

## **ORDINANCE NO. 906**

### **AN ORDINANCE AMENDING THE CITY'S SALES AND USE TAX CODE CONCERNING ECONOMIC NEXUS AND MARKETPLACE FACILITATORS AND THE CITY'S LODGING TAX CONCERNING MARKETPLACE FACILITATORS**

**WHEREAS**, the City of Dacono 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 and Use Tax Code (the "Code"), set forth In Chapter 4, Article 1 of the Dacono Municipal 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 of Colorado 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 Council 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.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DACONO, COLORADO:**

**Section 1.** The following definitions set forth in Section 4-3 of the Dacono Municipal Code (Sales and Use Tax) are hereby amended to read as follows (words to be deleted ~~stricken~~; words to be added underlined):

Sec. 4-3        Definitions.

*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 (1) 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;
- (2) Sends one (1) or more employees, agents or commissioned sales persons into the taxing jurisdiction 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 sales persons 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;
- (5) ~~Makes more than one (1) delivery into the City within a twelve-month period by any means other than a common carrier.~~  
Retailer or vendor in the state of Colorado that makes more than one delivery into the taxing jurisdiction within a twelve month period; or
- (6) Makes retail sales sufficient to meet the definitional requirements of economic nexus as set forth in this Code.

*Retailer or Vendor* means any person selling, leasing, renting, or granting a license to use tangible personal property or services at retail. The terms “retailer” shall include, but is not limited to, 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) Retailer-contractor, when acting in the capacity of a seller of building supplies, construction materials, and other tangible personal property;
- (5) Marketplace facilitator, marketplace seller, or multichannel seller.

**Section 2.** Section 4-3 of the Dacono Municipal Code (Sales and Use Tax) is hereby amended by the addition of the following new definitions, to be inserted alphabetically:

Sec. 4-3        Definitions.

*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:

(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 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.

*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*

(A) Means a person who:

- (1) 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;
- (2) 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
- (3) Either directly or indirectly, through agreements or arrangements with third parties, collects payment from the purchaser on behalf of the seller.

(B) 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.

*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 3.** Section 4-11 of the Dacono Municipal Code (Sales and Use Tax) is hereby amended by the addition of a new subsection (c) to read as follows:

Sec. 4-11 Sales tax; taxable property and services.

(c) Marketplace sales.

- (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 the marketplace facilitator.
- (2) A marketplace facilitator shall assume all the duties, responsibilities, and liabilities of a vendor under 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 of 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, 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) From 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.
- (5) A marketplace seller makes that is not facilitated by a licensed marketplace facilitator in a marketplace, the marketplace seller is subject to all of the same licensing, collection, remittance, filing and recordkeeping requirements as any other retailer.
- (6) Auditing. With respect to any sale, the City shall solely audit the marketplace facilitator for sales made by 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.

**Section 4.** Section 4-182 of the Dacono Municipal Code (Lodging Tax) is hereby amended by the addition of the following new definitions, to be inserted alphabetically:

Sec. 4-182 Definitions.

*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*

- (A) Means a person who:
- (1) 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;

- (2) 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
- (3) Either directly or indirectly, through agreements or arrangements with third parties, collects payment from the purchaser on behalf of the seller.

(B) 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.

*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 leasing or rental any hotel room, motel room, or other accommodation located within the City through a marketplace owned, operated, or controlled by a marketplace facilitator.

*Multichannel Seller* means any person that offers for leasing or rental any hotel room, motel room, or other accommodation located within the City through a marketplace owned, operated, or controlled by a marketplace facilitator, and through other means.

**Section 5.** Chapter 4, Article 6 of the Dacono Municipal Code (Lodging Tax) is hereby amended by the addition of a new Section 4-185 to read as follows:

Sec. 4-185 Marketplace Sales.

(a) A marketplace facilitator engaged in business in the City is required to collect and remit lodging tax on all leases and rentals of any hotel room, motel room, or other accommodation located within the City 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 leases or rentals are facilitated would have been required to collect lodging tax had the sale not been facilitated by the marketplace facilitator.

(b) A marketplace facilitator shall assume all the duties, responsibilities, and liabilities for payment of the lodging tax under 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.

(c) The liabilities, obligations, and rights set forth under this article are in addition to any duties and responsibilities of the marketplace facilitator has under this Article if it also offers for sale tangible personal property, products, or services through other means.

(d) A marketplace seller, with respect to the lodging tax imposed by this Article, does not have the liabilities, obligations, or rights imposed pursuant to this Article if the marketplace seller can show that such sale was facilitated by a marketplace facilitator:

- a. With whom the marketplace seller has a contract that explicitly provides that the marketplace facilitator will collect and remit lodging tax on all leases and rentals subject to tax under this article; or
- b. From whom the marketplace seller requested and received in good faith a certification that the marketplace facilitator is registered to collect lodging tax and will collect lodging tax on all leases and rentals subject to tax under this Article made in or through the marketplace facilitator's marketplace.

(e) When a marketplace seller that rents or leases hotel rooms, motel rooms, or other accommodations that are not facilitated by a licensed marketplace facilitator in a marketplace, the marketplace seller is subject to all of the same licensing, collection, remittance, filing and recordkeeping requirements as any other person liable to the lodging tax.

(f) Auditing. With respect to any lease or rental subject to the lodging tax, the City shall solely audit the marketplace facilitator for leases and rentals made by marketplace sellers or multichannel sellers but facilitated by the marketplace facilitator. The City will not audit or otherwise assess tax against marketplace sellers or multichannel sellers for sales facilitated by a marketplace facilitator.

**Section 6.** No obligation to collect the sales and use tax or lodging tax required by this Ordinance may be applied retroactively. Responsibilities, duties and liabilities described in this Ordinance of a marketplace facilitator, marketplace seller, or multichannel seller 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 or lodging tax.

**Section 7.** If any article, section, paragraph, sentence, clause, or phrase of this ordinance is held to be unconstitutional or invalid for any reason, such decision shall not affect the validity or constitutionality of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance and each part or parts hereof irrespective of the fact that any one part or parts be declared unconstitutional or invalid.

**Section 8.** The repeal or modification of any provision of any prior ordinance by this ordinance shall not release, extinguish, alter, modify, or change in whole or in part any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such provision, and each provision shall be treated and held as still remaining in force for the purpose of sustaining any judgment, decree, or order which can or may be rendered, entered, or made in such actions, suits, proceedings, or prosecutions.

**Section 9.** All other ordinances or portions thereof inconsistent or conflicting with this ordinance or any portion hereof are hereby repealed to the extent of such inconsistency or conflict.

**INTRODUCED, READ, ADOPTED ON FIRST READING, AND ORDERED PUBLISHED AND POSTED BY TITLE this 24th day of May, 2021.**

**PUBLIC HEARING AND SECOND READING WILL BE THE 14th DAY OF June, 2021, AT 6:00 P.M. AT DACONO CITY HALL, 512 CHERRY STREET, DACONO, CO.**

**READ, ADOPTED ON SECOND READING, APPROVED, SIGNED, AND ORDERED PUBLISHED BY TITLE this \_\_\_\_ day of \_\_\_\_\_, 2021.**

CITY OF DACONO, COLORADO

\_\_\_\_\_  
Joe Baker, Mayor

ATTEST:

\_\_\_\_\_  
Valerie Taylor, City Clerk

**Summary of Ordinance No. 906, “AN ORDINANCE AMENDING THE CITY’S SALES AND USE TAX CODE CONCERNING ECONOMIC NEXUS AND MARKETPLACE FACILITATORS AND THE CITY’S LODGING TAX CONCERNING MARKETPLACE FACILITATORS”:** Implements the model ordinance drafted by the Colorado Municipal League Sales Tax Simplification Committee for home rule municipalities that self-collect taxes in their jurisdictions, to allow for the City to collect taxes from marketplace facilitators, who collect taxes on behalf of third-party sellers, and businesses that are only connected to the City by economic presence rather than physical presence.