

CITY MANAGER'S OFFICE MEMORANDUM
#11-2021

DATE: April 12, 2021

TO: Honorable Mayor Meredith Leighty and City Council Members

FROM: Heather Geyer, City Manager 

SUBJECT: CB-1970 – Food Delivery Fee Cap Emergency Ordinance Extension

PURPOSE

To consider CB-1970, an emergency ordinance extending the provisions of Article 3 of Chapter 20 of the Municipal Code, which places a 15% fee cap on third-party food delivery fees. This ordinance will be repealed following the expiration of 30 consecutive days of retail food establishments being authorized by the State of Colorado and Tri-County Health Department to operate at 100% capacity. This extension of Ordinance No. 1810, adopted by Council on Dec. 21, 2020, and expired on March 31, 2021, seeks to provide relief to restaurants that have experienced severe financial impacts as a result of COVID-19 restrictions.

BACKGROUND

HB20B-1005 – Local Authority To Impose Food Delivery Fee Restrictions allows local governments to control how much of those fees can be charged during a declared public health emergency.

Northglenn's ordinance prohibited the following actions:

- Performing a delivery or other service, or offering that service for a restaurant without the restaurant's consent
- Charging commissions or fees for the delivery platform service (for delivery or pickup) exceeding 15% of the purchase price (based on the restaurant menu price, not including taxes, tips, or other fees)
- Garnishing tips to cover the fee limit
- Charging fees for phone orders through the platform that don't result in a transaction

The ordinance also required clear disclosures of fees and other costs prior to concluding the order and on receipts.

COVID-19 Restrictions on Restaurants

On March 16, 2020, restaurants in Colorado were ordered to close their dining rooms due to COVID-19 restrictions enacted by the Colorado Department of Public Health and Environment. They remained closed until June 19, 2020. When restaurants reopened, they could operate at 50% capacity. Additionally, restaurants could not seat their customers and could only offer take-out, curbside or delivery services. As a result, restaurants increased their use of third-party delivery services (if they did not have their own service) such as Grubhub, DoorDash, Postmates and Uber Eats.

Generally speaking, this is how the third-party delivery app business model works:

- Customer pays a delivery fee (\$5 to 10 per order).
- Customer pays a tip to the delivery driver (typically 15 to 30%).
- Restaurant pays a 15 to 35% commission on each order.
- Restaurant may pay additional fees for online marketing support.
- Platform pays for the driver, driver background check and app technology.

- The driver earns around \$1+ per delivery and 100% of the tip.
- Drivers use their own vehicle and are responsible for their own expenses (i.e. gas, insurance, phone).

The City received complaints about the increase in fees and responded as other jurisdictions did with an emergency ordinance capping the fees at 15%.

Current Restaurant Restrictions

The State of Colorado COVID-19 Dial is set to expire on April 15. At that time, any new guidance on restrictions for restaurants will be provided by Tri-County Health Department. As of publication of this memorandum, the City is operating in Level Yellow on the COVID-19 Dial, which allows restaurants to operate at a restricted capacity of 50% or 150 people, whichever number is fewer, and 6 feet between parties outdoors, per local zoning.

Restaurants that have received the 5 Star Designation from Adams County are allowed to operate at 100% capacity with 6-foot distancing between parties.

In Northglenn, approximately 54 restaurants are operating under yellow restrictions and eight are operating under the 5 Star program.

Food Delivery Service Fee Restrictions

Previously, the following entities had passed a 15% temporary fee cap:

- Adams County
- City of Aurora
- City of Commerce City
- City and County of Broomfield
- City of Boulder
- City and County of Denver
- City of Westminster

Some cities are responding to the ongoing restrictions on restaurants by extending the food service delivery fee restrictions through early summer 2021.

- Adams County – Their ordinance is set to expire when indoor capacity restrictions are removed, and they have not decided on further action.
- Aurora – Their ordinance being presented to City Council on April 26 includes an expiration of May 15, 2021, or when public health orders allow restaurants to have 100% unrestricted capacity.
- Broomfield – Their ordinance expired the week of April 1 and no further action is being taken.
- Commerce City – Their City Council extended their cap on fees until July 31.
- Denver – Extended its 15% service fee cap to June 14
- Federal Heights – Their ordinance has the following expiration clause: “This ordinance shall be repealed in its entirety once the indoor capacity restrictions imposed by the State and the Tri-County Health Department on retail food establishments due to the COVID-19 pandemic are terminated.”
- Westminster – Their emergency cap expired on March 31; no further action is being taken.

Currently, Northglenn has approximately 54 restaurants operating. Based on a review of a couple of third-party services, it is estimated that only 10 of those restaurants are not utilizing them.

SB21-035 – Restrictions on Third-party Food Delivery Services

SB21-035 is pending legislation. As of April 6, SB21-035, was introduced in the Senate, passed out of the Committee on Business, Labor & Technology with amendments and not yet scheduled for vote by the Senate. This bill is aimed at controlling apps’ relationships with restaurants and

with their delivery drivers, not on restricting municipalities' ability to cap fees. The bill prohibits a third-party food delivery service from:

- Offering food or beverage deliveries from a retail food establishment without a written agreement with the establishment; or
- Reducing the compensation rate paid to a delivery service driver or withholding gratuities or tips to a retail food establishment, its staff, or any delivery service driver.

Enforcement

To enforce the ordinance, Economic Development staff will investigate complaints and initiate notices of violation if necessary.

Northglenn Restaurant Survey

Economic Development staff sent a survey to all Northglenn restaurants. With a short turnaround time, unfortunately there was a low response rate with only eight businesses responding to the survey. At the April 5 study session, staff provided the following survey results to City Council for their consideration in extending the fee cap (Attachment 1). Below is an overview of the six questions:

1. 87.5% – The emergency ordinance did provide financial relief to the business.
2. 75% – Had no new issues arise with the emergency ordinance that the regulations did not consider.
 - a. Business Comment: *Need to be sure it covers ALL fees, as they manipulate the delivery fee portion and increase other fees.*
3. 100% – Support the City extending or permanently placing a cap on third-party delivery service fees.
4. The emergency ordinance included several prohibited actions, and the most helpful to the survey respondents were:
 - a. 83% – Commissions or fees for the third-party delivery service cannot exceed 15% of the purchase price.
 - b. 100% – Third-party food delivery services cannot offer a delivery or other service, or offer that service without the restaurant's consent.
 - c. 83% – Third-party food delivery services cannot charge fees for phone orders that don't result in a transaction.
 - d. 67% – Third-party food delivery services cannot garnish tips to cover the fee limit.
5. Below are recommendations from the survey respondents for City Council consideration relative to extending or permanently capping third-party delivery fees:
 - a. *Make it permanent.*
 - b. *No restaurant can pay exorbitant fees and pay ever increasing wages, rent, costs of goods, insurances, etc. and give up 30 plus % of their sales.*
 - c. *If the 3rd party delivery companies go back to the normal fees, we will make no profit on those sales.*
 - d. *Thank you for considering our opinion.*
6. Below are the comments from the survey respondents regarding the state's consideration of SB21-035, and if they support state over local jurisdiction action.
 - a. *I prefer both state and local, as I don't believe the state protects small businesses enough. We should be protected both locally and statewide.*
 - b. *No*
 - c. *No to state action, this bill does not help us. Putting a cap on fees would help. We support local action.*
 - d. *Yes*

TIME IMPLICATIONS

This issue involves financial impacts to restaurants as a result of COVID-19 restrictions, ultimately affecting what is remitted to the City in the form of sales tax. An emergency ordinance requires one reading for adoption. If CB-1970 is approved, the ordinance will take effect on April 12, 2021.

STAFF RECOMMENDATION

Staff recommends approval of CB-1970.

STAFF REFERENCE

If Council members have any questions, please contact Heather Geyer, City Manager, at hgeyer@northglenn.org or 303.450.8706.

ATTACHMENT

1. Survey capping third-party delivery fees

Capping Third-Party Delivery Fees Survey

Surveys Sent: 54 businesses (March 27)

Survey Responses: 8 businesses (March 31)

Q1. Did the emergency ordinance, capping third-party delivery fees, provide financial relief to your restaurant? **87.5%** (yes)

Q2. Did any new issues arise following the adoption of the emergency ordinance that the regulations did not consider? **75%** (no)

Business Comment:

- a. *Need to be sure it covers ALL fees, as they manipulate the delivery fee portion and increase other fees.*

Q3. Do you support the City extending or permanently adopting an ordinance to place a fee cap of 15% on third-party delivery fees? **100%** (yes)

Q4. The emergency ordinance included several additional prohibited actions. Please check if these were helpful to your business: (6 responses)

- a. Performing a delivery or other service, or offer that service to a restaurant without the restaurant's consent: **83%** (yes)
- b. Charging commissions or fees for the delivery platform service (for delivery or pickup) exceeding 15% of the purchase price (based on the restaurant menu price, not including taxes tips, or other fees): **100%** (yes)
- c. Garnishing tips to cover the fee limit: **67%** (yes)
- d. Charging fees for phone orders through the platform that don't result in a transaction: **83%** (yes)

Q5. Is there anything else you would encourage City Council to consider when discussing this topic? (4 answered)

Business Comments:

- a. *Make it permanent.*
- b. *No restaurant can pay exorbitant fees and pay ever increasing wages, rent, costs of goods, insurances, etc. and give up 30 plus % of their sales.*
- c. *If the 3rd party delivery companies go back to the normal fees, we will make no profit on those sales.*
- d. *Thank you for considering our opinion.*

Q6. The State Legislature is currently considering state action through SB21-035. Do you support state action over local action on this issue? (4 answered)

Business Comments:

- a. *I prefer both state and local, as I don't believe the state protects small businesses enough. We should be protected both locally and statewide.*
- b. *No*
- c. *No to state action, this bill does not help us. Putting a cap on fees would help. We support local action.*
- d. *Yes*

SPONSORED BY: MAYOR LEIGHTY

COUNCILMAN'S BILL

ORDINANCE NO.

No. CB-1970
Series of 2021

Series of 2021

A BILL FOR AN EMERGENCY ORDINANCE EXTENDING THE PROVISIONS OF ARTICLE 3 OF CHAPTER 20 OF THE NORTHGLENN MUNICIPAL CODE REGARDING THIRD-PARTY FOOD DELIVERY PLATFORM FEES

WHEREAS, the City Council of the City of Northglenn adopted Emergency Ordinance No. 1810, Series of 2020, on December 21, 2020, which enacted a new Article 3 of Chapter 20 of the Northglenn Municipal Code, and which expired by its terms on March 31, 2021; and

WHEREAS, the City Council desires to reenact the provisions Article 3 of Chapter 20 in order to continue to provide relief to restaurants as a result of the continuing COVID-19 restrictions.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF NORTHGLENN, COLORADO, THAT:

Section 1. The Northglenn Municipal Code is amended by the addition thereto of a reenacted Article 3 to the existing Chapter 20, to read as follows:

ARTICLE 3

THIRD-PARTY FOOD DELIVERY PLATFORM FEES

Section 20-3-1. Findings and Intent. The City Council finds and determines as follows:

(a) The City Council finds and determines that the recent COVID-19 pandemic and resulting emergency orders continue to restrict food service establishments from operating freely in the City of Northglenn (the "City"), thereby increasing the demand for take-out meal services;

(b) The City Council finds and determines that the restrictions from freely operating within the City have had severe financial impacts on all food service establishments within the City;

(c) The City Council finds that while some restaurants may receive take-out orders directly, there are many third-party food delivery platforms and other services that operate through websites or mobile phone applications used by consumers to quickly and easily order pick-up and delivery meals from local restaurants;

(d) The City Council finds that in most instances the third-party food delivery platforms and services, without the local restaurant's knowledge or consent, will purport to sell meals from the local restaurant to consumers, and sometimes charge exorbitant fees to

the already struggling local restaurants during the time of and following the declared emergency that restricts on-premises dining; and

(e) The City Council finds that the fees charged by a third-party food delivery platform should be immediately capped for the immediate preservation of health and safety and for the protection of public convenience and welfare while on-premises dining remains restricted to avoid further harm to food establishments in the City.

Section 20-3-2. Definitions. As used in this Article, the following terms shall have the following meanings:

Food establishment or retail food establishment means a retail food establishment, as defined by C.R.S. § 25-4-1602(14), that is located in the City.

Online order means an order placed by a customer through a platform provided by a third-party food delivery platform for delivery or pickup within the City.

Purchase price for purposes of this Article, means the final price of an online order of prepared food or beverages, excluding taxes, gratuities, or any other fees that may make up the total cost to the customer of an online order.

Telephone order means an order placed by a customer to a restaurant through a telephone call forwarded by a call system provided by a third-party food delivery platform for delivery or pickup within the City.

Third-party food delivery platform means any person, company, 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, retail food establishments located within the City.

Section 20-3-3. Fee Restrictions.

(a) A third-party food delivery platform shall not perform any service for or disclose any information about a retail food establishment without the retail food establishment's consent.

(b) No person shall cause a third-party food delivery platform to charge a retail food establishment a commission fee for the use of the platform's services for delivery or pick-up that exceeds 15% of the purchase price per online order or telephone order; provided that this Section shall not limit the ability of any retail food establishment to choose to pay a higher commission or supplemental fee to access additional advertising or other products and services offered by any third-party food delivery platform.

(c) No person shall cause a third-party food delivery platform to reduce the compensation rate paid to a delivery service driver or garnish gratuities in order to comply with subsection (b) hereof.

(d) A third-party delivery food platform shall not charge any additional fee to a retail food establishment that it has not voluntarily agreed to pay.

(e) At the time a final price is disclosed to a customer for the intended purchase and delivery of food from a retail food establishment through a third-party food delivery platform and before that transaction is completed by the customer, the third-party food delivery platform shall disclose to the customer, in plain language and in a conspicuous manner, any commission, fee, or any other monetary payment charged to the customer by the third-party food delivery platform.

(f) After a transaction occurs for the purchase and delivery of food from a retail food establishment through a third-party food delivery platform, the third-party food delivery platform shall provide an electronic or printed receipt to the customer. The receipt shall disclose, in plain and simple language and in a conspicuous manner:

(1) The menu price of the food;

(2) Any sales or other tax applied to the transaction;

(3) Any delivery charge or service fee, imposed on and collected from the customer by the third-party food delivery platform and by the covered food establishment, in addition to the menu price of the food;

(4) Any tip that will be paid to the person delivering the food, and not to the third-party food delivery platform, that was added into the transaction when it occurred; and

(5) Any commission associated with the transaction.

(g) No third-party food delivery platform may charge any fee to a retail food establishment for a telephone order if a telephone call between such retail food establishment and a customer does not result in an actual transaction during such telephone call.

(h) No third-party food delivery platform may charge any fee to a retail food establishment for an online order if the online order between such retail food establishment and a customer does not result in an actual transaction during such online order.

Section 20-3-4. Violation and penalty.

(a) Failure to comply with the terms of this Article shall constitute a civil infraction. Any person who is found guilty of, or pleads guilty or nolo contendere to the commission of, the civil infraction shall be subject to a civil penalty as set forth in Article 1 of Chapter 1 of this Code.

(b) For each day, or portion thereof, during which any violation continues, a person may be cited for a separate civil infraction. The penalties specified in this Section shall be cumulative and nothing shall be construed as either prohibiting or limited the City from pursuing other such remedies or penalties, including an action at law or equity.

Section 20-3-5. Sunset. This Article 3 of Chapter 20 shall be repealed by operation of law following the expiration of thirty (30) consecutive calendar days of retail food

establishments being authorized by the State of Colorado and the Tri-County Health Department to operate at 100% capacity.

Section 2. Authority. The City Council hereby finds, determines and declares that it has the power to adopt this Ordinance pursuant to: (i) Section 31-15-103, C.R.S. (concerning municipal police powers); (ii) Section 31-15-401, C.R.S. (concerning municipal police powers); (iii) Section 31-15-501 C.R.S. (concerning municipal power to regulate businesses); (iv) C.R.S. § 31-15-904 (concerning specific authority to cap delivery fees; (v) the authority granted to home rule municipalities by Article XX of the Colorado Constitution; and (vi) the powers contained in the City of Northglenn Home Rule Charter (the "Charter").

Section 3. Emergency Declared. Pursuant to Section 4.11 of the Charter, the City Council finds, determines and declares that passage of this Ordinance is necessary for the immediate preservation of public property, health, peace and safety in order to prevent exorbitant fees from being imposed during the COVID-19 pandemic on the delivery of food to consumers within the City.

Section 4. The City Council finds and determines that this ordinance is necessary for the immediate preservation of public property, health, peace, or safety based on the emergency declaration set forth herein. Accordingly, pursuant to Section 4.11 of the Northglenn City Charter, **this ordinance shall take effect immediately upon enactment.**

PASSED ON FIRST AND FINAL READING this _____ day of _____, 2021.

MEREDITH LEIGHTY
Mayor

ATTEST:

JOHANNA SMALL, CMC
City Clerk

APPROVED AS TO FORM:

COREY Y. HOFFMANN
City Attorney