ORDINANCE NO. 21-004

AN URGENCY ORDINANCE OF THE
CITY OF PACIFIC GROVE ESTABLISHING A TEMPORARY
CAP ON CHARGES BY THIRD-PARTY FOOD DELIVERY FIRMS FOR
ORDERING AND DELIVERY OF RESTAURANT FOOD WITHIN
THE CITY OF PACIFIC GROVE

Findings

1. A condition of extreme peril to the safety of persons and property have arisen within the City, based on the following:

1.1. 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 6, 2020, the Monterey County Public Health Officer declared a public health emergency in Monterey County due to COVID-19. Directives from federal, state, and local health officials have advised residents to avoid public gatherings and stay at home to prevent the spread of this disease.

1.2. On March 16, 2020, the Governor issued Executive Order N-28-20. The order suspends any state law that would preempt or otherwise restrict the city’s exercise of its police power to impose substantive limitations on evictions based on nonpayment of rent resulting from the impacts of COVID-19.

1.3. On March 17, 2020, the Monterey County Public Health Officer issued a “Shelter in Place” Order, requiring people to stay home except for essential needs.

1.4. On August 28, 2020, Governor Gavin Newsom unveiled a new State framework to replace the former State County Monitoring List and Variance Processes effective Monday, August 31, 2020. This blueprint provided a new color coded four-tier framework, with different restrictions on activity for each tier.

1.5. On September 30, 2020, the State added a COVID-19 Equity requirement to its Blueprint for a Safer Economy framework. Under this new state requirement, counties with more than 106,000 residents must bring infections down in these places and invest heavily there in testing, contact tracing, outreach and providing means for infected people to isolate. The measure is designed to ensure that test positivity rates in the most disadvantaged neighborhoods do not significantly exceed a county’s overall rate. Counties will not be permitted to reopen their economies further unless they reduce coronavirus infections in the hardest-hit places where the poor, African American, Latinos, Pacific Islanders, and essential workers live.

1.6. On December 3, 2020, the State issued a new Regional Stay at Home Order that creates five Regions within California and imposes tight restrictions on any Region in which ICU capacity drops below 15%.

1.7. Under the State’s December 3, 2020 Regional Stay at Home Order and the County Health Officer’s December 4, 2020 Mandatory Directive Implementing State’s Stay At Home Order, all dining establishments (including restaurants, bars, wineries, and other food service facilities) and smoking lounges are temporarily prohibited from providing

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any on-site service. Dining establishments and smoking lounges may provide only curbside pickup, take away, or delivery service.

1.8. The efforts required to prepare for, respond to, mitigate, and recover from the emergency conditions caused by COVID-19 have imposed and will continue to impose extraordinary requirements and expenses on the City.

2. Access to food is essential, and it is therefore necessary to take steps to support restaurants and other food providers so they may continue to perform an essential function of providing access to food via delivery and pick-up options and to address food insecurity to those who are unable to obtain food in other ways;

3. It is necessary to take action to maximize restaurants’ revenue from delivery and pick-up orders that are a lifeline and currently the sole source of revenue for the City’s restaurant and food industry to enable these businesses to survive the impacts of the COVID-19 pandemic and continue supporting the workforce and contributing to the vitality of the City’s economy.

4. Many consumers are eager to support local restaurants by using third-party, app-based delivery platforms to place orders with those restaurants, and these third-party platforms charge commission fees based on the purchase price;

5. Capping the delivery commission fees on delivery or pick-up orders while restaurants are unable to provide unrestricted dine-in service will ease the economic hardship for these essential service providers, while not unduly burdening third-party, app-based delivery platforms.

6. During this time of local economic shutdown and uncertainty caused by the COVID-19 pandemic, many vulnerable workers have found work as delivery drivers for these third-party delivery platforms to financially support themselves and their families, and may be economically impacted if third-party, app-based delivery platforms reduce compensation rates to these delivery drivers as a result of the cap on delivery commission fees, and therefore, it is necessary to take action to prevent such under-compensation.

7. Article 15 of the Pacific Grove City Charter enables the Council to enact an urgency ordinance when the measure is needed by an emergency to preserve the public peace, health, safety or public welfare.

8. An urgency ordinance that is effective immediately is necessary to avoid the continued and immediate threat to public peace, health, and safety, and to protect life and property, as failure to adopt such an urgency ordinance would result in City residents having limited or no access to prepared food during the period in which the Regional Stay at Home Order remains in effect, the avoidable exposure of City residents to COVID-19 in the absence of delivered prepared food, and permanent damage to vital City small businesses and their contributions to employment and economic vitality.

9. Enactment of a third-party food delivery fee cap does not constitute a “Project” as that term is defined under the California Environmental Quality Act (CEQA), CEQA Guideline Section 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and 15060(c)(3) (the activity is not a project as defined in section 15378). Furthermore, the City Council finds there is no possibility that adoption of this fee cap could have a significant effect on the environment; therefore, no further
environmental review is necessary in accordance with Section 15061(b)(3) of the CEQA Guidelines.

NOW, THEREFORE, THE COUNCIL OF THE CITY OF PACIFIC GROVE DOES ORDAIN AS FOLLOWS:

SECTION 1. Findings.
The foregoing Findings are adopted as an integral part of this ordinance as if set forth in full.

SECTION 2. Declaration of Urgency.
The City Council declares this ordinance to be an urgency measure, to take effect immediately upon adoption pursuant to Pacific Grove Charter Article 15. The facts constituting the urgency are as follows:

Directives from health officials required to curtail the spread of COVID-19 have resulted in loss of business, furloughs, loss of wages, and lack of work for many employees. To protect the public peace, health, safety, and welfare, the City must act to prevent (a) residents from having limited or no access to prepared food during the period in which the Regional Stay at Home Order remains in effect, (b) avoidable exposure of residents to COVID-19 in the absence of delivered prepared food, and (c) permanent damage to vital small businesses and their contributions to employment and economic vitality.

SECTION 3. Scope.
The Ordinance makes it unlawful for a third-party food delivery firm to charge a fee per online restaurant order or for use of restaurant services where the fee totals more than 15 percent of the purchase price of such online order. This Ordinance shall remain in effect during the local public health emergency related to COVID-19. The Ordinance will sunset sixty (60) days after prohibition of on-premises dining has been lifted.

SECTION 4. Definitions.
For the purpose of this Ordinance:

a. “Covered Establishment” shall mean a restaurant, or a similar retail food establishment, that sells ready to eat food or beverages for consumption within the City. This term does not include grocery stores or convenience stores.

b. “Customer” shall mean any person or entity that places an Online Order.
c. “Delivery Fee” shall mean a commission fee charged by a third-party food delivery firm or service for service of delivering food or beverages from the covered establishment to customers.

d. “Delivery Firm” shall mean any person or entity that offers or arranges to sell food or beverages prepared by, and the same-day delivery or same-day pickup of food and beverages from a Covered Establishment to customers, including use of a Platform.

e. “Delivery Worker” shall mean any person engaged by a Delivery Firm in any capacity to deliver an Online Order to a Customer.

f. “Listing Services” shall mean services offered by a Delivery Firm to make it possible for a Customer to place an Online Order at a given Covered Establishment, including (i) listing the information and/or menu of a Covered Establishment, (ii) processing Online Orders, and (iii) arranging payment for Online Orders, including paying any credit card processing fees.

g. “Online Order” shall mean an order placed by a Customer from a Covered Establishment through or with the assistance of a Platform provided by a Delivery Firm, including a telephone order, for delivery or pick-up within the City.

h. “Platform” shall mean any website, mobile application, or other internet service.

i. “Promotional Services” shall mean services offered by a Delivery Firm to a Covered Establishment for the purposes of promoting, advertising, or otherwise strengthening the business or performance of the Covered Establishment that are independent of order and delivery services or Listing Services.

j. “Purchase Price” shall mean the price of food or beverage items set by a Covered Establishment and listed on such Covered Establishment’s menu, excluding any taxes, tips, gratuities, or other charges imposed by the Covered Establishment or any Delivery Service.

SECTION 5. Cap on Fees; Compensation of Delivery Service Workers

a. Maximum Fees Charged to Covered Establishment

1. A Delivery Firm shall not impose upon a Covered Establishment any Fee or combination of Fees that in total constitute more than fifteen percent (15%) of the Purchase Price for order and delivery of each Online Order that is delivered to a Customer by or at the direction of the Delivery Firm.

2. A Delivery Firm shall not impose upon a Covered Establishment any Fee or combination of Fees for non-delivery services, including Listing Services, that in total constitute more than ten percent (10%) of the Purchase Price for each Online Order that is not delivered to a Customer by or at the direction of the Delivery Firm.
3. Nothing in Paragraph (1) or Paragraph (2) of this Subsection shall prevent a Delivery Firm from selling Promotional Services to a Covered Establishment at prices negotiated between the Covered Establishment and the Delivery Firm, provided that a Delivery Firm shall not make the provision of services included in Paragraph (1) or Paragraph (2) contingent upon the purchase by a Covered Establishment of Promotional Services.

4. A Delivery Firm shall not limit or impede in any manner the ability of a Covered Establishment to determine such Covered Establishment’s Purchase Prices.

b. Compensation of Delivery Workers.
   1. A Delivery Firm shall not reduce the compensation per delivery of Online Orders, including any tip or gratuity, paid to any Delivery Worker for any reason related to the implementation of this Ordinance.

   2. A Delivery Firm shall pass on to Delivery Workers and shall not retain any tip or gratuity paid by a Customer to a Delivery Worker.

   3. Except for a collective bargaining agreement provision, any waiver by a Delivery Worker of any or all rights under this Ordinance shall be deemed contrary to public policy and shall be void and unenforceable. Other than in connection with the bona fide negotiation of a collective bargaining agreement, any request by a Delivery Firm to a Delivery Worker to waive such Delivery Worker's rights under this Ordinance shall be unlawful.

c. Disclosures and Other Protections.
   1. Upon written request by a Covered Establishment, a Delivery Firm shall promptly provide a written invoice specifying in reasonable detail all Fees charged to that Covered Establishment by the Delivery Firm for all Listing Services, Promotional Services, and Fees per Online Order.

   2. Upon written request by a Delivery Worker, a Delivery Firm shall provide documentation of all compensation received by such Delivery Worker per Online Order, including any tips or gratuities.

   3. A Delivery Firm shall not list, or cause to list, any Covered Establishment, or the menu of the Covered Establishment, on any website, mobile application or other internet.

SECTION 6. Compensation to Delivery Workers
A Delivery Firm platform shall not reduce compensation to Delivery Workers, including the reduction of any amount of tips provided to delivery workers, that results from the restrictions on Delivery fees as set forth in this Ordinance.
SECTION 7. Disclosure.
Delivery Firms shall disclose to the Customer an accurate, clearly identified, and itemized cost breakdown of each transaction, including, but not limited to, the following:

1. The Purchase Price of the food and beverages at the cost listed on the Covered Establishment’s menu;
2. The Delivery Fee charged to the Covered Establishment;
3. Each fee, commission, or cost, other than a Delivery Fee, charged to the Covered Establishment;
4. Each fee, commission, or cost, other than the Delivery Fee or the Purchase Price of the food, charged to the Customer by the Delivery Firm; and
5. Any tip or gratuity that will be paid to the Delivery Worker delivering the food or beverages.

SECTION 8. Enforcement.
a. Enforcement Procedure. The City shall issue an administrative citation for the violation of any section of this Ordinance. Violations shall be enforced pursuant to Chapter 1.19 PGMC.

b. Violations Subject to Penalties. Any Delivery Firm that violates any provision of this Ordinance shall be subject to administrative penalties and fines pursuant to PGMC Chapter 1.19.
   1. For purposes of assessing penalties for violations of this Ordinance, a separate violation shall accrue each time an Online Order is processed subject to any contract, term, fee, commission, charge, or price that violates one or more of these sections.
   2. For purposes of assessing penalties for violation of this Ordinance, each day a Delivery Firm fails to disclose documents or records in violation of this Ordinance shall constitute a separate violation.

c. Penalty Amounts. In setting the amount of the administrative penalty, which shall not exceed $1,000 per violation, the Hearing Officer prescribed in Chapter 1.19 PGMC shall consider any one or more mitigating or aggravating circumstances presented, including but not limited to the following: the amount of any fee, commission, or charge collected in violation of this Ordinance, the persistence of the misconduct, the willfulness of the misconduct, the length of time over which the misconduct occurred, and the assets, liabilities, and net worth of the Delivery Firm.
SECTION 9. **Effective Date.**
This ordinance shall take immediate effect upon adoption by five-sevenths (5/7ths) vote of the City Council and shall remain operative at any time during which a federal, state, or local order, resulting from the COVID-19 pandemic, limits customer capacity to less than full capacity at Covered Establishment in the City of Pacific Grove, and for a period of sixty (60) days after any such federal, state, or local order is lifted.

SECTION 10. **Severability.**
If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are severable.

**PASSED AND ADOPTED BY THE COUNCIL OF THE CITY OF PACIFIC GROVE**
this 20th of January, 2021, by the following vote:

**AYES:** Mayor Peake, Councilmembers Amelio, Coletti, McAdams, Poduri, Smith, and Tomlinson

**NOES:** None.

**ABSENT:** None.

**APPROVED:**

[Signature]
BILL PEAKE, Mayor

**DATING:** 1/21/2021

**ATTEST:** SANDRA KANDELL, City Clerk

**APPROVED AS TO FORM:**

[Signature]
DAVID C. LAREDO, City Attorney