



STAFF REPORT TO THE CITY COUNCIL

DATE: Regular Meeting of January 24, 2021

TO: Members of the City Council

SUBMITTED BY: David Biggs, City Manager
Patrick Tang, City Attorney

SUBJECT: Possible Ordinance Imposing a Cap on Food Delivery Service Charges

RECOMMENDED ACTION: Receive Report, Discuss, and Provide Direction, if any.

FISCAL IMPACT OF RECOMMENDATION: None for this item. Development and consideration of a possible ordinance would require City Attorney time and expense, in addition to the cost to advertise any ordinance for public hearing. Additional costs could be incurred if City staff were to play a role in enforcement or if there were any type of legal challenge to the ordinance.

DISCUSSION: At the January 12, 2021, City Council meeting, the City Council agreed to have an initial discussion of a possible ordinance to impose a cap on food delivery charges. This item is being presented to provide some initial information to facilitate that requested discussion.

Whether Hercules could legally implement a cap on food delivery service charges as Berkeley and several other cities have done, it appears that most of the cities doing this are larger sized charter cities. However, the City Attorney did find that at least one general law city has enacted similar caps and the staff report from that city (Milpitas) is attached (Attachment 1).

While the City Attorney has not done any specific independent research, given the fact that several cities have adopted these measures, they must have concluded that the risk of a legal challenge from Doordash, Grubhub, and other service providers is not high. The Milpitas staff report recommended that their council stick to the same limits as those being adopted by other cities, to avoid possibly being singled out if the food delivery service providers decided to sue one or more cities.

Please also note the enforcement provision in the Milpitas scheme provides a cause of action for the restaurant owner to file a civil action against a food delivery service provider who violates the cap. There appears to be no enforcement role for the city and thus arguably no impact on city staff resources.

In addition, City Staff was contacted by the County to see if we would be supportive of the County sponsoring a countywide cap on third-party restaurant delivery fees. County staff advised that the incoming board chair, Supervisor Burgis, had identified this as an issue of concern. At this point, it has not been set for the full board's deliberation though the County Staff anticipates the Board asking County Counsel to prepare something to adopt relatively soon, presumably based on San Mateo's ordinance, but with the caveat that the services cannot add a new fee called "Contra Costa County fee" like Hayward has seen. County staff has committed to keeping us in the loop as their possible ordinance progresses.

ATTACHMENTS:

1. Milpitas Staff Report