of the resolution can be enforced through a private right of action after a third-party delivery service has been given a period of seven days to cure the violation. This resolution is being considered due to the current state of emergency and the critical issues retail food services establishments are facing during the emergency and the prohibition and/or severe restriction of indoor dining.

FISCAL IMPACT

n/a

ATTACHMENT

Proposed Resolution

RESOLUTION 20-__

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF FAIRFAX ESTABLISHING A TEMPORARY LIMIT OF 15% ON COMMISSIONS CHARGED BY THIRD-PARTY FOOD DELIVERY COMPANIES TO SUPPORT RESTAURANTS IN FAIRFAX DURING THE COVID-19 PANDEMIC

WHEREAS, the Public Health Officer of the County of Marin has issued revised Shelter in Place Orders, extending restrictions on activities and requiring individuals to shelter at home, allowing for certain specified restrictions; and

WHEREAS, the Public Health Officer of the County of Marin has issued a May 29, 2020 modification to appendix C-1 of the May 15, 2020 Shelter in Place Order, newly allowing “seated outdoor dining,” but not allowing for any indoor dining; and

WHEREAS, California Government Code sections 8630 and 8634, and Fairfax Town Code Chapter 2.52 empowers the Town Council and the Director of Emergency Services to make and issue rules and regulations on matters reasonably related to the protection of life, property and the environment as affected by a local emergency, as defined by Government Code section 8558, based on the Proclamation of Local Emergency; and

WHEREAS, the Town of Fairfax, pursuant to its police powers, has broad authority to maintain public peace, health, and safety of its community and preserve quality of life, adopted Emergency Resolution No. 20-04 under Government Code Sections 8630 and 8634 and Chapter 2.52 of the Fairfax Town Code; and

WHEREAS, this order is being issued during this emergency because of the propensity of the virus to spread person-to-person and also because the virus physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time; and

WHEREAS, to reduce the spread of the virus and protect the public health, the Shelter in Place Order prohibits restaurants in the Town from offering indoor dining; and

WHEREAS, restricting restaurants to takeout and delivery offerings only has placed a sudden and severe financial strain on many restaurants, particularly those that are small businesses that already operate on thin margins, adding to financial pressures in the industry that predate the COVID-19 crisis; and

WHEREAS, it is in the public interest to take action to maximize restaurant revenue from the takeout and delivery orders that, with the exception of some limited outdoor dining operations, are currently the sole source of revenue for these small businesses to enable restaurants to survive this crisis and remain as sources of employment and neighborhood vitality in the Town; and

WHEREAS, even when dine-in service is allowed by the Public Health Officer in the future, it is unclear how rapidly dine-in service will begin to resume and restaurants may continue to see a significant loss of revenue for an ongoing period of time as dine-in service is reintroduced; 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 10% of the purchase price per order, while some agreements provide for higher per-order fees; and

WHEREAS, restaurants, and particularly restaurants that are small businesses, 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 small business restaurants are facing in this COVID-19 emergency; and

WHEREAS, if retail food providers 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

WHEREAS, capping the per-order fees at 15% will accomplish the legitimate public purpose of easing the financial burden on struggling restaurants during this emergency while not unduly burdening third-party platforms, as this fee is recognized as reasonable, and third-party platforms continue to earn significant profits; and

WHEREAS, during the COVID-19 emergency, many residents rely on food delivery and may not be able to receive delivered food if the fees charged by third-party delivery services are too high.

NOW, THEREFORE, BE IT HEREBY RESOLVED AND ORDERED that:

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% of the purchase price of such online order.
2. For purposes of this order, 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 Town of Fairfax.
 - 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 Town.
 - 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 an 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, no fewer than 20 separately owned and operated food service establishments.
3. The Director of Emergency Services, or designee, is authorized to implement this order and issue any necessary guidance or rules consistent with this order.
4. This order shall take effect on July 1, 2020 and shall terminate at such time as both (1) the Public Health Officer amends or terminates the order prohibiting restaurants from offering dine-in service or that prohibition otherwise expires, so that dine-in service is then allowed; and (2) the Town Council rescinds this Resolution at a public meeting. For the purposes of this order, the restoration of outdoor-only dining does not constitute the restoration of dine-in service.

5. A Third-Party Food Delivery Service shall not be found in violation of this order if between July 1, 2020 and July 15, 2020, it imposes a fee per online order for the use of its services that totals more than 15% of the purchase price of such online order, provided it refunds the portion of the fee that exceeds 15% of the purchase price to the covered establishment prior to July 31, 2020.

6. 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.

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 Town of Fairfax, its departments, officer, or employees.

PASSED AND ADOPTED at a regular meeting of the Town Council of the Town of Fairfax held on this 1st day of July 2020, by the following vote, to wit:

AYES:
NOES:
ABSTAIN:
ABSENT:

RENEE GODDARD, Mayor

ATTEST: _____
Michele Gardner, Town Clerk