PARKER
COLORADO

TOWN COUNCIL STUDY SESSION AGENDA
September 14, 2020
5:30 PM

I. <u>Town Council Items</u>

II. <u>Study Session Items</u>

1. Parker Water & Sanitation District Update - Ron Redd - 30 minutes
2. Wayfair Update - Brown/Graham/Quade - 30 minutes
3. O'Brien Park Discussion - Tsurapas/Williams/Colton - 20 minutes

MEMORANDUM

TO:	Michelle Kivela
FROM:	Mary Lou Brown, Finance Director Linda Quade, Sales Tax Administrator
DATE:	September 14, 2020
SUBJECT:	Wayfair Update

ISSUE:
The state-wide adoption of Economic Nexus definitions for sales tax and single statewide payment portal for remittance.

FISCAL/BUDGET IMPACT:
Minimal

BACKGROUND:
In 2017, the Sales and Use Tax Simplification Task Force was created pursuant to House Bill 17-1216. The task force studied sales and use tax simplification between the state and local governments, including home rule municipalities, to identify opportunities and challenges within existing fiscal frameworks to adopt innovative revenue-neutral solutions that did not require constitutional amendments or voter approval.

The State of Colorado adopted HB19-1240 codifying economic nexus definitions (including marketplace facilitators) for all state collected jurisdictions. Senate Bill 19-006 required the Colorado Department of Revenue to implement a system for accepting and processing returns and payments for the sales and use tax levied by State and Local tax jurisdictions. To support the Sales Tax and Use Tax System (SUTS) the Office of Information Technology would implement a global information system (GIS) database to house and maintain sales tax districts and boundaries and to calculate sales and use tax rates for individual addresses.

Wayfair provides the Town a legal basis for capturing local sales tax on remote sales. While many of the larger vendors are voluntarily remitting to the Town there has been some legal uncertainty with enforcing economic nexus. If the Town wants to capture local sales tax on remote sales, we can adopt the economic nexus definitions and participate in the SUTS agreement. The Town could adopt the definitions and not participate in the payment portal; however, we all risk a challenge if Colorado cannot demonstrate the tax is collected using single-point tax administration (required in the Wayfair decision).

The Colorado Municipal League warns as follows:
The risk of a challenge increases should a municipality enforce economic nexus language without using the portal…f extending the sales tax net to capture internet sales by otherwise out-of-state vendors, the compromise for fairness seems to require single-point payment, such

as through SUTS. *See* CML May 29, 2020, memorandum (attached).
Corey Hoffmann, contract attorney to the Town of Parker, prepared a memo on August 25, 2020, summarizing his review of the initial statewide response to the Wayfair decision and Colorado's adoption of Economic Nexus definitions.
Currently, 22 home rule municipalities have adopted the Economic Nexus definitions and signed the SUTS Intergovernmental Agreement. Another 20 have started the process of securing signatures on the agreement. The rest of the home rule municipalities are reviewing and evaluating the system.

RECOMMENDATION:
Adopt Economic Nexus Definitions and sign the Intergovernmental Agreement for SUTS.

REQUESTED DIRECTION:
Consider adopting Economic Nexus Definitions and entering the Intergovernmental Agreement for Single Point of Collection

ATTACHMENT:
1. Economic Nexus and Single Point of Collection

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Town of Parker

MEMORANDUM

TO: Mary Lou Brown, Finance Director
Linda Quade, Sales Tax Administrator
Brandy Zink, Sales Tax Auditor

FROM: Corey Y. Hoffmann, Esq.
Hilary M. Graham, Esq.

DATE: August 25, 2020

SUBJECT: Economic Nexus and the SUTS IGA

The purpose of this memorandum is to provide information for your use in drafting a memorandum to Town Council prior to the September 14, 2020, Town Council study session at which the Finance Department is set to present a *Wayfair* update. This issue has been prompted by the Colorado Municipal League ("CML") and its economic nexus and marketplace facilitator model ordinance project.

CML is urging the Town, as one of 72 home rule municipalities collecting its own sales tax, to adopt the model ordinance and to begin using a Colorado Department of Revenue state portal (commonly referred to as "SUTS") to collect Town sales tax. Doing both will impose Town sales tax on internet transactions while also providing businesses with a single point of remittance for state and Town sales tax. This issue is unique to home rule municipalities who collect their own sales tax because, for municipalities whose sales tax is collected by the state, which includes all statutory cities and towns, this issue was addressed in 2019 by passage of House Bill 19-1240 ("HB 19-1240").

HB 19-1240 codified the Colorado Department of Revenue ("DOR") rules requiring out-of-state vendors to collect and remit sales tax, established destination-based sourcing rules, and required marketplace facilitators to collect and remit sales tax on behalf of their third-party vendors. HB 19-1240 *Fiscal Note*, drafted by Legislative Council Staff, dated August 5, 2019. The DOR's rules and HB 19-1240 were in direct response to the United States Supreme Court decision announced in June of 2018, *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018), which for the first time, authorized states and municipalities to require out-of-state vendors to collect and remit sales tax from online transactions.

Prior to *Wayfair*, so as not to discriminate against or unduly burden interstate commerce, an out-of-state vendor needed to maintain a physical presence, such as employees or a retail location in the jurisdiction before that jurisdiction could require the vendor to remit sales tax on purchases made by consumers within the jurisdiction. *Complete Auto Transit, Inc. v. Brady*, 97 S.Ct. 1076, 1077-78 (1977). The physical presence required was more than the contacts a vendor would have through mail or common carrier delivery of merchandise to its customers, and it became known as "nexus." *Quill Corporation v. North Dakota*, 112 S.Ct. 1904 (1992).

Wayfair, decided in the age of internet commerce, recognized a new concept, known as "economic nexus," by which a vendor can become responsible for collecting and remitting a jurisdiction's sales tax without physical presence in the jurisdiction. "Economic nexus" can exist when a vendor subjects itself to the taxing jurisdiction's authority by selling its products in the jurisdiction online or through "virtual connections," such as "cookies" or "apps." *Wayfair*, 138 S.Ct. at 2095. The Court did not specify how to establish economic nexus, and courts will continue to consider whether a law taxing internet sale discriminates against or unduly burdens interstate commerce.

That said, the Court endorsed some concepts within South Dakota's sales tax system: economic nexus is created when a vendor completed either $100,000 in annual sales or 200 annual transactions within the state; the tax is collected using single-point tax administration at the state level; uniform definitions of products and services are in place; the tax rate structures are simplified; and there are other uniform rules. *Wayfair*, 138 S.Ct. at 2100. Together, these factors meant South Dakota's method for taxing internet sales did <u>not</u> place a burden on interstate commerce, so it did not unconstitutionally violate the Commerce Clause.

Yet, adopting definitions for economic nexus and marketplace facilitators is only part of *Wayfair*. Concerns exist about applying the concept in Colorado where, unlike South Dakota, local sales tax is far from standardized. Colorado will still need to demonstrate that taxing internet sales does not discriminate against or unduly burden interstate commerce. CML's model ordinance is part of making that case. With cooperation and adoption by self-collecting jurisdictions, the state would have uniform economic nexus and marketplace facilitator concepts. The definitions would create consistency among self-collected and state-collected municipalities, and voluntary use of SUTS would simulate single-point tax administration at the state level. The hope is that these steps, when taken together, will insulate Colorado from a sales tax challenge, and potentially maintain the expansive home rule taxing authority that exists in Colorado.

In many ways, this effort is a continuation of CML's efforts since 2014, in response to Senate Joint Resolution 14-082, to explore ways to simplify and standardize the local sales tax collection and payment process. You will recall the standardized sales tax definitions project. The Town adopted standardized definitions in 2017 by Ordinance No. 8.28.4. The following recitals from the ordinance provide additional background and context:

> WHEREAS, in Senate Joint Resolution14-038 the General Assembly asked the Colorado Municipal League to revive the tax simplification project from the 1990s to address current systemic problems associated with local tax collection;
>
> WHEREAS, the Town Council has determined that the standard tax definitions project is a major collaborative sales tax simplification initiative by Colorado's home rule municipalities that locally collect their sales tax and the retail business community;
>
> WHEREAS, the Town Council has determined that the Town will cooperate in furtherance of a statewide goal to have all locally collecting municipalities agree to use standard definitions in their sales and use tax codes;
>
> WHEREAS, the Town Council has determined that maintaining the local collection of sales and use taxes for the Town is of paramount importance to the continued financial strength of the Town;
>
> WHEREAS, the Town Council has determined that the retail business community desires better uniformity and simplicity when operating in the Town;
>
> WHEREAS, the Town Council has determined that sales tax revenue is directly tied to how well the Town's retail business community is faring, Council and staff have generally supported the idea that the Town should simplify the tax code, without sacrificing revenue…

CML's concern in this current effort continues to be addressing pressure from businesses that oppose Colorado's non-centralized state and local sales tax system. The business community has been vocal about the additional burden Colorado's separate local sales tax collection and payment process places on them (nationally only 3 states use this model), and state legislators are interested in finding a business-friendly approach. Pressure continues to mount with adoption of Senate Bill 19-006, which formed a sales and use tax simplification task force "to study the necessary components of a simplified sales and use tax system for both the state and local governments, including home rule municipalities and counties." SB 19-006; codified at C.R.S. § 39-26-802(1)(a).

The concern is that with enough business opposition, the general assembly will act to impose unified state collection of local sales tax throughout the state. At this point, the Town retains some local control. Thus, in addition to formalizing taxation on internet sales post-*Wayfair*, this effort is about preventing a state-imposed end to local sales tax autonomy.

Model Ordinance[1]

Given *Wayfair*, the Town has a legal basis for capturing local sales tax on internet sales. While many of the big players in e-commerce were already voluntarily remitting Town sales tax, there has been some legal uncertainty about how the Town could truly establish and enforce economic nexus.

The model ordinance uses the state's concept of "economic nexus," modeled after South Dakota and given the *Wayfair* endorsement, and adopts the state's $100,000 annual threshold. C.R.S. § 39-26-102(3)(c). ***Importantly, by using the state threshold, the model ordinance infers that economic nexus within the state amounts to economic nexus within the Town.*** There is no separate threshold for vendors to meet showing sales originating from or being delivered into the Town. There is a bit of a trade-off here and some risk. CML and the municipalities adopting this approach are presuming that vendors will concede economic nexus because of the ease of remitting taxes through a single-point payment system.

In other words, CML and self-collecting home rule municipalities are betting that, in exchange for convenience of SUTS, vendors will forego mounting a nexus challenge. On this point, CML warns as follows:

> The risk of a challenge increases should a municipality enforce economic nexus language without using the [SUTS] portal…[I]f extending the sales tax net to capture internet sales by otherwise out-of-state vendors, the compromise for fairness seems to require single-point payment, such as through SUTS. *See* CML May 29, 2020, memorandum (attached).

Also consistent with HB 19-1240, the model ordinance adds the concept of "marketplace facilitators" to reach third-party sellers on platforms such as Amazon and Ebay who would not individually meet the $100,000 annual economic nexus sales threshold. The "marketplace facilitator" is the entity that facilitates sales on its platform, it may retain a fee for this service, it communicates the offer between the buyer and seller, and it provides a payment processing service for both parties. C.R.S. § 39-26-102(5.9). This reflect in many ways how Amazon does business as an example. The "marketplace seller" is the vendor who makes sales through the facilitator's marketplace. C.R.S. § 39-26-102(6). Just like HB 19-1240, and as authorized by *Wayfair*, the model ordinance places responsibility on the marketplace facilitator to collect the taxes owed on sales made by all marketplace sellers. Accordingly, the $100,000 annual threshold and the legal

[1] CML's model ordinance, dated June 4, 2020, and its explanatory memorandum, dated May 29, 2020, are attached for reference.

obligation applies to the marketplace facilitator rather than to the individual marketplace sellers. C.R.S. § 39-26-102(3)(c)(II); C.R.S. § 39-26-105(1.5).

SUTS

Under the mandate of Senate Bill 19-006, DOR engaged private software developers to enable SUTS for use by self-collecting home rule municipalities. There is a *de minimis* fee to participate but otherwise no cost involved. The IGA requires an annual prepayment of $260 to cover the cost of ACH transfer fees DOR will incur throughout the year in transferring the Town its portion of taxes. DOR will require the Town to sign the intergovernmental agreement (the "IGA"). The IGA has been reviewed and is acceptable as to form. DOR has provided other reference documents, available upon request, that explain more about the collection and transfer process. In addition, the Town could contract with MuniRevs separately at its own cost for custom programming to create more interface between the Town's current system and SUTS.

Before using SUTS, vendors will need to have a DOR account number. If new to the system, SUTS will require that the vendor submit an online sales tax license application and pay the State of Colorado license fee. This state license and fee remains separate from the Town's business licensing requirement, set out in Section 4.03.050 of the Parker Municipal Code (the "Code"). SUTS provides no enforcement or auditing functions, and the Town retains full authority in both regards. Using SUTS would require no change to the Town's current sales tax compliance and auditing provisions, set forth in Chapter 4.03, Title 4, of the Code. It also has no effect on collection of the Town's use tax.

Conclusion

If the Town would like to adopt the model ordinance, it is recommended that the Town also enter into the SUTS agreement. There is likely to be a "safety in numbers" benefit from using the model ordinance and SUTS. The convenience SUTS will provide to vendors is likely to counteract any incentive they may have to challenge the basis for taxation in the first place. The risk of a challenge from out-of-state vendors is likely greatest in adopting the model ordinance to establish economic nexus but still requiring local remittance. Doing so would not follow the model approved in *Wayfair* and could arguably be found to place an impermissible burden on interstate commerce. Preferable to that would be to do nothing and to simply continue relying on voluntary compliance.

With direction from staff or Town Council we will be happy to draft an ordinance adopting the definitions necessary for this effort and making the other minor changes needed to the Code. The ordinance will follow the CML model ordinance with immaterial adjustments. If the ordinance is adopted, the SUTS IGA should also be approved and signed.

As always, please let us know if you have any questions or wish to discuss further.

cc: James S. Maloney, Town Attorney
Kristin Hoffmann, Deputy Town Attorney

Enclosure

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To:	Finance Directors of Self-Collecting Municipalities
From:	Laurel Witt, CML Associate Counsel
Date:	May 29, 2020
Subject:	Economic Nexus and Marketplace Facilitator Model Ordinance Project

The CML Model Ordinance on Economic Nexus and Marketplace Facilitators (attached to the announcement email, hereinafter "Model Ordinance") was developed by municipal tax professionals as part of a sales tax simplification effort. It has long been recognized, by governments and businesses alike, that various home rule municipalities giving the same term different meanings is a source of complexity in our tax system for businesses that operate in multiple municipalities. Use of "standardized" definitions, such as those put into the Model Ordinance, can help minimize this complexity and provide clarity to those remitting taxes to local governments in Colorado.

The purpose of this memo is to briefly explain how and why the Model Ordinance was developed, so as to inform your possible adoption of it. If you have questions or would like more details do not hesitate to email or call me or Meghan Dollar at CML (contact information at the end).

Background

While Colorado's sales tax system is generally well received by taxpayers, and quite effective for municipalities as a revenue raiser, it is regarded by multi-jurisdictional businesses as complex and burdensome. CML has sought to engage the business community constructively by taking the lead in accomplishing simplifications. Simplification must also maintain the basic integrity of our principal revenue raising mechanism and preserve rights that home rules have derived from the Colorado Constitution.

The heavy lifting in all of our tax simplification projects is done by the municipal tax professionals on the CML Sales Tax Simplification Committee, who represent many of Colorado's locally collecting municipalities.

Model Ordinance Project

The discussion around clarification to marketplace facilitators and economic nexus began two years ago when the United States Supreme Court decided a case called *South Dakota v. Wayfair*, Inc., 138 S.Ct. 2080 (2018) (hereinafter "*Wayfair*"). South Dakota enacted a statute requiring internet sellers with no physical presence in the state to collect and remit sales tax, which was not allowed under prior Supreme Court rulings. The Supreme Court overturned their prior rulings and held that out-of-state seller's physical presence in taxing state is not necessary for state to require seller to collect and remit its sales tax. South Dakota had showed that their ordinance did not place a burden on interstate commerce, therefore violating the Commerce Clause, by doing the following: enacting a threshold amount to not require small businesses to remit, using a single state level tax administration, creating uniform definitions of products and services, simplifying the tax rate structures, and other uniform rules.

Here in Colorado, the sales tax system is more complicated than South Dakota, however, the CML Sales Tax Simplification Committee strives to make the process easier for businesses while still allowing for the Constitutionally derived self-collection afforded to home rule municipalities. As such, while the state worked on a single point of remittance (see below), the Committee decided it needed to streamline appropriate definitions and encourage uniformity on this particular issue. In the meantime, the municipalities that make up the Committee agreed to allow for voluntary collection—those businesses who wished to remit to home rule municipalities could do so while the state and the Committee discussed the best path for moving forward.

Under the direction of both CML Legislative Advocacy Manager Meghan Dollar and myself, the CML Sales Tax Simplification Committee developed the enclosed Model Ordinance. A subcommittee of this larger Committee started with the state definitions of economic nexus and marketplace facilitators, and began to work in definitions that were clear and concise.

Once the Model Ordinance was developed, it was reviewed by a group of business tax experts and attorneys, as well as by a group of municipal attorneys. All parties were supportive of simplification with minor disagreements on the language of the Model Ordinance. Following these discussions, several final revisions were made to the Model Ordinance and it was finalized by the Standard Definitions Subcommittee of the CML Sales Tax Simplification Committee.

The goal of this Model Ordinance is clarify who can collect and remit taxes along with clarifying the authority given to taxing jurisdictions under *Wayfair*. This Ordinance is designed to be adopted by those municipalities that are joining the state single point of remittance portal. This Ordinance updates current allowed practices of collection and remittance, which is not a tax policy change. However, please check with your municipal attorney about any TABOR or related concerns.

Importantly, CML encourages only those who will be joining the state single point of remittance portal to adopt this model ordinance. Under *Wayfair*, part of the reason South Dakota did not overburden interstate commerce was due to an easy way for businesses to remit to all taxing jurisdictions. While it is not a requirement to join the state portal (and home rules can join at any time), we do believe that the risk of a challenge increases should a municipality enforce economic nexus language without using the portal. Should a municipality wish to just adopt the marketplace facilitator ordinance, then CML recommends the municipality sever any portions related to economic nexus. The municipality is then encouraged to continue with voluntary compliance for those businesses who only have economic nexus ties into the jurisdiction. Again, we recommend speaking with your municipal attorney(s) to weigh risks of adopting and not adopting.

ADOPTION OF THE MODEL ORDINANCE

This ordinance was designed to be adopted in its entirety (with some adjustments to the whereas clauses to meet the needs of your municipality). Having a uniform adoption will help with any potential challenge under the Commerce Clause (under *Wayfair*). The goal with this ordinance is uniformity and simplicity so that *all* municipalities in Colorado can collect from online or remote retailers.

Your municipality may be interested in only adopting the language around marketplace facilitators. If that is the case, we strongly urge you continue to use the same language for simplification for the business community and simply leave out the pieces related to economic nexus. This may be particularly palatable to those who do not want to join the state single point of remittance and will continue moving forward with voluntary compliance.

SINGLE POINT OF REMITTANCE, SENATE BILL 19-006

House Bill 006 (2019) gave the Department of Revenue and the Office of Information Technology the go ahead to contract with vendors and create a single point of remittance. The idea of a single portal for businesses to remit has been proffered many times before by the business community. However, with the *Wayfair* decision that confirmed the importance of a single portal for remote sellers, and the state moved forward with the creation of this portal. The portal will allow businesses to go to one website and remit taxes to those taxing jurisdictions who have signed on to use this portal. The portal, according to the current agreements, do not stop a municipality from auditing, requiring licenses, and more. This portal is *not* limited to only remote/online retailers, Although it can capture revenue from those groups.

While this Model Ordinance and the portal are drafted to help clarify and administrate tax collection, they are not the same thing. The Model Ordinance clarifies administrative authority for home rule municipalities. As mentioned above, we encourage any self-collecting home rule to only adopt the ordinance in full if it will be using the state portal, to lessen the chance of a *Wayfair* challenge.

CONCLUSION

If you do decide to use the state single point of remittance portal, we strongly recommend you adopt this model ordinance so as to clarify for businesses who can collect. Additionally, CML highly recommends your municipalities work directly with your attorneys when adopting the model ordinance. .

Enclosed in this email is an FAQ for additional information. If you are facing obstacles in adoption, please contact me at CML. When and if you adopt this ordinance or join the state SUTS program, please let us know so we can monitor the progress.

CONTACT

Laurel Witt, Associate Counsel, CML, (303) 831-6411, lwitt@cml.org

Meghan Dollar, Legislative Advocacy Manager, CML, (303) 831-6411, mdollar@cml.org

CML MODEL ORDINANCE – For Self-Collecting Home Rule Municipalities
Economic Nexus and Marketplace Facilitators
Spring 2020

Ordinance No. ________

WHEREAS, the City of *[Insert city name here],* Colorado, (the "City"[or the "Town"]), 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

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;

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.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF *[Insert city name here]*, COLORADO:

<u>Section 1:</u> Section X of the Code is hereby amended as follows:

"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; (2) 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; (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; ~~or~~ <u>(5) retailer or vendor in the state of Colorado that makes more than one delivery into the taxing jurisdiction within a twelve month period</u>; or (6) <u>Makes retail sales sufficient to meet the definitional requirements of economic nexus as set forth in [*Drafters Note: Insert section of your Code*].</u>

[Drafter's Note: Your municipality may have separate sales and use tax articles, with this definition only found in the use tax article. The U.S. Supreme Court has only considered economic nexus as applied to sales tax. It is suggested that you contact your municipal attorney to see how you can change your sales tax code to include something similar to the above.]

Section 2: Section X of the Code is hereby amended as follows:

[Drafter's Note: put where in your code these are being added—into the definitions in your tax 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.

[Drafter's Note: if you have a separate section for the taxation of lodging, we also recommend referencing marketplace facilitator, marketplace seller, and multichannel seller engaged in business in the city to capture companies such as Airbnb and VRBO, if you do not already have an agreement with those companies. We added back in "or Vendor" here to address and municipalities who have the term vendor elsewhere in their taxing codes.]

Section 3: Section X of the Code is hereby amended to include the following new definitions:

[Drafter's Note: put where in your code these are being added—into the definitions in your tax code]

"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.

[Drafter's Note: The above definitions are dependent on sales into the state. This is because we suggest adopting and enforcing this language if you are using the state portal system. Otherwise, we suggest continuing with voluntary collection. Please speak with your municipal attorney to weigh the pros and cons of adopting the above.]

"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.

<u>Section 4</u>: Section X of the Code is hereby amended by the addition of the following new subsection x:

"Marketplace Sales"

(A)

(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 *[Drafter's Note: insert reference(s) to retailer or vendor definition]*. 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:

a. 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

b. 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.

(B) 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 5: No obligation to collect the sales and use tax required by this article may be applied retroactively. Responsibilities, duties and liabilities described in Section 4(A) 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 under Section 3.

Section 6: 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 7: This ordinance shall become effective on the first day of the month that is at least thirty (30) days after date of its adoption.

MEMORANDUM

TO:	Honorable Mayor and Members of Town Council
FROM:	Jim Tsurapas, Chief of Police Tom Williams, Director Eng/PW Mary Colton, Parks and Recreation Director
DATE:	September 14, 2020
SUBJECT:	O'Brien Park Discussion

ISSUE:
Safety concerns with activity in O'Brien Park.

FISCAL/BUDGET IMPACT:
Will be discussed during the Study Session.

BACKGROUND:
Over the past several months there has been an increase in juvenile activity at O'Brien Park and the downtown area, to include assaults, loitering, and other criminal activity. The Town has received complaints from citizens and business owners with requests to address the activity.

Staff has identified a number of improvements that could be made at the park to improve security, including additional lighting and cameras. These improvement options and the estimated costs will be presented to Town Council at the Study Session.

RECOMMENDATION:
Options will be discussed during the Study Session.

REQUESTED DIRECTION:
Provide direction on how you wish staff to proceed.

ATTACHMENT:
None