

URGENCY ORDINANCE NO. 1537

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ARCATA ESTABLISHING A CAP ON DELIVERY SERVICE COMMISSIONS, CHARGES, AND FEES DURING THE COVID-19 PANDEMIC EMERGENCY

The City Council of the City of Arcata does ordain as follows:

Section 1. **Findings and Purpose.** The City Council hereby finds as follows:

A. On March 4, 2020, the Governor declared a State of Emergency in California due to the threat of Coronavirus Disease 2019 (“COVID-19”). On March 11, 2020, the Humboldt County Health Officer declared a Local Health Emergency in response to the COVID-19 outbreak in California.

B. On March 19, 2020, the Governor issued Executive Order N-33-20 directing all California residents to stay at home indefinitely except for persons working in critical essential services. On March 20, 2020, the Humboldt County Health Officer issued an order directing all individuals living in Humboldt County to shelter in their residences except as needed to provide or receive specified essential services or engage in specified essential activities.

C. On March 26, 2020, the City Council adopted a resolution ratifying the Director of Emergency Services’ Proclamation of a Local Emergency in the City of Arcata due to the increase of COVID-19 in the community and the potential impact on community resources.

D. Under the State and County COVID-19 emergency orders, restaurants have been limited to providing only take-out food service, outdoor seating, and/or limited indoor seating. These service restrictions have 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. Providing take-out food service protects the public from coronavirus transmission and offers important revenue to many restaurants while the COVID-19 emergency orders are effective. These restaurants also provide employment to many Arcata residents.

E. Many members of the public rely on third-party food service applications and websites to place orders with restaurants for takeout and delivery. These third-party platforms charge delivery fees to the restaurants. Arcata restaurants are small businesses and have limited bargaining power to negotiate lower fees with third-party platforms that typically have high market saturation and strong bargaining positions. Further, the many Arcata restaurants currently experiencing dire financial straits in this COVID-19 emergency are unable to absorb high delivery fees.

E. Capping the per-order third party delivery fees at 15% with a penalty of up to \$1,000 for violations in an effort to support Arcata restaurants 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 these fees are recognized as reasonable, and third-party platforms continue to earn significant profits. The 15% limit is based on the findings and experience of other California cities that have already adopted 15% fee limits as reasonable emergency regulations.

F. During the COVID-19 emergency, the public health is best served by minimizing coronavirus transmission. Supporting local take-out food delivery service achieves this important interest and also helps to maximize restaurant revenue from the takeout and delivery orders, which currently provide the sole

source or a substantial component of revenue for these small businesses. This will further enable restaurants to survive this crisis and remain as sources of employment and neighborhood vitality in Arcata.

G. Restricting restaurants to takeout, delivery, and reduced seating as the only options to provide food service has placed a sudden and severe financial strain on many restaurants, many of which are very small businesses operating on thin margins, magnifying the pre-COVID financial strain in this economic sector.

H. It is in the public interest to take action to maximize restaurant revenue from takeout and delivery orders, which are a predominate source of income for these small businesses and will enable restaurants to remain viable through the pandemic, retaining jobs, providing services to the community, and contributing to community economic and social vitality.

I. Restaurants have limited bargaining power to negotiate lower fees with third party delivery companies, and due to pandemic market conditions, third party delivery companies have a captured market. The fees for these services can substantially eliminate restaurant profits necessary to remain viable.

J. Limiting the per-order fees at 15% will accomplish the legitimate public purpose of ensuring the continued operation of local restaurants during the period of emergency.

K. This measure is temporary in nature and is only intended to promote stability and safe and healthy operations within the restaurant sector in the City during the COVID-19 pandemic, and to prevent avoidable business closures thereby serving the public peace, health, safety, and public welfare and ensuring jobs and economic vitality within the City, while also preventing further spread of the virus.

Section 2. Delivery Service Provider Regulation Established.

A. The City Council hereby establishes a limitation on Independent Delivery Service Provider fees.

Section 3. Definitions.

“Covered Establishment” shall mean a restaurant located within the City of Arcata that offers the sale and same-day delivery of food to customers in a single commercial transaction, whether directly or through a third-party delivery service, from one or more restaurant locations within the City.

“Independent Delivery Service Provider” shall mean any company that offers same-day delivery service to Covered Establishments that are independent legal entities from the businesses for which the services are provided.

“Purchase Price” shall mean the menu price for an Online Order, which excludes taxes, gratuities, and any other fee that comprise the total cost to the customer of an Online Order.

“Restaurant” shall have the meaning defined in the City’s Land Use Code, Arcata Municipal Code Title IX, Section 9.100.020.

“Third-Party Order” shall mean an order for food placed by a customer through an application, website, telephone, text/sms, or other platform provided by an Independent Delivery Service Provider for pick up or delivery.

Section 4. City Manager Authority.

A. The City Manager, or its designee, is authorized to implement this Urgency Ordinance and

issue any guidance or rules necessary for implementation.

Section 5. Regulation of Fees.

A. An Independent Delivery Service Provider may charge no more than 15% of the Purchase Price offered by a Covered Establishment purchased as a Third-Party Order.

B. Any tax or gratuity paid by the customer for the individual transaction, and any fee charged by the Independent Delivery Service Provider in excess of 15%, without limitation, shall be remitted to the Covered Establishment from which the order was made within 15 days of the purchase.

C. The Independent Delivery Service Provider shall be financially responsible for the purchase price and any taxes or normal fees charged by a Covered Establishment for any Third-Party Order, whether or not the order is retrieved and delivered by the Independent Delivery Service Provider, if the Third-Party Order is prepared by a Restaurant.

D. If an Independent Delivery Service Provider charges a Covered Establishment fees in excess of 15%, the Covered Establishment shall provide written notice to the Independent Delivery Service Provider requesting a refund within 10 working days of the charge. The Independent Delivery Service Provider shall remit the full balance in excess of 15% within 10 working days.

Section 6. Administrative Enforcement Remedies

A. General. It shall be the duty of the City Manager, its deputy, agents, and/or employees, and they and each of them are hereby directed to enforce each and all of the provisions of this Urgency Ordinance. A complaint may be filed by the City Manager or any of its designees against any and all persons found to be in violation of any of said provisions.

When the City Manager or designee finds that an Independent Delivery Service Provider has violated or continues to violate any provision in this Urgency Ordinance, or applicable State or local law, the City Manager or designee may impose administrative penalties in accordance with Government Code Section 36901 in an amount which shall not exceed one thousand dollars (\$1,000). In determining the amount of the civil penalty, the City Manager may take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the economic benefit derived through any noncompliance, the nature and persistence of the violation, the length of time over which the violation occurred and corrective action, if any, attempted or taken by the permittee.

B. Reconsideration. Any Independent Delivery Service Provider affected by any administrative enforcement action made by the City Manager or its designee may file with the City Manager a written request for reconsideration within ten (10) days of such decision, action, or determination, setting forth in detail the facts supporting the permittee's request for reconsideration. The City Manager shall schedule a meeting with the Independent Delivery Service Provider to consider the reconsideration request, and shall make a final determination within fifteen (15) days after the meeting. The City Manager's decision, action, or determination shall remain in effect during such period of reconsideration.

C. City Council Appeal. The City Manager's reconsideration determination may be appealed by the affected Independent Delivery Service Provider to the City Council by submitting a written request for appeal to the City Manager no later than ten (10) days after notification of the City Manager's reconsideration decision. The written appeal shall be heard by the City Council within sixty (60) days from the date of filing. The City Manager's decision, action, or determination shall remain in effect during such period of appeal.

Section 7. Judicial Remedies.

A. Injunctive Relief—Penalties. When the City Manager finds that an Independent Delivery Service Provider has violated any permit condition, the provisions of this Chapter, or any other applicable City or State law, the City through its City Attorney may petition the Humboldt County Superior Court for the issuance of a preliminary or permanent injunction, or both, as may be appropriate in restraining the continuance of the activity. The City may also seek such other action as is appropriate for legal and/or equitable relief. A petition for injunctive relief shall not be a bar against, or a prerequisite for, taking any other action against an owner.

B. Criminal Prosecution. Any violation of this Chapter may be prosecuted by the City Attorney and charged in the discretion of the City Attorney as either a misdemeanor or an infraction.

Section 8. Remedies Nonexclusive.

A. The remedies in this Urgency Ordinance are not exclusive. The City may take any, all, or any combination of these actions against a noncompliant Independent Delivery Service Provider.

Section 9. Severability. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional, the decision shall not affect the validity of the remaining portions of the Ordinance. The City Council hereby declares that it would have passed this Ordinance, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid under law.

Section 10. Environmental Review. This ordinance creates a regulatory framework to ensure an existing and ongoing activity, the delivery of food by independent contractors, does not unduly affect the Covered Establishments. The program itself does not create a new activity, nor does it have an environmental impact itself. The primary effect of the program is to limit the expansion of the activity citywide to its current level. In so doing, the regulatory program is establishing a limit on the current condition. The program does not create a new market or otherwise encourage the expansion of the current condition. Therefore, the program does not have the potential to impact the environment and is exempt from the California Environmental Quality Act (CEQA) pursuant to Section 15061(b)(3) of the CEQA Guidelines.

Section 11. Effective Date of Ordinance. Based on the findings set out above and the need for the immediate preservation of public health and safety, this Urgency Ordinance shall have an early effective date pursuant to Government Code section 36937(b), and will take effect immediately upon its adoption.

Section 12. Termination Date of Ordinance. This Urgency Ordinance shall remain in effect until March 31, 2021, or until the restrictions on dine-in service are lifted by State and County health orders.

DATE October 21, 2020

ATTEST:

APPROVED:

/s/ Bridget Dory
City Clerk, City of Arcata

/s/ Paul Pitino
Vice Mayor, City of Arcata

CLERK’S CERTIFICATE

I hereby certify that the foregoing is a true and correct copy of Urgency Ordinance No. 1537, passed and adopted at a regular meeting of the City Council of the City of Arcata, Humboldt County, California on the 21st day of October, 2020, by the following vote:

AYES: WINKLER, PITINO, PEREIRA, WATSON

NOES: NONE

ABSENT: NONE

ABSTENTIONS: NONE

/s/ Bridget Dory
City Clerk, City of Arcata