



Rashi Kesarwani  
Councilmember District 1

CONSENT CALENDAR  
December 1, 2020

TO: Honorable Mayor and Members of City Council

FROM: Councilmember Rashi Kesarwani (Author), Councilmember Sophie Hahn (Co-Sponsor)

SUBJECT: Urgency Ordinance Amending Berkeley Municipal Code 13.111.020(a) (Ordinance No.7,727-N.S.) to Further Limit Third-Party Food Delivery Service Fees

RECOMMENDATION

Adopt an Urgency Ordinance amending Berkeley Municipal Code Section 13.111.020(a) (Ordinance No. 7,727-N.S.)—which establishes a temporary limit on the charges imposed by third-party delivery services on retail food establishments for the duration of the declared COVID-19 local state of emergency—by reducing the delivery fee cap from 15 percent to 10 percent, while maintaining the limit on other fees, commissions, or costs at 5 percent.

FISCAL IMPACT

Limited staff time to educate retail food establishments and third-party food delivery services about the ordinance amendment.

CURRENT SITUATION AND ITS EFFECTS

Currently, Berkeley Municipal Code Section 13.111.020(a) caps third-party food delivery charges at 15 percent for delivery fees and 5 percent for all other fees, commissions, or costs.<sup>1</sup> Unlike many other jurisdictions, our ordinance intends to provide greater protection to restaurants by imposing two separate caps—one on delivery fees and another on other fees, commissions, or costs—in an effort to prevent third-party food delivery services from shifting costs and circumventing the cap on delivery fees. This approach is modeled after the ordinance in Los Angeles.<sup>2</sup> Neighboring jurisdictions

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<sup>1</sup> City of Berkeley, Urgency Ordinance Limiting Third-Party Delivery Service Fees, July 7, 2020, [https://www.cityofberkeley.info/uploadedFiles/Clerk/Level\\_3\\_-\\_City\\_Council/Urgent%20Item%20Cover%20Memo%20-%20Third-Party%20Food%20Delivery.pdf](https://www.cityofberkeley.info/uploadedFiles/Clerk/Level_3_-_City_Council/Urgent%20Item%20Cover%20Memo%20-%20Third-Party%20Food%20Delivery.pdf).

<sup>2</sup> Los Angeles press release, “Mayor Garcetti Signs Law Limiting Delivery App Fees for Local Restaurants,” June 2020, <https://www.lamayor.org/mayor-garcetti-signs-law-limiting-delivery-app-fees-local-restaurants>.

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including Oakland,<sup>3</sup> Hayward,<sup>4</sup> and San Leandro<sup>5</sup> have taken a slightly different approach of only imposing a cap on delivery fees at 15 percent. It has also come to our attention that Portland imposed a delivery fee cap of 10 percent in early July 2020.<sup>6</sup>

Recently on October 30, 2020, Councilmember Kesarwani hosted a restaurant roundtable to gauge restaurants' experiences with Berkeley's cap on third-party food delivery charges. In some cases, third-party food delivery services may be applying our ordinance as a total cap of 20 percent on all charges when it is actually two separate caps—15 percent on delivery fees and 5 percent on any other fees, commissions, or costs. The input we received during the restaurant roundtable indicates that a lower cap on delivery fees would help our restaurants, and the experience of Portland leads us to believe that a 10 percent cap on delivery charges is viable.

## BACKGROUND

On July 7, 2020, the Berkeley City Council unanimously passed Ordinance No. 7,727-N.S. effectively limiting the fees third-party delivery services could charge retail food establishments in Berkeley. Key elements of Berkeley's ordinance established that it was unlawful for third-party delivery services to:

- Charge a retail food establishment a delivery fee that totals more than 15 percent of the purchase price of each online order;
- Charge a retail food establishment any combination of fees, commissions, or costs for the use of the third-party food delivery service that is greater than 5 percent of the purchase price of each online order; and
- Reduce the compensation rates paid to the delivery service driver or retain any portion of amounts designated as a tip or gratuity.

Cities such as San Francisco, Seattle, New York and Los Angeles had all recently passed similar ordinances in an effort to support their struggling restaurant industries that were being harmed by unreasonably high fees that could run close to 30 percent of the total sales of an order.

Due to the pandemic and the subsequent Shelter in Place orders that began on March 16, 2020, Berkeley food establishments pivoted to takeout services exclusively in order

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<sup>3</sup> Oakland City Council's Ordinance No. 13613, July 2020, <https://cao-94612.s3.amazonaws.com/documents/Food-Service-Delivery-Fee-Cap.pdf>.

<sup>4</sup> City of Hayward press release, "Emergency Ordinance: Temporary 15% Limit on Third-Party Delivery Service Fees," Sept. 2020, <https://www.hayward-ca.gov/your-government/departments/economic-development-division/Temporary-15-percent-limit-third-party-delivery-service-fees>.

<sup>5</sup> City of San Leandro press release, "City Council directs City Manager to Order 15% Limit on Third Party Food Delivery Company Fees," July 2020, <https://www.sanleandro.org/news/displaynews.asp?NewsID=1881&TargetID=1>.

<sup>6</sup> City of Portland, Oregon press release, "City Council Unanimously Adopts Ordinance Limiting Third-Party Food Delivery Fees," July 2020, <https://www.portland.gov/eudaly/news/2020/7/8/city-council-unanimously-adopts-ordinance-limiting-third-party-food-delivery>.

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to be in compliance with the initial Shelter In Place Order. At the same time, restaurants were forced to accept excessively high fees from third-party delivery services for a significant share of sales. As many people were reluctant to leave their homes for fear of infection, third-party delivery services became an essential option for restaurants to remain in business. In the best of times, however, restaurants operate on very slim margins of profit. The high fees charged by the third-party delivery services during the early stages of the pandemic when most restaurants had been forced to lay off staff and were fulfilling just a fraction of their previous sales resulted in restaurants at times operating at a loss. Ordinance No. 7,727-N.S. limiting the fees that third-party food delivery services can charge was a response to the economic challenges facing restaurants.

While currently some restaurants have been able to boost their sales with installations for outdoor dining and indoor dining at a limited capacity, many people remain reluctant to make use of these options particularly as recent numbers of infections have been climbing throughout the county. As of Sunday, Nov. 8, 2020, Berkeley's number of reported infections jumped by more than 50 cases<sup>7</sup> from the end of October, while cases also climbed in Alameda and neighboring counties. As it is clear that the pandemic will be with us for some time, the City must continue its efforts to further support our retail food establishments.

#### ENVIRONMENTAL SUSTAINABILITY

There is no significant impact on environmental sustainability.

#### CONTACT

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Attachments:

Ordinance No. 7,727-N.S. Section 13.111.020 with Proposed Tracked Changes

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<sup>7</sup> See City of Berkeley COVID-19 Dashboard, accessed Nov. 9, 2020: <https://datastudio.google.com/u/0/reporting/5f30863b-6ba3-4fbc-9e0f-d7b573d82a32/page/azYOB?s=o8VEd87a4ow>

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Ordinance No. 7,727-N.S. section 13.111.020 with Proposed Tracked Changes

ORDINANCE NO. X,XXX–N.S.

URGENCY ORDINANCE AMENDING THE BERKELEY MUNICIPAL CODE TO ESTABLISH A TEMPORARY LIMIT ON THE CHARGES IMPOSED BY THIRD-PARTY DELIVERY SERVICES ON RETAIL FOOD ESTABLISHMENTS DURING THE LOCAL DECLARED STATE OF EMERGENCY RESULTING FROM THE COVID-19 PANDEMIC

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Section 13.111.020 is amended to read as follows:

**13.111.020. Prohibitions.**

A. It shall be unlawful for a Third-Party Food Delivery Service to charge a Retail Food Establishment a Delivery Fee that totals more than 10 percent of the Purchase Price of each Online Order.

B. It shall be unlawful for a Third-Party Food Delivery Service to charge a Retail Food Establishment any amount designated as a Delivery Fee for an Online Order that does not involve the delivery of food or beverages.

C. It shall be unlawful for a Third-Party Food Delivery Service to charge a Retail Food Establishment any combination of fees, commissions, or costs for the Retail Food Establishment's use of the Third-Party Food Delivery Service that is greater than 5 percent of the Purchase Price of each Online Order. Fees, commissions, or costs do not include Delivery Fee.

D. It shall be unlawful for a Third-Party Food Delivery Service to charge a Retail Food Establishment any fee, commission, or cost other than as permitted in Subsections A through C, above.

E. It shall be unlawful for a Third-Party Food Delivery Service to charge a customer any Purchase Price for a food or beverage item that is higher than the price set by the Retail Food Establishment on the Third-Party Food Delivery Service or, if no price is set by the Retail Food Establishment on the Third-Party Food Delivery Service, the price listed on the Retail Food Establishment's own menu.

F. It shall be unlawful for a Third-Party Food Delivery service to reduce the compensation rates paid to the delivery service driver or retain any portion of amounts designated as a tip or gratuity. Any tip or gratuity shall be paid by the Third Party Delivery Service, in its entirety, to the person delivering the food or beverages.

Section 2. Severability Clause. If any subsection, sentence, clause or phrase of this article is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this article. The City Council hereby declares that it would have adopted this article and each and every subsection, sentence, clause, and phrase thereof not declared invalid or unconstitutional, without regard to whether any portion of the article would be subsequently declared invalid or unconstitutional.

Section 3. Urgency Clause. The City Council finds and declares that this ordinance is required for the immediate preservation of public health, peace and safety for the following reason: The State of California and the City of Berkeley have declared a state of emergency due to the novel COVID-19 pandemic. Residents are subject to a "Shelter in Place" Order and Retail Food Establishments are currently only able to offer limited dining options. Many Retail Food Establishments use Third-Party Food Delivery Services, and due to the high fees imposed by Third-Party Food Delivery Services, must increase food prices to stay in business. Residents who rely on food delivery may be not be able to absorb increased food prices. Also, some Retail Food Establishments being charged high fees struggle to remain financially viable. If these Retail Food Establishments close, their workers will lose employment, which affects their ability to feed and shelter their families. Based on the findings and evidence presented, the Council determines that this Ordinance is necessary for the immediate preservation of the public health, peace and safety in accordance with Article XIV Section 93 of the Charter of the City of Berkeley. This Ordinance shall go into effect immediately upon a seven-ninths vote of the City Council, in satisfaction of the Charter of the City of Berkeley.

