

ORDINANCE NO. 8.32, Series of 2020

**TITLE: A BILL FOR AN ORDINANCE TO AMEND CHAPTER 4.03 OF THE PARKER MUNICIPAL CODE TO DEFINE ECONOMIC NEXUS AND UPDATE METHODS FOR COLLECTION AND REMITTANCE OF SALES TAX**

WHEREAS, the Town of Parker is a home rule municipality, organized and existing under Article XX, Section 6 of the Colorado Constitution;

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 Town and is necessary to raise revenue with which to conduct the affairs and render the services performed by the Town;

WHEREAS, pursuant to such authority, the Town has adopted and enacted a Sales Tax Code (the "Code"), under which Town 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;

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");

WHEREAS, based upon such decision, the retailer's obligation to collect tax on 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 Code needs to be amended to clearly reflect such obligation consistent with said decision;

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

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;

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 Town, but that still have a taxable connection with the Town;

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;

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

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

WHEREAS, the Town 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 as permitted in 2018 by the U.S. Supreme Court; and

WHEREAS, the State's adoption of economic nexus for state sales tax and state-collected municipal sales tax did not require voter approval under the Taxpayer's Bill of Rights ("TABOR"), Article X, § 20 of the Colorado Constitution, and, similarly, updating the Town's methods to allow collection and remittance of sales tax to the full extent permitted by law does not require voter approval under TABOR.

NOW, THEREFORE, THE TOWN COUNCIL OF THE TOWN OF PARKER, COLORADO, ORDAINS:

**Section 1.** Section 4.03.030 of the Parker Municipal Code is amended by the revision to or addition of the following defined terms, which shall appear in alphabetical order:

**4.03.030 Definitions.**

For the purpose of this Code, unless the context clearly indicates otherwise, the words, terms and phrases set forth below shall have the following meanings:

\* \* \*

*Economic nexus* means the connection between the Town 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 Town, 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 Section 39-26-102(3)(c), C.R.S., as amended; or

b. In the current calendar year, ninety (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 Section 39-26-102(3)(c), C.R.S., 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 Town* means performing or providing services or selling, leasing, renting, delivering or installing tangible personal property for storage, use or consumption within the Town. Engaged in business in the

Town includes, but is not limited to, any one of the following activities by a person:

- a. Directly, indirectly, or by a subsidiary maintains a building, store, office, salesroom, warehouse, or other place of business within the taxing jurisdiction;
- b. Sends one 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;
- c. Maintains one or more employees, agents or commissioned sales persons on duty at a location within the taxing jurisdiction;
- d. Owns, leases, rents or otherwise exercises control over real or personal property within the taxing jurisdiction;
- e. Retailer or vendor in the state of Colorado that makes more than one delivery into the Town within a 12-month period; or
- f. Makes retail sales sufficient to meet the definitional requirements of economic nexus as set forth herein.

*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 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.

This definition 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 Town, 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.

*Retailer or Vendor* means any person selling, leasing, renting, or granting a license to use tangible personal property or services at retail. Retailer shall include, but is not limited to, any:

- a. Auctioneer;
- b. 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;
- c. 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;
- d. Retailer-contractor, when acting in the capacity of a retailer; or
- e. Marketplace facilitator, marketplace seller, or multichannel seller.

**Section 2.** Section 4.03.190 of the Parker Municipal Code is amended by the addition of the following new Paragraph (a)(14):

**4.03.190 Sales tax – Taxable property and services.**

a. As set forth below, there is hereby levied and there shall be collected and paid a sales tax in the amount stated in Section 4.03.140 of this Code, upon the sale at retail of such tangible personal property and the furnishing of such certain services as are set forth herein and in the rules and regulations promulgated by the Director pursuant to Section 4.03.040 of this Code.

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14. Marketplace sales as follows:

a. A marketplace facilitator engaged in business in the Town 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 Town, 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.

b. A marketplace facilitator shall assume all the duties, responsibilities, and liabilities of a vendor under this Chapter. Marketplace facilitators shall be liable for the taxes collected from marketplace sellers or multichannel sellers. The Town 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 Paragraph 14 are in addition to any duties and responsibilities of the marketplace facilitator has under this Chapter if it also offers for sale tangible personal property, products, or services through other means.

d. 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 Chapter 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 Chapter made in or through the marketplace facilitator's marketplace.

e. If a marketplace seller makes a sale 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.

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

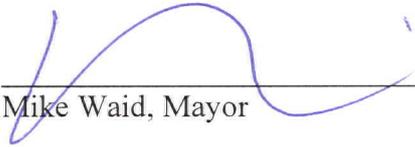
**Section 3.** No obligation to collect the sales and use tax required by this Ordinance may be applied retroactively. Responsibilities, duties and liabilities described in Section 2 of a marketplace facilitator, marketplace seller, or multichannel seller begin upon the earlier of when they became licensed to collect the Town's sales tax or when they became legally obligated to collect the Town's sales tax.

**Section 4. Safety Clause.** The Town Council hereby finds, determines and declares that this Ordinance is promulgated under the general police power of the Town of Parker, that it is promulgated for the health, safety and welfare of the public, and that this Ordinance is necessary for the preservation of health and safety and for the protection of public convenience and welfare. The Town Council further determines that the Ordinance bears a rational relation to the proper legislative object sought to be obtained. The Town Council further finds that the title to this Ordinance was posted in two public places two days before the Town Council meeting, as provided by Section 7.5e. of the Town of Parker Home Rule Charter.

**Section 5. Severability.** If any clause, sentence, paragraph or part of this Ordinance or the application thereof to any person or circumstances shall for any reason be adjudged by a court of competent jurisdiction invalid, such judgment shall not affect application to other persons or circumstances.

**Section 6. Effective Date.** This ordinance shall become effective on the first day of the month that is at least thirty (30) days after date of its adoption.

INTRODUCED AND PASSED ON FIRST READING this 5<sup>th</sup> day of Oct., 2020.

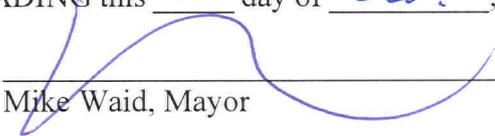
  
Mike Waid, Mayor

ATTEST:

  
Chris Vandelepool

Carol Baumgartner, Town Clerk  
Deputy Town Clerk

ADOPTED ON SECOND AND FINAL READING this 19<sup>th</sup> day of Oct., 2020.

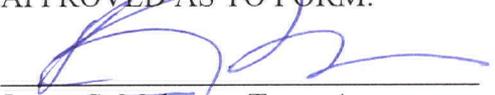
  
Mike Waid, Mayor

ATTEST:

  
Chris Vandelepool

Carol Baumgartner, Town Clerk  
Deputy Town Clerk

APPROVED AS TO FORM:

  
James S. Maloney, Town Attorney

Deputy