

**TOWN OF TIMNATH, COLORADO
ORDINANCE NO. 1, SERIES 2021**

**AN ORDINANCE AMENDING THE TIMNATH MUNICIPAL CODE REGARDING
SALES AND USE, AND LODGING TAXES FOR REMOTE SALES**

WHEREAS, the Town of Timnath (the "Town") is a home rule municipality operating under the Timnath Home Rule Charter (the "Charter") and the Town's Municipal Code (the "Code"). Pursuant to the Charter, the Code, and the authority given home rule municipalities, the Town may adopt ordinances; and

WHEREAS, pursuant to Article XX, Section 6 of the Colorado Constitution, the Town has the authority to enact, administer, and enforce sales taxes in order to raise revenue with which to conduct the affairs and render the services performed by the Town; and

WHEREAS, the Town has adopted and enacted Chapter 4, Articles 3, 4 and 5 of the Code, under which Town taxes are levied on the sales and purchases of tangible personal property or taxable services at retail; and

WHEREAS, the United States Supreme Court in *South Dakota v. Wayfair*, 138 S.Ct. 2080 (2018), held that a State may require retailers to collect sales tax even if such retailer does not have a physical presence in the State ("Remote Sales"); and

WHEREAS, based on the *Wayfair* 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 Code needs to be amended to clearly reflect such obligation consistent with said decision, and to clarify a retailer's obligation to collect taxes from Remote Sales; and

WHEREAS, the delivery of tangible personal property, products, or services into the Town 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 the Town to adopt uniform sales tax definitions of 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; and

WHEREAS, the Town seeks to join the simplification efforts of all the self-collecting home rule municipalities in Colorado, including through the use of the SUTS System provided by the Colorado Department of Revenue to assist with online revenue collection, and provide a safe harbor to those who transact limited sales within the Town; 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 uncollected taxes and permits an inequitable functional exception that prevents market participants from competing on an even playing field; and

WHEREAS, the Town adopts this Ordinance with the intent to address tax administration, and, in connection therewith, to formally acknowledge the economic nexus for retailers or vendors without physical presence in the State, and to ensure that all retailers and vendors collect and remit sales tax for all sales made within the Timnath marketplace.

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

ARTICLE 1 – ORDINANCE AMENDED

Section 1. Section 4-3-10(b) of the Timnath Municipal Code is hereby repealed and replaced as follows:

Sec. 7-6-10. – Legislative Intent.

(b) The sales tax is a transaction tax levied upon all sales, purchases and leases of tangible personal property and taxable services sold or leased by persons engaged in business in the Town and is collected by the retailer or lessor, and remitted to the Town. The use tax is levied upon the privilege of storing, using or consuming within the Town any motor and other vehicles, purchased at retail on which registration is required. The use tax is remitted to the Town by the persons using or consuming any construction and building materials purchased at retail or storing, using or consuming any motor and other vehicles, purchased at retail on which registration is required.

Section 2. The following definitions are hereby added to, or repealed and replaced from, Section 4-3-20 of the Timnath Municipal Code.

Sec. 4-3-20. – Definitions.

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 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.

Engaged in business in the Town 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 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 taxing jurisdiction within a twelve month period; or

(f) Makes retail sales sufficient to meet the definitional requirements of an Economic Nexus.

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) A 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 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. The term *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 seller of building supplies, construction materials, and other tangible personal property;
- (e) Marketplace facilitator, marketplace seller, or multichannel seller.

Section 3. Section 4-3-30(a)-(c) of the Timnath Municipal Code is hereby repealed and replaced as follows:

Sec. 4-3-30. – Sales Tax Imposed.

(a) There is hereby imposed a sales tax equal to three percent in accordance with Section 39-26-104, C.R.S. Items classified as food for home consumption shall be charged at a sales tax rate equal to two and one-quarter percent of the gross sales.

(b) Retailers shall add the tax imposed, or the average equivalent thereof, to the purchase price, showing such tax as a separate and distinct item. Except as provided in this Subsection, no retailer shall advertise, hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof shall be assumed or absorbed by the retailer or that it will not be added to the price, or, if added, that it or any part thereof shall be refunded. Sales tax may be included in the price of any malt, vinous or spirituous liquor sold by the drink. Sales tax may be included in the price of vending machine sales. Sales tax may be included in the price of an admissions charge.

Section 4. Section 4-3-55 of the Timnath Municipal Code is hereby added as follows:

Sec. 7-3-55. – Marketplace Sales.

- (a)
- (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 Section. 4-3-20 of this code. 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 Seller.
 - (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 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:
 - i. 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
 - ii. 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.
 - (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.
- (b) Auditing. With respect to any sale the Town shall solely audit the Marketplace Facilitator for sales made by Marketplace Seller 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 5. Section 4-5-10 of the Timnath Municipal Code is hereby repealed and replaced as follows:

Sec. 4-5-10. – Tax imposed; conditions.

There is hereby imposed an excise tax on the price paid or charged for the lease, rental or on the transaction of furnishing rooms or accommodations to any person who, for a consideration, uses, possesses or has the right to use or possess any room or other accommodations in any hotel, apartment hotel, guesthouse, guest ranch, mobile home, auto camp, trailer court or park, or any other place furnishing rooms or other accommodations under any concession, permit, right of access, license to use or other special agreement. Such tax on accommodations shall be subject to the following conditions:

- (a) The tax hereby imposed shall be in lieu of Town sales tax on such rental or furnishing of accommodations. The tax hereby imposed shall not apply to the sale of any goods, services or commodities other than the furnishing of rooms and accommodations.
- (b) The tax hereby imposed shall be collected and paid at the rate of three percent of the purchase price paid or charged for such accommodations and shall exclude the sale of any goods, services and commodities other than the furnishing of rooms or other accommodations.
- (c) The person making such rooms or other accommodations available shall, for purposes of this Article, be deemed a retailer, vendor, Marketplace Facilitator, Marketplace Seller, or Multichannel Seller engaged in business in the Town.
- (d) The rental or furnishing of accommodations for a period of at least 30 consecutive days shall be exempt from the tax hereby created. For purposes of establishing the 30-day period, the accommodation may not be transferred or transferable by one person to any other person.

ARTICLE 2 – APPLICABILITY

No obligation to collect the sales and use tax required by this Ordinance may be applied retroactively. Responsibilities, duties and liabilities described in Chapter 4, Article 3 of the Code 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.

ARTICLE 3 – AUTHORITY TO ENTER AGREEMENTS

The Town Manager is hereby authorized to enter the Town into agreements that the Town Manager, with assistance from the Finance Director, determines to be necessary and appropriate

to protect the interests of the Town and effectuate the purposes set forth herein and not otherwise inconsistent with this ordinance

ARTICLE 4 – SEVERABILITY

If any part or provision of this Ordinance, or its application to any person or circumstance, is adjudged to be invalid or unenforceable, the invalidity or unenforceability of such part, provision, or application shall not affect any of the remaining parts, provisions or applications of this Ordinance that can be given effect without the invalid provision, part or application, and to this end the provisions and parts of this Ordinance are declared to be severable.

ARTICLE 5 – CODE REVISIONS

Minor changes such as the format and other changes to unify the revised Code may be necessary. The Town Clerk is hereby authorized to make such changes, provided that neither the intent nor substantive content will be altered by such changes.

ARTICLE 6 – EFFECTIVE DATE

This Ordinance shall take effect April 1, 2021.

INTRODUCED, MOVED, AND ADOPTED BY THE TOWN COUNCIL OF THE TOWN OF TIMNATH ON FIRST READING, ON JANUARY 12, 2021, AND SET FOR PUBLIC HEARING AND SECOND READING AT 6:00 P.M. ON JANUARY 26, 2021 AT THE TIMNATH TOWN CENTER BUILDING, 4750 SIGNAL TREE DRIVE, TIMNATH COLORADO AND ORDERED PUBLISHED BY TITLE THIS 12TH DAY OF JANUARY 2021.

MOVED, SECONDED AND FINALLY ADOPTED ON SECOND READING FOLLOWING PUBLIC HEARING BY THE TIMNATH TOWN COUNCIL ON JANUARY 26, 2020.

TOWN OF TIMNATH, COLORADO

DocuSigned by:
Mark Soukup
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Mark Soukup, Mayor

ATTEST:

DocuSigned by:
Milissa Peters-Garcia
07A6AF3B02114D7...
Milissa Peters-Garcia, CMC
Town Clerk

