

ORDINANCE NO. 1

Series 2023

April 4, 2023: Introduced as Council Bill 1, Series 2023 by Councilor Earl Hoellen, seconded by Mayor Pro Tem Randy Weil and considered in full text on first reading. Passed by a vote of 5 yes and 0 no.

April 18, 2023: Considered in full text on second reading. Passed by a vote of 5 yes and 0 no.

A BILL FOR AN ORDINANCE OF THE CITY OF CHERRY HILLS VILLAGE, AMENDING CHAPTER 4, ARTICLE IV CONCERNING RETAIL SALES TAX PURSUANT TO VOTER APPROVAL GRANTED ON NOVEMBER 8, 2022

WHEREAS, the City of Cherry Hills Village, Colorado (“City”) 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 the City currently imposes a sales tax for the privilege of selling tangible personal property at retail upon every vendor having a place of business within the City and who sells such property within the City, unless prohibited, under the Constitution or laws of the United States or as set forth in Chapter 4, Article IV of the Cherry Hills Village Municipal Code (“Municipal Code”); 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 of the United States Constitution 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, a retailer’s obligation to collect sales 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, thus enabling amendments to local sales tax codes in Colorado to reflect such obligation; and

WHEREAS, pursuant to Resolution 19, Series 2022, the City Council of Cherry Hills Village submitted to the City’s registered electors Ballot Issue 2A for the November 8, 2022 election; and

WHEREAS, the City’s registered electors approved Ballot Issue 2A, which sought approval to amend the City’s sales tax code to require persons “engaged in business in the City,” including persons making deliveries to City residents and remote sellers, to collect tax as a voter-approved tax policy change, as tabulated by and reflected in election results of the Arapahoe County Clerk and Recorder (“Ballot Issue 2A”); and

WHEREAS, the delivery of tangible personal property 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 (“State”) and its respective communities, resulting in fewer jobs and increasing the share of taxes to those consumers who buy from competitors with a physical presence in the State and its municipalities; and

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

WHEREAS, the goal of adopting this ordinance is to join 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 the Code amendments enacted by this ordinance, the continued failure of retailers voluntarily to 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 therewith, establish economic nexus for retailers or vendors without physical presence in the State and require the retailer or vendor to collect and remit sales tax for all sales made within the marketplace; and

WHEREAS, in accordance with the electorate's grant of authorization pursuant to Ballot Issue 2A, in consideration of the health, safety, and welfare of the City's residents, and to clearly reflect a retailer's or vendor's obligation to collect local sales tax on Remote Sales consistent with the *Wayfair* decision, and to clarify, update, and make consistent existing regulations, the City Council desires to amend Article IV of Chapter 4 of the Municipal Code as set forth herein.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF CHERRY HILLS VILLAGE, COLORADO, ORDAINS:

Section 1. Recitals Incorporated. The recitals contained above are incorporated herein by reference and are adopted as findings and determinations of the City Council.

Section 2. Section 4-4-10 Amended. Section 4-4-10 of the Cherry Hills Village Municipal Code, entitled "Definitions," is hereby amended to read as follows, with additions shown in underline and deletions shown in ~~strikethrough~~, with the remainder of Section 4-4-10 to remain intact:

Sec. 4-4-10. - Definitions.

The following words, terms, and phrases as used in this Article shall have the following meanings, whether or not capitalized:

Consumer means any person in the City who purchases, uses, stores, distributes or otherwise consumes tangible personal property ~~or taxable services~~ purchased from sources inside or outside the City.

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.

~~*Engaged in Business in the City*~~ means ~~performing or providing services or~~ selling, leasing, renting, delivering or installing tangible personal property for storage, use or consumption within the City. Engaged in ~~Business~~ in the City includes, but is not limited to, any one (1) 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 (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;

c. Maintains one (1) 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; or

~~e. Makes more than one (1) delivery into the taxing jurisdiction within a twelve (12) 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 City within a twelve(12)-month period; or~~

f. Makes retail sales sufficient to meet the definitional requirements of Economic Nexus as set forth in this Section 4-4-10.

Gross Sales means the total amount received in money, credit, property or other consideration valued in money for all sales, leases or rentals of tangible personal property or services.

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 or taxable products 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 or products 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, that has an agreement with a Marketplace Facilitator and offers for sale tangible personal property or products through a Marketplace owned, operated, or controlled by a Marketplace Facilitator.

Multichannel Seller means a Retailer that offers for sale tangible personal property or commodities through a marketplace owned, operated, or controlled by a Marketplace Facilitator, and through other means.

Price or Purchase Price means the aggregate value measured in currency paid or delivered or promised to be paid or delivered in consummation of a sale, without any discount from the price on account of the cost of materials used, labor or service cost, and exclusive of any direct tax imposed by the federal government or by this Article, and, in the case of all Retail Sales involving the exchange of property, also exclusive of the fair market value of the property exchanged at the same time and place of the exchange, if:

a. Such exchanged property is to be sold thereafter in the usual course of the Retailer's business.

b. Such exchanged property is a vehicle and is exchanged for another vehicle and both vehicles are subject to licensing, registration or certification under the laws of this State, including, but not limited to, vehicles operating upon public highways, off-highway recreation vehicles, watercraft and aircraft. Any money or other consideration paid over and above the value of the exchanged property is subject to tax.

Price or Purchase Price includes:

1. The amount of money received or due in cash and credits.

2. Property at fair market value taken in exchange but not for resale in the usual course of the Retailer's business.

3. Any consideration valued in money, whereby the manufacturer or someone else reimburses the ~~R~~retailer for part of the purchase price and other medium of exchange.

4. The total price charged on credit sales, including finance charges which are not separately stated at the time of sale. An amount charged as interest on the unpaid balance of the purchase price is not part of the purchase price unless the amount added to the purchase price is included in the principal amount of a promissory note; except the interest or carrying charge set out separately from the unpaid balance of the purchase price on the face of the note is not part of the purchase price. An amount charged for insurance on the property sold and separately stated at the time of sale is not part of the purchase price.

5. Installation, applying, remodeling or repairing the property, delivery and wheeling-in charges included in the purchase price and not separately stated.

6. Transportation and other charges to ~~æffect~~ delivery of tangible personal property to the purchaser.

7. Indirect federal manufacturers' excise taxes, such as taxes on automobiles, tires and floor stock.

8. The gross purchase price of articles sold after manufacturing or after having been made to order, including the gross value of all the materials used, labor and service performed and the profit thereon.

Price or ~~p~~Purchase ~~p~~Price shall not include:

1. Any sales or use tax imposed by the State of Colorado or by any political subdivision thereof.

2. The fair market value of property exchanged if such property is to be sold thereafter in the retailer's usual course of business. This is not limited to exchanges in Colorado. Out-of-state trade-ins are an allowable adjustment to the purchase price.

3. Discounts from the original price, if such discount and the corresponding decrease in sales tax due is actually passed on to the purchaser, and the seller is not reimbursed for the discount by the manufacturer or someone else. An anticipated discount to be allowed for payment on or before a given date is not an allowable adjustment to the price in reporting gross sales.

Purchase or ~~s~~Sale means the acquisition for any consideration by any person of tangible personal property, or other taxable products ~~or taxable services~~ that are purchased, leased, rented, sold, used, stored, distributed, or consumed. These terms include capital leases, installment and credit sales, and property ~~and services~~ acquired by:

a. Transfer, either conditionally or absolutely, of title or possession or both to tangible personal property, or other taxable products, ~~or taxable services~~;

b. A lease, lease-purchase agreement rental or grant of a license, including royalty agreements, to use tangible personal property, or other taxable products ~~or taxable services~~;

~~Performance of taxable services; or~~

~~dc.~~ Barter or exchange for other tangible personal property, or other taxable products, ~~or services~~.

The terms ~~p~~Purchase and ~~s~~Sale do not include:

a. A division of partnership assets among the partners according to their interests in the partnership;

b. The transfer of assets of shareholders in the formation or dissolution of professional corporations, if no consideration including, but not limited to, the assumption of a liability is paid for the transfer of assets;

c. The dissolution and the pro rata distribution of the corporation's assets to its stockholders, if no consideration including, but not limited to, the assumption of a liability is paid for the transfer of assets;

d. A transfer of a partnership or limited liability company interest;

e. The transfer of assets to a commencing or existing partnership or limited liability company, if not consideration including, but not limited to, the assumption of a liability is paid for the transfer of assets;

f. The repossession of personal property by a chattel mortgage holder or foreclosure by a lienholder;

g. The transfer of assets from a parent company to a subsidiary company or companies which are owned at least eighty percent (80%) by the parent company, which transfer is solely in exchange for stock or securities of the subsidiary company;

h. The transfer of assets from a subsidiary company or companies which are owned at least eighty percent (80%) by the parent company to a parent company or to another subsidiary which is owned at least eighty percent (80%) by the parent company, which transfer is solely in exchange for stock or securities of the parent corporation or the subsidiary which received the assets;

i. The transfer of assets between parent and closely held subsidiary companies, or between subsidiary companies closely held by the same parent company, or between companies which are owned by the same shareholders in identical percentage of stock ownership amounts, computed on a share-by-share basis, when a tax imposed by this ~~a~~Article was paid by the transferor company at the time it acquired such assets, except to the extent that there is an increase in the fair market value of such assets resulting from the manufacturing, fabricating, or physical changing of the assets by the transferor company. To such an extent any transfer referred to in this paragraph shall constitute a sale. For the purposes of this paragraph, a closely held subsidiary corporation is one (1) in which the parent company owns stock possessing or membership interest at least eighty percent (80%) of the total combined voting power of all classes of stock entitled to vote and owns at least eighty percent (80%) of the total number of shares of all other classes of stock.

Retailer means Vendor as defined in this Code.

Retailer-contractor means a contractor who is also a Retailer of building supplies, construction materials, or other tangible personal property, and purchases, manufactures, or fabricates such property for sale (which may include installation), repair work, time and materials jobs, and/or lump sum contracts.

~~Taxable services means services subject to tax pursuant to this Code.~~

Vendor means any person selling, leasing, renting or granting a license to use tangible personal property or services at retail. Vendor 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 4-4-30 Amended. Section 4-4-30 of the Municipal Code, entitled *License required*, is hereby amended to read as follows, with additions shown in underline and deletions shown in ~~strikethrough~~:

Sec. 4-4-30. – License required.

- (a) It is unlawful for any person Engaged in Business in the City ~~business with a retail storefront~~ to engage in the business of selling tangible personal property at retail without first having obtained a license therefor. Such license shall be granted and issued by the City and shall be in force and effect until December 31 of the year for which it is issued, unless sooner revoked.
- (b) Such license shall be granted and renewed only upon application stating the name and address of the person desiring such a license, the name and location of such business, and such other facts as the City may require.
- (c) It shall be the duty of each licensee, before January 1 of each year during which this Article remains in effect, to obtain a renewal thereof if the licensee remains in the retail business or liable to account for the tax herein provided, but nothing herein contained

shall be construed to empower the Finance Director to refuse such renewal except revocation for cause of the licensee's prior license, or except for failure to provide the necessary information.

(d) In case business is transacted at one (1) or more separate premises by one (1) person, a single license setting forth the licensee's places of business within the City shall be sufficient.

~~(e) The license imposed by this Section shall be required of every vendor having a place of business within the City, unless the vendor is engaged exclusively in the business of selling commodities which are exempt from taxation under this Chapter.~~

(e) ~~(f)~~ Any person engaged in the business of selling tangible personal property at retail in the City, without having secured a license therefor, except as specifically provided herein, shall be guilty of an offense.

(f) Each license shall be numbered and shall show the name, residence, place and character of business of the licensee and shall be posted in a conspicuous place in the place of business for which it is issued. No license shall be transferable.

(g) The City may, after giving reasonable notice and after hearing, revoke the license of any person found by the City to have violated any provisions of this Article.

Section 4. Section 4-4-40 Repealed. Section 4-4-50 of the Cherry Hills Village Municipal Code, entitled "Map of Municipal Boundaries, is hereby repealed in its entirety and replaced with the following:

Sec. 4-4-40. – Reserved.

Section 5. Section 4-4-50 Amended. Section 4-4-50 of the Cherry Hills Village Municipal Code, entitled *Place of consummation of sale*, is hereby amended to read as follows:

Sec. 4-4-50. Place of consummation of sale.

For the purpose of this Article, all retail sales are consummated at the location identified in C.R.S. § 39-26-104(3)(a), as may be amended from time to time. ~~are consummated at the place of business of the vendor unless the tangible personal property sold was delivered by the vendor or his agent to a destination outside the limits of the City or to a common carrier for delivery to a destination outside the limits of the City.~~ The gross receipts from such sales shall include delivery charges, regardless of the place to which delivery is made.

Section 6. Section 4-4-110 Amended. Section 4-4-110 of the Cherry Hills Village Municipal Code, entitled *Imposition of Tax*, is hereby amended to read as follows, with additions shown in underline and deletions shown in ~~strikethrough~~:

Sec. 4-4-110. – Imposition of tax.

A tax is hereby imposed for the privilege of selling tangible personal property at retail upon every vendor Engaged in Business in the City. ~~having a place of business within the City and who sells such property within the City.~~

Section 7. New Sub-section (d) Added to Section 4-4-310. Section 4-4-310 of the Cherry Hills Village Municipal Code, entitled *Vendor liable for tax*, is hereby amended to read as follows, with additions shown in underline and deletions shown in ~~strikethrough~~:

Sec. 4-4-310. – Vendor liable for tax; Marketplace sales.

(a) Every vendor shall, irrespective of the provisions of Division 2 above, be liable and responsible for the payment of an amount equivalent to three and one-half percent (3½%) of all sales made by him of commodities as specified in Section 4-4-130 above, and shall, before the twentieth day of each month, make a return to the City for the preceding calendar month and remit an amount equivalent to said three and one-half percent (3½%) on such sales to the City, less two and one-half percent (2½%) of the sum so remitted to cover the vendor's expense in the collection and remittance of said tax, up to a maximum of one hundred fifty dollars (\$150.00). Such returns of the taxpayer shall contain such information and be made in such manner and upon such forms as the City may prescribe.

(b) The burden of proving that any vendor is exempt from collecting the tax on any goods sold and paying the same to the City, or from making such returns, shall be on the ~~vendor~~retailer or vendor under such reasonable requirements of proof as the City may prescribe.

(c) Every vendor conducting a business in which the transaction between the vendor and the consumer consists of the supplying of tangible personal property ~~and services in connection with the maintenance or serving of same~~ shall be required to pay the taxes levied under this Article upon the full contract price unless application is made to the City for permission to use a percentage basis of reporting the tangible personal property sold ~~and the services supplied~~ under such contract. The Finance Director is hereby authorized to determine the percentage based upon the ratio of the tangible personal property included in the consideration as it bears to the total of the consideration paid under said combination contract or sale which shall be subject to the sales tax levied pursuant to the provisions of this Article. This Section shall not be construed to include items upon which the sales tax is imposed on the full purchase price as defined in Section 4-4-10.

(d) 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 as defined in this Article. Marketplace Facilitators shall be liable for the taxes collected from Marketplace Sellers or Multichannel Sellers. The City may recover any unpaid taxes, penalties, and interest from the Marketplace Facilitator that is responsible for collecting on behalf of Marketplace Sellers or Multichannel Sellers.

(3) The liabilities, obligations, and rights set forth under this Article are in addition to any duties and responsibilities of the Marketplace Facilitator has under this Article if it also offers for sale tangible personal property through other means.

(4) A Marketplace Seller, with respect to sales of tangible personal property or products 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) 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 Vendor.

(6) Responsibilities, duties, and liabilities described herein 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 this Article.

(7) 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 8. Section 4-4-320 Repealed. Section 4-4-320 of the Cherry Hills Village Municipal Code, entitled "Standard Reporting Form," is hereby repealed in its entirety and replaced with the following:

Sec. 4-4-320. – Reserved.

Section 9. No Retroactive Obligations. No obligation to collect the sales and use tax required by this Article may be applied retroactively.

Section 10. Severability. If any provision of this ordinance should be found by a court of competent jurisdiction to be invalid, such invalidity shall not affect the remaining portions or applications of this ordinance that can be given effect without the invalid portion, provided that such remaining portions or applications of this ordinance are not determined by the court to be inoperable. The City Council declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase, or portion thereof, despite the fact that any one or more section, subsection, sentence, clause, phrase, or portion be declared invalid.

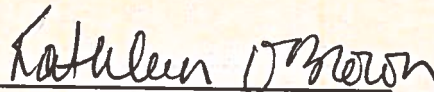
Section 11. Safety. This ordinance is deemed necessary for the protection of the health, welfare, and safety of the community.

Section 12. Codification Amendments. The codifier of the City's Municipal Code, Municode, is hereby authorized to make such numerical and formatting changes as may be necessary to incorporate the provisions of this ordinance within the Cherry Hills Village Municipal Code.

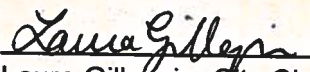
Section 13. Effective Date. This ordinance shall become effective ten (10) days after publication after second reading in accordance with Section 4.5 of the Charter for the City of Cherry Hills Village.

Adopted as Ordinance No. 1 Series 2023, by the City Council of the City of Cherry Hills Village, Colorado this 18th day of April, 2023.

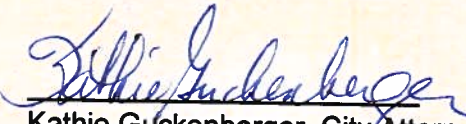
(SEAL)


Kathleen Brown, Mayor

ATTEST:


Laura Gillespie, City Clerk

APPROVED AS TO FORM:


Kathie Guckenberger, City Attorney

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CITY OF CHERRY HILLS VIL-
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ADOPTION OF ORDINANCE
ORDINANCE 1, SERIES 2023

A BILL FOR AN ORDINANCE OF
THE CITY OF CHERRY HILLS
VILLAGE, AMENDING CHAPTER
4, ARTICLE IV CONCERNING
RETAIL SALES TAX PURSUANT
TO VOTER APPROVAL GRANT-
ED ON NOVEMBER 8, 2022

Copies of the Ordinances are on
file at the office of the City Clerk
and may be inspected during
regular business hours.

Published in The Villager
Published: April 27, 2023
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