

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**ORDINANCE NO. 2021-02**

**AN URGENCY ORDINANCE OF THE CITY OF ALBANY 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**

**WHEREAS**, on March 16, 2020, the City Council of the City of Albany adopted Resolution No. 2020-29, proclaiming the existence of a local emergency due to the COVID-19 pandemic; and

**WHEREAS**, on March 16, 2020, public health officers within six Bay Area counties, including Alameda County, issued a legal order directing residents to shelter at home and limit activity, travel and business functions to only the most essential needs. A similar shelter in place order was issued statewide by the Governor of the State of California on March 19, 2020; and

**WHEREAS**, on July 13, 2020, the State Public Health Officer issued an order closing all indoor restaurant dining, among other indoor operations; and

**WHEREAS**, under these public health orders, restaurants were prohibited from providing in-person dining and limited to drive through, pick-up or delivery. Subsequent health orders have allowed limited in-person dining where physical distancing can be maintained in accordance with evolving guidance from the State of California and local health officials, then orders reverted back to drive through, pick-up or delivery due to increased COVID-19 cases locally; and

**WHEREAS**, these new operating restrictions placed a sudden and severe financial strain on many restaurants, particularly those that already operate on thin margins, adding to financial pressures in the industry that predate the COVID-19 crisis; and

**WHEREAS**, as restaurants return to modified, lower capacity restaurant service, it is unclear how restaurants will fare, as restaurants must create new, physically distanced dining areas and implement increased training and sanitation measures. It is also unclear how quickly restaurant patrons will return to in-person restaurant dining and restaurants may continue to see a significant loss of revenue for an ongoing period of time; and

1           **WHEREAS**, takeout and delivery orders have become a primary source of revenue for  
2 restaurants, and many consumers use third-party applications and websites to place orders with  
3 restaurants for delivery and takeout; and

4           **WHEREAS**, given that only a few companies in the marketplace provide such delivery  
5 services, small restaurants that do not operate their own delivery service resort to contracting with  
6 third-party delivery service providers as a means to compete in the marketplace; and

7           **WHEREAS**, these third-party delivery service platforms charge restaurants fees. Service  
8 agreements between some restaurants and third-party platforms provide that the platform charges  
9 the restaurant between ten percent (10%) to thirty percent (30%) of the purchase price per order;  
10 and

11           **WHEREAS**, restaurants, eating and drinking establishments, and particularly those that  
12 are small businesses, have limited bargaining power to negotiate lower fees with third-party  
13 platforms given the market saturation of third-party platforms and the financial straits restaurants  
14 are facing during this period of emergency; and

15           **WHEREAS**, capping delivery service per-order fees at 15% and non-delivery services at  
16 10% per order, will achieve the public purpose of ensuring the continued operation of local  
17 restaurants and third-party platforms during the period of emergency; the expressed caps on fees  
18 charged to restaurants is based on the findings and experience of other California cities and cities  
19 nationwide that have already adopted similar caps as reasonable emergency regulations in  
20 collaboration with food delivery companies; and

21           **WHEREAS**, it is in the public interest to take action to ensure the delivery of essential  
22 food services to residents who are sheltering in place and to make the use of third-party delivery  
23 services more affordable, thereby enabling an increase in their use by consumers, and thereby  
24 reducing the potential for spread of COVID-19 from in-person dining; and

25           **WHEREAS**, it is in the public interest to maximize restaurant revenue from the takeout  
26 and delivery orders to enable these restaurants to survive this crisis and remain as sources of  
27 neighborhood character and vitality in the City; and  
28

1           **WHEREAS**, it is in the public interest to maintain economic infrastructure so that the  
2 City’s restaurant and food service industry may remain open and have the ability to recover from  
3 the impacts of the COVID-19 pandemic outbreak and continue to provide employment and  
4 generate tax revenue and so that economic recovery is possible after the emergency is over, all of  
5 which are in the interest of the public peace, health, safety and welfare; and

6           **WHEREAS**, this Urgency Ordinance is temporary in nature and necessary to avoid the  
7 continuing and immediate threat to public peace, health, and safety as failure to adopt this Urgency  
8 Ordinance would result in the avoidable displacement or exposure to COVID-19 of the City’s  
9 restaurant and food service industry and to the amplification of the factors that lead to the spread  
10 of the virus, as described in these Recitals; and

11           **WHEREAS**, the California Constitution, Article XI, Section 7, provides cities and  
12 counties with the authority to enact ordinances to protect the health, safety, and general welfare,  
13 of their citizens; and

14           **WHEREAS**, California Government Code Section 36937 authorizes the City Council to  
15 introduce and adopt an ordinance it declares to be necessary as an emergency measure to preserve  
16 the public peace, health, and safety at one and the same meeting if passed by at least four-fifths  
17 affirmative votes.

18 **NOW, THEREFORE, THE ALBANY CITY COUNCIL ORDAINS AS FOLLOWS:**

19  
20 **SECTION 1. INCORPORATION OF RECITALS; URGENCY DECLARATION.**

- 21           A. The City Council hereby finds that all of the foregoing recitals are true and correct and are  
22 hereby incorporated and adopted as findings of the City Council as if fully set forth herein.  
23  
24           B. The City Council finds and declares there is a current and immediate threat to the public  
25 health, safety and/or welfare and a need for immediate preservation of the public peace,  
26 health, or safety that warrants this urgency measure, which finding is based upon the facts  
27 stated in the Findings above, the accompanying staff report, and any oral and written  
28 testimony and additional information presented to this Council at its February 16, 2021  
meeting.

1 C. The City Council finds and declares the adoption and implementation of this Ordinance  
2 is an urgency measure necessary for the immediate preservation and protection of the  
3 public peace, health and safety as detailed above and as this Ordinance is an emergency  
4 response measure aimed at ensuring the vitality and return of the restaurant industry after  
5 closure and limited operations. The facts constituting such urgency are all of those certain  
6 facts set forth and referenced in this Ordinance and the entirety of the record before the  
7 City Council.  
8

9 **SECTION 2. FOOD SERVICE DELIVERY AND NON-DELIVERY COMMISSIONS**  
10 **CAP ESTABLISHED.**

11 A. Commissions Cap and Prohibitions. During the period of declared local emergency  
12 pursuant to City Council Resolution No. 2020-29, as may be amended from time to time,  
13 it shall be unlawful for any Third-Party Food Delivery Service to do any of the following  
14 within the City of Albany:

- 15 1. Charge a Retail Food Establishment a Fee of more than 15 percent of the  
16 Purchase Price per Online Order for delivery services.
- 17 2. Charge a Retail Food Establishment a Fee of more than 10 percent of the Purchase  
18 Price per Online Order for pick-up services.
- 19 3. Charge a Retail Food Establishment any fee, commission, or cost other than as  
20 permitted in Subsections A1 through A2, above.
- 21 4. Charge a Customer any Purchase Price for a food or beverage item that is higher  
22 than the price set by the Retail Food Establishment on the Third-Party Food  
23 Delivery Service or, if no price is set by the Retail Food Establishment on the  
24 Third-Party Food Delivery Service, the price listed on the Retail Food  
25 Establishment's own menu.
- 26 5. Limit or impede in any manner the ability for a Retail Food Establishment to  
27 otherwise determine the purchase price for food or beverage items listed in its  
28 menu.

- 1                   6. List any Retail Food Establishment, or its respective menu in the Third-Party  
2                   Food Delivery Service’s website, mobile application or other internet service,  
3                   without the specific consent of the Retail Food Establishment.

4                   B. Tips and Gratuities; no reduction of compensation.

- 5                   1. A Third-Party Food Delivery Service shall offer Customers the option to, as a part  
6                   of an Online Order for delivery or non-delivery service, authorize a tip or gratuity  
7                   to be paid to food delivery service workers and any Retail Food Establishment  
8                   from which the Customer places an Online Order through the Third-Party Food  
9                   Delivery Service.
- 10                  2. It shall be unlawful for a Third-Party Food Delivery Service to reduce or retain  
11                  the compensation, including any tip or gratuity, paid to any food delivery service  
12                  worker, or to reduce or retain any tip or gratuity authorized by a customer to be  
13                  paid to any Retail Food Establishment, as a result of the prohibitions stated in this  
14                  Ordinance.

15                  C. Enforcement.

- 16                  1. A Retail Food Establishment, or food delivery service worker claiming a violation  
17                  of this Ordinance shall first provide written notice to the Third-Party Food  
18                  Delivery Service of the specific section of this Ordinance which is alleged to have  
19                  been violated and the facts to support the alleged violation. The Third-Party Food  
20                  Delivery Service shall have seven (7) business days from the date of receipt of  
21                  the written notice to cure any alleged violation including but not limited to  
22                  providing a refund of any charges exceeding the caps imposed herein.
- 23                  2. If, after written notice is provided pursuant to subsection (C)(1) above and the  
24                  Third-Party Food Delivery Service fails to cure the alleged violation, including  
25                  failing to provide a refund or continuing to charge fees in violation of this  
26                  Ordinance, the person or entity claiming a violation of this Ordinance may bring  
27                  a civil action seeking damages and injunctive relief. The prevailing party in any  
28                  such action shall be entitled to an award of reasonable attorney’s fees.

1           3. This Ordinance is not intended to, and does not, create any rights or benefits,  
2           substantive or procedural, enforceable at law or in equity, against the City of  
3           Albany, its departments, officers, or employees.

4           D. Definitions. For the purposes of this Ordinance, the following definitions shall apply:

- 5           1. "Customer" means any person, firm, or association who makes use of a Third-  
6           Party Food Delivery Service for the purpose of obtaining food or beverage items  
7           for consumption from a Retail Food Establishment located within the City.
- 8           2. "Fee" means any fees, commissions or costs charged for listing or advertising  
9           the Retail Food Establishment on the Third-Party Food Delivery Service  
10           platform, fees related to processing the Online Order, including, but not limited  
11           to, delivery service fees, fees for facilitating Online Orders for pick-up, and credit  
12           card processing fees.
- 13           3. "Online Order" means an order for a consumer food item placed through an  
14           application or platform provided by a Third-Party Food Delivery Service for  
15           delivery or pickup within the City.
- 16           4. "Purchase Price" means the menu price of an Online Order, excluding taxes,  
17           gratuities, and any other fees which may contribute to the total cost to the  
18           Customer of an online order.
- 19           5. "Retail Food Establishment" means a restaurant, delicatessen, bakery, coffee  
20           shop, or other eat-in or carry-out service of processed or prepared raw and ready-  
21           to- eat food or beverages.
- 22           6. "Third-party Food Delivery Service" means any individual, firm, association,  
23           corporation or entity through website, mobile application or other internet service  
24           that offers or arranges for the sale of consumer food or beverage items for same-  
25           day delivery or same-day pickup from a Retail Food Establishment located  
26           within the City of Albany.

1 **SECTION 3. EFFECTIVE DATE; DURATION.**

2 This Urgency Ordinance shall become effective immediately upon its adoption pursuant to  
3 California Government Code Section 36937. This Urgency Ordinance shall expire on the date  
4 that the Albany City Council terminates the local emergency proclaimed pursuant to Resolution  
5 No. 2020-29 as may be amended from time to time, related to COVID-19, unless such term is  
6 otherwise specifically amended by the City Council. The City Council may review this Ordinance  
7 prior to its expiration and determine whether to extend its provisions.

8  
9 **SECTION 4. CEQA.**

10  
11 The City Council finds that adoption and implementation of this Ordinance is not a “project” for  
12 purposes of the California Environmental Quality Act (CEQA), as that term is defined by CEQA  
13 guidelines (Guidelines) sections 15061(b)(3), and 15378(b)(5). This is an emergency response  
14 measure aimed at capping delivery services fees on existing restaurants. No new development will  
15 result from the proposed action and the regulation temporary. No direct or indirect impact to the  
16 physical environment will result. The City Council also alternatively finds that the adoption and  
17 implementation of this Ordinance is exempt from the provisions of CEQA Guidelines section  
18 15064(e) (economic regulations).

19  
20 **SECTION 5. SEVERABILITY.**

21 If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance for  
22 any reason is held to be invalid or unconstitutional by the decision of any court of competent  
23 jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance.  
24 The City Council hereby declares that it would have adopted this Ordinance, and each section,  
25 subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that  
26 any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions  
27 thereof be declared invalid or unconstitutional.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**SECTION 6. CERTIFICATION**

The City Clerk shall certify to the passage and adoption of this Ordinance and shall cause the same, or the summary thereof, to be published or posted in the manner required by law.

PASSED, APPROVED AND ADOPTED this 16th day of FEBRUARY 2021.

AYES: Council Members Jordan, McQuaid, Nason, Tiedemann and Mayor Gary

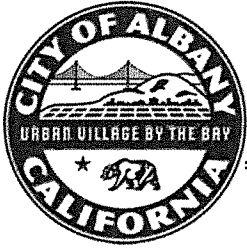
NOES:

ABSENT:

ABSTAIN:

  
\_\_\_\_\_  
GE'NELL GARY, MAYOR





# City of Albany

1000 San Pablo Avenue • Albany, California 94706  
(510) 528-5710 • [www.albanyca.org](http://www.albanyca.org)

**ORDINANCE NO. 2021-02**

PASSED AND APPROVED BY THE COUNCIL OF THE CITY OF ALBANY,

The 16th day of February, 2021, by the following votes:

AYES: Council Members Jordan, McQuaid, Nason, Tiedemann and Mayor Gary

NOES: none

ABSENT: none

ABSTAINED: none

RECUSED: none

WITNESS MY HAND AND THE SEAL OF THE CITY OF ALBANY, this

17th day of February, 2021.

Anne Hsu  
CITY CLERK