

ORDINANCE NO. 2350
INTRODUCED BY: Cushing

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BRIGHTON, COLORADO,
AMENDING CERTAIN SECTIONS OF TITLE 3 OF THE BRIGHTON MUNICIPAL CODE
PERTAINING TO THE SALES TAX CODE

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

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

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

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

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

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

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

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

WHEREAS, the City adopts this ordinance with the intent to address tax administration, and, in connection with, 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; and

WHEREAS, the City Council has been advised by the City Manager that certain terms and requirements for businesses licenses should be amended to provide clarity and fairness for all business owners; and

WHEREAS, the City Manager has recommended and the City Council agrees that certain sections require clarification.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BRIGHTON, COLORADO, AS FOLLOWS:

The following amendments shall be effective upon passage on second reading.

Section 1. Sec. 3-28-20 (2) is hereby amended to include the following definitions; all definitions shall appear in alphabetical order.

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 in the City, and;

- (a) 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**
- (b) 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 in C.R.S. § 39-26-102(3)(c), as amended.**

***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* means a person that 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 or marketplace operated by the person, engages;**

- (a) directly or indirectly, through one or more affiliated persons, in transmitting or otherwise communicating the offer or acceptance between a purchaser and marketplace seller or multichannel seller; and
- (b) Either directly or indirectly, through agreements or arrangements with third parts, collects payment from the purchaser on behalf of the seller.

The term marketplace facilitator does not include a person that, with respect to marketplace seller's or multichannel seller's products, exclusively provides internet advertising services or lists products for sale.

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

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

Section 2 Sec. 3-28-20 (2) (q) is hereby amended to read as follows

Engaged in business in the City means performing or providing services or selling, leasing, renting, delivering or installing tangible personal property for storage, use or consumption within the City. Engaged in business in the City includes, but is not limited to, any (1) of the following activities by which 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;
2. Sends one (1) or more employees, agents or commissioned salespersons into the taxing jurisdiction to solicit business or to install, assemble, repair, service or assist in the use of products or for demonstration or other reasons;
3. Maintains one (1) or more employees, agents, or commissioned salespersons on duty at a location within the taxing jurisdiction;
4. Owns, leases, rents or otherwise exercises control over real or personal property within the taxing jurisdiction; or
5. ~~Makes more than one (1) delivery into the taxing jurisdiction within a twelve-month period.~~ **Any retailer or vendor who has a physical presence in the State of Colorado but does not have a physical presence in the City, who makes more than (1) delivery into the taxing jurisdiction within a (12) twelve month period by any means, including common carrier;**
6. **Makes retail sales sufficient to meet the definitional requirements of economic nexus as set forth in this Section 3-28-20.**

Section 3 Sec. 3-28-20 (2) (ax) is hereby amended to read as follows

Retailer means any person selling, leasing or renting tangible personal property or services at retail. A retailer shall include any:

1. Auctioneer.
2. Salesperson, representative, peddler or canvasser, who makes sales as a direct or indirect agent of or obtains such property or services sold from a dealer, distributor, supervisor or employer.
3. Charitable organization or governmental entity which makes sales of tangible personal property to the public, notwithstanding the fact that the merchandise sold may have been acquired by gift or donation or that the proceeds are to be used for charitable or governmental purposes.
4. **Marketplace facilitator, marketplace seller, or multichannel seller.**

Section 4. Sec. 3-28-85 shall have the following amendments and additions to read as follows

- (a) Exemption; burden of proof. The burden of proving that any vendor, retailer, consumer or purchaser is exempt from collecting or paying City tax upon any goods sold or purchased, paying the tax to the Finance Director, or from making and remitting the appropriate tax returns, shall be on the vendor, retailer, consumer or purchaser under such reasonable requirements of proof as the Finance Director may prescribe.
- (b) Reports and records. The City Finance Director may require any person, by regulation or notice served on such person, to make such return, render such statement or keep and furnish such records or make such information reports as the Finance Director may deem sufficient to show whether or not such person is liable under this Article for payment or collection of the tax imposed in this Article.
- (c) Vendor responsibility for collection of and remittance of tax and license
 - (1) Collection of tax. Every retailer or vendor engaged in business or selling at retail, as such are defined in this Article, shall, irrespective of the provisions of Section 3-28-40, be liable and responsible for the payment of taxes in the amount yielded by applying the rate imposed by Section 3-28-40 hereof to all taxable sales made by such retailer or vendor of commodities or services as specified in Section 3-28-75 hereof.
 - (2) Remittance of tax. Every retailer or vendor engaged in business and selling at retail, as such are defined in this Article, shall file a return as prescribed in this Article with the Finance Director on or before the 20th day of the month, unless the 20th day falls on a weekend day or holiday; then the return is due on the first business day thereafter, for the preceding month or months under report and remit taxes in the amount yielded by applying the rate imposed by Section 3-28-40 hereof to such sales and also any excess tax amounts as provided in Subsection (i) of this Section, less three and one-third percent (3⅓%) up to a maximum of twenty-five dollars (\$25.00) of the amount of taxes to be paid by the retailer's expense of collection and remittance of tax. The retailer shall not be permitted to deduct any amount to cover the expense of collection and remittance of the tax with respect to any return which is not timely filed or for which the tax amount is not timely paid. The retailer shall add the tax as a separate and distinct item, and such tax shall be a debt from the consumer to the retailer and shall be recoverable at law in the same manner as other debts.
 - (3) License for vendors. **Unless otherwise exempt under this Article**, it shall be unlawful for any person to engage in business in the City as defined in this Article,

without first having obtained a license therefor, which license shall be granted and issued by the Finance Director.

(c) Marketplace Sales. Obligation to collect sales tax.

- (1) A Marketplace facilitator engaged in business in the city is required to collect and remit sales tax on all taxable sales made by the marketplace facilitator, or facilitated by it for marketplace sellers or multichannel sellers to customers in the city, whether or not the marketplace seller for whom sales are facilitated would have been required to collect sales tax had the sale not been facilitated by a marketplace facilitator.**
- (2) A Marketplace facilitator shall assume all duties responsibilities, and liabilities of a vendor as defined in this article. Marketplace facilitators shall be liable for the taxes collected from marketplace sellers or multichannel sellers. The City may recover any unpaid taxes, penalties, and interest from the marketplace facilitator that is responsible for collecting on behalf of marketplace sellers or multichannel sellers.**
- (3) The liabilities, obligations and rights set forth under this article are in addition to any duties and responsibilities the marketplace facilitator has under this article if it also offers for sale tangible personal property, products, or services through other means.**
- (4) A marketplace seller shall be subject to all the same licensing, collection, remittance, filing, and recordkeeping requirements as any other retailer under this Article for retail sales made on its own behalf and not facilitated by or through a licensed marketplace facilitator in a marketplace.**

(d) Marketplace seller relief. A marketplace seller, with respect to sales of tangible personal property, products, or services made in or through a marketplace facilitator's marketplace, does not have the liabilities, obligations, or rights of a retailer under this article if the marketplace seller can show that such sale was facilitated by a marketplace facilitator;

- (1) With whom the marketplace seller has a contract that explicitly provides that the marketplace facilitator will collect and remit sales tax on all sales subject to tax under this article; or**
- (2) For whom the marketplace seller requested and received in good faith a certification that the marketplace facilitator is registered to collect sales tax and will collect sales tax on all sales subject to tax under this article made in or through the marketplace facilitator's marketplace.**

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

(f) No retroactive application. Responsibilities, duties, and liabilities of a marketplace facilitator, marketplace seller, or multichannel seller described in this section begin

upon the earlier of when they became licensed to collect the City's sales tax or when they became legally obligated to collect the City's Sales Tax under this Article.

- (g) Exempt institutions. No exempt organization, including quasi-governmental, charitable or other types of organizations, may purchase tax free in the City or use in the City tangible personal property or taxable services tax free unless a State Sales Tax Exemption Number is presented to the vendor prior to the allowance of a purchase tax free.
- (h) Contractors, owners or lessees of realty; methods of paying use tax when construction permit required. Subject to the provisions of Section 3-32-60 hereof, every contractor who shall build, construct, reconstruct, alter, expand, modify or improve any building, dwelling or other structure or improvement to real property, and who shall purchase lumber, fixtures or any other construction materials and supplies used therefor and every owner or lessee of realty located in the City upon which any improvements have been or will be made or upon which any articles of tangible personal property are or will be attached, shall pay the City use tax as follows:
 - (1) Payment on estimated basis. By paying a permit use tax on the estimated percentage basis based on a percentage of the total valuation of the construction contract and paid, either through the owner, lessee or the general contractor, or separately, if such contractor is a subcontractor electing to do so, at the time a building permit is issued.
 - (2) Taxes for construction materials and prefabricated goods and materials. Taxes for all purchases of construction materials and prefabricated goods and materials shall be satisfied in full. The owner of the property for which such materials were purchased shall be ultimately responsible for the payment of any City use taxes that are not properly paid by the contractor. Records supporting such construction use tax payments and all related construction records are subject to review by the Finance Director in accordance with Section 3-32-60 hereof. Any overpayment of an estimated construction use tax shall be subject to refund in accordance with Section 3-28-105 hereof.
- (i) New business purchases; sellers and purchasers.
 - (1) Acquisition of business. The City tax shall be remitted on the price paid for tangible personal property which is acquired with the purchase of a business and for use in the operation of such business. The tax shall be based on the price paid for such chattels as recorded in the bill of sale or agreement and constituting a part of the total transaction at the time of the sale or transfer, provided that the valuation is as great or greater than the fair market value of such merchandise or chattels. Where the transfer of ownership is a package deal made by a lump sum transaction, the tax shall be paid on the book value set up by the purchaser for income tax depreciation purposes or fair market value if no determination has been made. When a business is taken over in return for the assumption of outstanding indebtedness owed by former owners, the tax shall be paid on the fair market value of all taxable tangible personal property acquired by the purchaser.

- (2) Purchaser liable for prior owner's unpaid tax. Purchasers of a business are liable for any unpaid tax of a predecessor. Vendors or consumers having outstanding accounts on which the sales tax has not been remitted must compute and pay the tax at the time of the sale.
- (3) Agent of seller and seller liable for tax. The taxpayer shall report such tax on the City sales tax return as prescribed. The seller or the seller's agent will be held liable for sales tax remittance on the sale of the business in the event that the purchaser fails to remit the tax due on the purchase.
- (j) Purchasers of automotive vehicles, mobile machinery or self-propelled construction equipment. Any resident of the City who purchases any automotive vehicle, mobile machinery or self-propelled construction equipment as defined in Section 3-28-20 hereof for use within the City, and who has not paid the tax imposed by this Article to a vendor required or authorized to collect the tax shall pay the City tax due to the County Clerk at the time the automotive vehicle, mobile machinery or self-propelled construction equipment is registered.
- (k) Tax on credit sales, etc. Whenever tangible personal property is sold, including that sold in conjunction with the sale of a business, which is taxable under this Article, under a conditional sales contract or purchase contract whereby the seller retains title as security for all or part of the purchase price, or whenever the seller takes a chattel mortgage on such tangible personal property to secure all or part of the purchase price, the total tax based on the total selling price shall become immediately due and payable. The tax shall be charged or collected and remitted by the vendor. No refund or credit shall be allowed to either party to the transaction in case of repossession.
- (l) Excess collections; failure to remit collections. If any vendor shall during any reporting period collect any excess City tax amounts, the vendor shall remit to the City the full net amount of the tax imposed in this Article, together with such excess City tax amounts. If it is not possible to determine to whom the excess tax is due, the vendor shall remit one-half ($\frac{1}{2}$) of such excess tax to the City and one-half ($\frac{1}{2}$) of such excess tax to the State. The retention by the vendor of any excess tax amounts or the intentional failure to remit punctually to the City the full amount required to be remitted by the provisions of this Article is a violation of this Article.
- (m) Unlawful to advertise absorption of tax. It shall be unlawful for any taxpayer or vendor to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this Article will be assumed or absorbed by the vendor or taxpayer or that it will not be added to the selling price of the property sold or, if added, that it or any part thereof will be refunded.
- (n) Special accounting for alcoholic beverage sales by the drink, vending machine sales of tangible personal property, recreation services, sales. Any retailer selling malt, vinous or spirituous liquors by the drink may include in the sales price the tax levied under this Section, provided that no such retailer shall advertise or hold out to the public in any manner, directly or indirectly, that such tax is not included as a part of the sales price to the consumer. No such retailer shall gain any benefit from the collection or payment of such tax, except as permitted in Subsection (c) (2) above. Also, any vending device

operator selling tangible personal property through vending devices, any vendor who sells recreation services may include in the sales price the tax levied under this Section, with the same provisions as provided above.

- (o) Special accounting for combined sales of services and personal property. Every retailer or vendor conducting a business in which the transaction between the vendor and the consumer or purchaser consists of the supply of tangible personal property and services in connection with the maintenance or servicing of such shall be required to pay the tax levied under this Article upon the full contract price, unless application is made to the Finance Director for permission to use a percentage basis for reporting the tangible personal property sold and the labor or services supplied under such contract. The Finance Director is authorized to determine the percentage based upon the ratio of the tangible personal property included in the consideration as it bears to the total of the consideration paid under such combination contract or sale which shall be subject to the tax levied pursuant to the provisions of this Article. This Subsection shall not be construed to include terms upon which the tax is imposed on the full purchase price, as defined in Section 3-28-20 hereof, nor shall it be construed as an allowance for the vendor to fail to itemize to the customer the taxable and nontaxable portions of the bill.
- (p) Special accounting for sales tax collections by nonresident vendors. Every retailer or vendor engaged in business in this City, as such is defined in Section 3-28-20 hereof, and making sales, even though not maintaining an office in this City, of tangible personal property or taxable services subject to the sales tax must, in accordance with this Article, collect and remit the sales tax on such sales in like manner as a retailer or vendor maintaining an office in this City. ~~If the nonresident vendor petitions the Finance Director, stating that the imposition of the tax on an individual sales basis will impose an unnecessary hardship, and if the type and occasion of sale so warrants, the Finance Director may accept payment of that vendor's tax liability on a calendar year quarterly basis.~~
- (q) Tax return contents, reporting periods, sale of business Reporting periods.
 - (1) Tax return contents, form. The returns to be filed by the taxpayer or the taxpayer's duly authorized agent shall contain such information and shall be completed in such manner and upon such forms as the Finance Director may prescribe.
 - (2) Reporting periods. The Finance Director may, by rule, permit a vendor or licensed consumer to make returns and pay taxes on a monthly, quarterly or annual basis.
 - (3) Sale or transfer of business. Any sale, transfer or purchase of an interest in a business enterprise by any person, where the respective interest of the person purchasing or selling, as a result of the transaction, has changed in any degree, requires the issuance of a new license. In all cases where any of the assets of any new business are within the City, payment of sales tax is required on transfer of title or possession, or both, of the tangible personal property taxable in this Article, whether involving a retail establishment or any other type business enterprise.

Section 5: If any provision of this ordinance, or the application of such provision to any person or circumstance, is held to be unconstitutional, then the remainder of this ordinance, and the application of the provisions of such to any person or circumstance, shall not be affected thereby.

Section 6. Sec. 3-28-80 (4) is hereby amended to read as follows

(4) All sales which the State is prohibited from taxing under the constitution or laws of the United States or the State. ~~and all retail sales within a distance of twenty (20) miles within the boundaries of this State to persons resident, excluding corporations, of adjoining states, which adjoining states do not impose or levy a retail sales tax on such sales, if such residents of such adjoining states are in this State for the express purpose of making purchases and not as tourists.~~

Section 7. Sec. 3-28-115 (i) (1) is hereby amended to read as follows

(i) Methods of enforcing collection

(1) Issuance of distraint. The Finance Director may issue a warrant under the Finance Director's own hand directed to any employee, agent or representative of the Finance Department, sometimes referred to collectively in this Section as "agent" or "revenue collector" or to any sheriff of any county in the State, commanding such person to distraint, **seize cash and cash equivalents, and/or** seize and sell the personal property of the taxpayer, except such personal property as is exempt from execution and sale by any statute of this State, for the payment of the tax due together with penalties and interest accrued thereon and cost of execution:

- (a) When any deficiency in tax is not paid within twenty (20) days from the mailing of notice of final determination, assessment and demand for payment therefor and no hearing has been requested and no appeal from such deficiency assessment has been docketed with any district court of this State within such period;
- (b) When any other amount of tax, penalty or interest is not paid within twenty (20) days from the mailing of assessment and demand for payment thereof; or
- (c) Immediately upon making of a jeopardy assessment or of the issuance of a demand for payment as provided in Subsection (h) above.

Section 8. Sec. 3-28-140 is hereby amended to read as follows

A business license shall be required for every retailer or vendor that is engaged in business in the City as defined in this Article, unless exempt under Section 3-28-200 of this Article. A business license shall be granted and issued by the Finance Director or designee and shall be in force and effect until the thirty-first day of December of odd-numbered years, unless **otherwise specified or** sooner revoked.

Section 9. Sec. 3-28-170 is hereby amended to read as follows:

So long as this Article remains in effect, it shall be the duty of each licensee, ~~on or before January 1 of each even-numbered year during which this Article remains in effect~~, to obtain a renewal of such license **on or before the license expiration date if the licensee remains engaged in business in the City**; however, nothing contained in this Article shall be construed

to empower the Finance Director to refuse such renewal, except revocation for cause of the licensee's prior license.

Section 10. Sec. 3-28-160 is hereby amended to read as follows

Such licenses shall be granted and renewed only upon application stating the name and address of the person desiring such a license, the name such business, the location and such other facts as the Finance Director may require. **Approval of a business license shall be conditioned upon the applicant's proposed business and location meeting all applicable provisions of this Code.**

Section 11. Sec. 3-28-200 is hereby amended to read as follows

- 1) Sec No license shall be required for infrequent sales of tangible personal property at the residence of the owner of the property to be sold if the property was originally purchased for use by members of the household where the sale is conducted and no person other than such household members conducts all or any portion of the sales
- 2) **No license shall be required under this article for a contractor based outside the limits of the City of Brighton who is required to obtain a contractor license under Article 15-16 of this Code and whose sole work in the City of Brighton requires a City of Brighton Building Permit.**

Section 12. Sec. 3-40-70 (b) is hereby amended to read as follows

(b) Every lodging provider or vendor shall, before February 20, 2012, and before the 20th day of each month thereafter, make a return to the Finance Director for the preceding calendar month, commencing with the month of January 2012, and remit to the Finance Director the total amount due to the City. The ~~monthly~~ returns of the lodging provider or vendor as required hereunder shall be made in such manner and upon such forms as the Finance Director may prescribe.

Section 13. Sec. 3-40-250 is hereby amended to read as follows

The Finance Director may revoke the license of any person found by the Finance Director to have violated any provisions of this ~~Article~~ **Code**; provided, however, that any such revocation shall be subject to an administrative hearing as provided in Section 3-28-110 of this Chapter.

Section 14. Sec. 3-40-220 and Sec. 3-240 are hereby eliminated in their entirety

~~Sec. 3-40-220—Application~~

~~Each license issued pursuant to this Article shall be issued only upon application for a business license pursuant to Article 3-28 of this Chapter, which shall include the name and address of the person desiring such license, the street number of the business and such other facts as may be reasonably required by the Finance Director.~~

~~Sec. 3-40-240—Term~~

~~Each license issued shall be in force until the thirty first of December of odd numbered years, unless sooner revoked or until the licensee is no longer engaged in business in the City, consistent with the provisions of Article 3-28 of this Chapter.~~

INTRODUCED, PASSED ON FIRST READING, AND ORDERED PUBLISHED THIS 15TH DAY OF DECEMBER, 2020.

PASSED ON SECOND AND FINAL READING AND ORDERED PUBLISHED, BY TITLE ONLY, THIS 5TH DAY OF JANUARY, 2021.

CITY OF BRIGHTON, COLORADO

GREGORY MILLS, Mayor

ATTEST:

NATALIE HOEL, City Clerk

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APPROVED AS TO FORM:

JACK D. BAJOREK, City Attorney