

ORDINANCE O-2020-

A BILL FOR AN ORDINANCE AMENDING TITLES 4.04, 4.05 AND 6.08 OF THE
LONGMONT MUNICIPAL CODE ON SALES AND USE TAX, LODGERS TAX AND
RETAIL BUSINESS LICENSES AND CREATING A NEW CODE SECTION 4.04.105 FOR
THE PURPOSE OF ENACTING THE COLORADO MUNICIPAL LEAGUE’S MODEL
ORDINANCE ON ECONOMIC NEXUS AND MARKETPLACE FACILITATORS FOR
SELF-COLLECTING HOME RULE MUNICIPALITIES AS PART OF A STATEWIDE
SALES TAX SIMPLIFICATION EFFORT

WHEREAS, the City of Longmont, Colorado, (the “City”) is a home rule municipality,
organized and existing under Article XX, Section 6 of the Colorado Constitution; and

WHEREAS, pursuant to Article XX, Section 6 of the Colorado Constitution, the right to enact, administer and enforce sales taxes is clearly within the constitutional grant of power to the City and is necessary to raise revenue with which to conduct the affairs and render the services performed by the City; and

WHEREAS, pursuant to such authority, the City has adopted and enacted a Sales Tax Code (the “Code”), under which City sales tax is levied on all sales and purchases of tangible personal property or taxable services at retail unless prohibited, as applicable to the provision of this Ordinance, under the Constitution or laws of the United States; and

WHEREAS, the United States Supreme Court in *South Dakota v. Wayfair*, 138 S.Ct. 2080 (2018), overturned prior precedent and held that a State is not prohibited by the Commerce Clause from requiring a retailer to collect sales tax based solely on the fact that such retailer does not have a physical presence in the State (“Remote Sales”); and

1 WHEREAS, based upon such decision, the retailer's obligation to collect Remote Sales is
2 no longer based on the retailer's physical presence in the jurisdiction by the Constitution or law
3 of the United States, and the City's Sales and Use Tax Code needs to be amended to clearly
4 reflect such obligation consistent with said decision; and

5 WHEREAS, the delivery of tangible personal property, products, or services into the City
6 relies on and burdens local transportation systems, emergency and police services, waste
7 disposal, utilities and other infrastructure and services; and

8 WHEREAS, the failure to tax remote sales creates incentives for businesses to avoid a
9 physical presence in the State and its respective communities, resulting in fewer jobs and
10 increasing the share of taxes to those consumers who buy from competitors with a physical
11 presence in the State and its municipalities; and

12 WHEREAS, it is appropriate for Colorado municipalities to adopt uniform definitions
13 within their sales tax codes to encompass marketplace facilitators, marketplace sellers, and
14 multichannel sellers that do not have a physical presence in the City, but that still have a taxable
15 connection with the City; and

16 WHEREAS, the goal of adopting this ordinance is to join in the simplification efforts of
17 all the self-collecting home rule municipalities in Colorado; and

18 WHEREAS, this ordinance provides a safe harbor to those who transact limited sales
19 within the City; and

20 WHEREAS, absent such amendment, the continued failure of retailers to voluntarily
21 apply and remit sales tax owed on remote sales exposes the municipality to unremitted taxes and
22 permits an inequitable exception that prevents market participants from competing on an even
23 playing field; and

WHEREAS, the City adopts this ordinance with the intent to address tax administration, and, in connection therewith, establish economic nexus for retailers or vendors without physical presence in the State and require the retailer or vendor to collect and remit sales tax for all sales made within the marketplace.

NOW, THEREFORE, THE COUNCIL OF THE CITY OF LONGMONT, COLORADO,
ORDAINS:

Section 1

In this ordinance, ellipses indicate material not reproduced as the Council intends to leave that material in effect as it now reads.

Section 2

The Council amends section 4.04.020 of the Longmont Municipal Code, by adding italicized material and deleting stricken material, to read as follows:

4.04.020. Definitions.

The following words and phrases, as used in this chapter, shall have the following meanings:

...

Economic Nexus means the connection between the City and a person not having a physical nexus in the State of Colorado, which connection is established when the person or marketplace facilitator makes retail sales into the City, and:

1. *In the previous calendar year, the person, which includes a marketplace facilitator, has made retail sales into the state exceeding the amount specified in C.R.S. § 39-26-102(3)(c), as amended; or*

2. In the current calendar year, 90 days has passed following the month in which the person, which includes a marketplace facilitator, has made retail sales into the state exceeding the amount specified in C.R.S. § 39-26-102(3)(c), as amended. This definition does not apply to any person who is doing business in this state but otherwise applies to any other person.

Engaged in business in the city means performing or providing services or selling, leasing, renting, delivering or installing tangible personal property, *products or services* for storage, use or consumption, within the city. Engaged in business in the city includes, but is not limited to, any one of the following activities by a person:

1. directly, indirectly, or by a subsidiary maintains a building, store, office, salesroom, warehouse, or other place of business within the ~~taxing jurisdiction~~ *city*;
2. sends one or more employees, agents or commissioned salespersons into the ~~taxing jurisdiction~~ *city* to solicit business or to install, assemble, repair, service, or assist in the use of its products, or for demonstration or other reasons;
3. maintains one or more employees, agents or commissioned salespersons on duty at a location within the ~~taxing jurisdiction~~ *city*;
4. owns, leases, rents or otherwise exercises control over real or personal property within the ~~taxing jurisdiction~~ *city*;
5. *retailer or vendor in the state of Colorado that* makes more than one delivery into the ~~taxing jurisdiction~~ *city* within a 12-month period ~~by any means other than a common carrier;~~ *or*

6. makes retail sales sufficient to meet the definitional requirements of economic nexus as set forth in this section.

...

Marketplace means a physical or electronic forum, including, but not limited to, a store, a booth, an internet website, a catalog, or a dedicated sales software application, where tangible personal property, taxable products, or taxable services are offered for sale.

Marketplace Facilitator

1. Means a person who:

(a) *Contracts with a marketplace seller or multichannel seller to facilitate for consideration, regardless of whether or not the consideration is deducted as fees from the transaction, the sale of the marketplace seller's tangible personal property, products, or services through the person's marketplace;*

(b) *Engages directly or indirectly, through one or more affiliated persons, in transmitting or otherwise communicating the offer or acceptance between a purchaser and the marketplace seller or multichannel seller; and*

(c) Either directly or indirectly, through agreements or arrangements with third parties, collects payment from the purchaser on behalf of the seller.

2. Marketplace Facilitator does not include a person that exclusively provides internet advertising services or lists products for sale, and that does not otherwise meet this definition.

1 *Marketplace Seller means a person, regardless of whether or not the person is*
2 *engaged in business in the city, which has an agreement with a marketplace*
3 *facilitator and offers for sale tangible personal property, products, or services*
4 *through a marketplace owned, operated, or controlled by a marketplace*
5 *facilitator.*

6
7 *Multichannel Seller means a retailer that offers for sale tangible personal*
8 *property, commodities, or services through a marketplace owned, operated, or*
9 *controlled by a marketplace facilitator, and through other means.*

10 ...

11 Retailer *or Vendor* means any person selling, leasing, renting, or granting a
12 license to use tangible personal property or services at retail. *The terms* ~~R~~retailer
13 *and vendor* shall include, but ~~is~~*are* not limited to, any:

- 14 1. Auctioneer;
- 15 2. Salesperson, representative, peddler or canvasser, who makes sales as a direct
16 or indirect agent of or obtains such property or services sold from a dealer,
17 distributor, supervisor or employer;
- 18 3. Charitable organization or governmental entity which makes sales of tangible
19 personal property to the public, notwithstanding the fact that the merchandise sold
20 may have been acquired by gift or donation or that the proceeds are to be used for
21 charitable or governmental purposes;
- 22 4. *Retailer*-Contractor, when acting in the capacity of a seller of building supplies,
23 construction materials, and other tangible personal property;

1 *5. Marketplace Facilitator, marketplace seller, or multichannel seller.*

2 Section 3

3 The Council amends Chapter 4 of the Longmont Municipal Code, adding a new section
4 4.04.105, by adding italicized material, to read as follows:

5 *4.04.105 Marketplace Sales*

6 *(A) Taxation of marketplace sales*

7 *(1) A marketplace facilitator engaged in business in the city is required to collect*
8 *and remit sales tax on all taxable sales made by the marketplace facilitator, or*
9 *facilitated by it for marketplace sellers or multichannel sellers to customers in the*
10 *city, whether or not the marketplace seller for whom sales are facilitated would*
11 *have been required to collect sales tax had the sale not been facilitated by the*
12 *marketplace facilitator.*

13 *(2) A marketplace facilitator shall assume all the duties, responsibilities, and*
14 *liabilities of a vendor under section 4.04.020. Marketplace facilitators shall be*
15 *liable for the taxes collected from marketplace sellers or multichannel sellers. The*
16 *City may recover any unpaid taxes, penalties, and interest from the marketplace*
17 *facilitator that is responsible for collecting on behalf of marketplace sellers or*
18 *multichannel sellers.*

19 *(3) The liabilities, obligations, and rights set forth under this section are in*
20 *addition to any duties and responsibilities the marketplace facilitator has under*
21 *this Title 4 if it also offers for sale tangible personal property, products, or*
22 *services through other means.*

1 (4) A marketplace seller, with respect to sales of tangible personal property,
2 products, or services made in or through a marketplace facilitator's marketplace,
3 does not have the liabilities, obligations, or rights of a retailer under this section
4 if the marketplace seller can show that such sale was facilitated by a marketplace
5 facilitator:

6 a. With whom the marketplace seller has a contract that explicitly provides
7 that the marketplace facilitator will collect and remit sales tax on all sales subject
8 to tax under this section; or

9 b. From whom the marketplace seller requested and received in good faith a
10 certification that the marketplace facilitator is registered to collect sales tax and
11 will collect sales tax on all sales subject to tax under this section made in or
12 through the marketplace facilitator's marketplace.

13 (5) If a marketplace seller makes a sale that is not facilitated by a licensed
14 marketplace facilitator in a marketplace, the marketplace seller is subject to all of
15 the same licensing, collection, remittance, filing and recordkeeping requirements
16 as any other retailer.

17 (B) Auditing. With respect to any sale, the city shall solely audit the marketplace
18 facilitator for sales made by marketplace sellers or multichannel sellers but
19 facilitated by the marketplace. The city will not audit or otherwise assess tax
20 against marketplace sellers or multichannel sellers for sales facilitated by a
21 marketplace facilitator.

22 Section 4:

The Council amends section 4.05.010 of the Longmont Municipal Code, by adding italicized material and deleting stricken material, to read as follows:

4.05.010. - Definitions.

Unless the context otherwise requires, the following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section:

• • •

Lodging provider shall mean any person furnishing lodging services or such provider's authorized agent *or marketplace facilitator as that term is defined in section 4.04.020.*

...

Lodging transaction shall mean the providing of lodging services, including through the use of a marketplace facilitator as the lodging provider's authorized agent.

Section 5:

The Council amends section 6.08.005 of the Longmont Municipal Code, by adding italicized material and deleting stricken material, to read as follows:

6.08.005. - Definitions.

The following words and phrases as used in this chapter shall have the following meaning:

...

Engaged in business in the city means performing or providing services or selling, leasing, renting, delivering or installing tangible personal property, *products or*

1 *services* for storage, use or consumption, within the city. Engaged in business in
2 the city includes, but is not limited to, any one of the following activities by a
3 person:

4 1. ~~d~~Directly, indirectly, or by a subsidiary maintains a building, store, office,
5 salesroom, warehouse, or other place of business within the city;

6 2. ~~s~~Sends one or more employees, agents or commissioned salespersons into the
7 city to solicit business or to install, assemble, repair, service, or assist in the use of
8 its products, or for demonstration or other reasons;

9 3. ~~m~~Maintains one or more employees, agents or commissioned salespersons on
10 duty at a location within the city;

11 4. ~~o~~Owns, leases, rents or otherwise exercises control over real or personal
12 property within the city; ~~or~~

13 5. *retailer or vendor in the state of Colorado that* ~~m~~Makes more than one delivery
14 into the city within a 12-month period; ~~or~~

15 6. *makes retail sales sufficient to meet the definitional requirements of economic*
16 *nexus as set forth in section 4.04.020.*

17 . . .

18 Section 6:

19 No obligation to collect the sales and use tax required by these articles may be applied
20 retroactively. Responsibilities, duties and liabilities described in Section 3 of a marketplace
21 facilitator, marketplace seller, or multichannel seller begin upon the earlier of when they became
22 licensed to collect the city's sales tax or when they became legally obligated to collect the city's
23 sales tax under Section 2.

1 Section 7

2 If any provision of this ordinance, or the application of such provision to any person or
3 circumstance, is held to be unconstitutional, then the remainder of this ordinance, and the
4 application of the provisions of such to any person or circumstance, shall not be affected thereby.

5 Section 8

6 To the extent only that they conflict with this ordinance, the Council repeals any
7 conflicting ordinances or parts of ordinances. The provisions of this ordinance are severable, and
8 invalidity of any part shall not affect the validity or effectiveness of the rest of this ordinance.

9 Introduced this _____ day of _____, 2020.

10 Passed and adopted this _____ day of _____, 2020.

11
12
13
14 _____
15 MAYOR

16
17 ATTEST:

18
19
20 _____
21 CITY CLERK

22
23
24 NOTICE: THE COUNCIL WILL HOLD A PUBLIC HEARING ON THIS ORDINANCE AT 7:00
25 P.M. ON THE _____ DAY OF _____, 2020, AT THE LONGMONT
26 CITY COUNCIL MEETING.

27
28
29 APPROVED AS TO FORM:

30
31
32 _____
33 ASSISTANT CITY ATTORNEY

DATE

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PROOFREAD

DATE

APPROVED AS TO FORM AND SUBSTANCE:

ORIGINATING DEPARTMENT

DATE

CA File: 20-000729