

ORDINANCE NO. 1655

AN ORDINANCE OF THE COUNCIL OF THE CITY OF FAIRMONT ENACTED, IN PART, PURSUANT TO THE PROVISIONS OF WEST VIRGINIA CODE §8-1-5a MUNICIPAL HOME RULE PILOT PROGRAM, AND THE CITY OF FAIRMONT'S APPROVED HOME RULE PLAN DATED OCTOBER 6, 2014, TO PROVIDE FOR THE IMPOSITION, ADMINISTRATION, COLLECTION, AND ENFORCEMENT OF A CONSUMERS SALES AND SERVICE TAX AND A COMPLIMENTARY USE TAX.

WHEREAS, in 2013, the West Virginia Legislature expanded the Municipal Home Rule Pilot Program created pursuant to the provisions of West Virginia Code §8-1-5a, "the Home Rule Statute" to allow participation by additional municipalities; and

WHEREAS, the City of Fairmont submitted its Home Rule Plan, "the City's Home Rule Plan" to the Home Rule Board, which plan was approved by the Board on October 6, 2014, authorizing the City to impose a consumers sales and service tax and a use tax pursuant to the provisions of West Virginia Code §8-1-5a; and

WHEREAS, The City of Fairmont ("City") has determined that it is appropriate to impose a consumers sales and service tax and a complimentary use tax to, among other things, finance its unfunded liabilities in the City of Fairmont's Policemen's and Firemen's Pension and Relief Funds; provide funding for the demolition of vacant and dilapidated structures; provide funding for quality of life projects, among others; and

WHEREAS, The City believes that it is in its best interest to provide funding for such by imposing these taxes that would be administered, collected and enforced by the State Tax Commissioner at the same time and in the same manner as the State's consumers sales and service tax and use tax.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF FAIRMONT THAT:

Pursuant to power and authority granted the City of Fairmont by the provisions of West Virginia Code §8-1-5a, and the City of Fairmont's Home Rule Plan, which plan was approved by the Home Rule Board on October 6, 2014, Part Seven Business and Taxation Code, Chapter Three, Taxation and Service Charges, of the Fairmont City Code be and is hereby amended and supplemented to provide for the imposition, administration, collection, and enforcement of a consumers sales and service tax and a complimentary use tax to be codified as Article 764, Customer Sales and Use Tax of said Chapter Three, and the same is hereby enacted as follows: (Matter to be deleted bracketed; New matter double underlined)

PART SEVEN BUSINESS AND TAXATION CODE

CHAPTER THREE TAXATION AND SERVICE CHARGES

ARTICLE 764 CONSUMER SALES AND USE TAX

Section 764-1. Council findings.

The Municipal Home Rule Board on October 6, 2014, approved the City of Fairmont's Home Rule Plan to enact a consumers sales and service tax and a use tax pursuant to West Virginia Code §8-1-5a without the limiting restrictions in West Virginia Code §§8-13C-1 et seq.. In accordance with the Home Rule Plan; the City Council hereby finds and declares that the adoption by this City for its consumers sales and service tax and use tax provisions of the code of West Virginia, as amended relating to imposition, administration, collection and enforcement of the state consumers sales and service tax codified in West Virginia Code §§11-15-1 et seq., the state use tax codified in West Virginia Code §§11-15A-1 et seq., and the streamlined sales and use tax act codified in West Virginia Code §§11-15B-1 et seq., will (1) simplify collection of the taxes, (2) simplify preparation of consumers sales and use tax returns by taxpayers, and (3) improve enforcement of the City's sales and use taxes.

The Council does, therefore, declare that this article be construed so as to accomplish the foregoing purposes.

Section 764-2. Definitions.

(a) Terms used in this article or in the administration, collection and enforcement of the taxes imposed by this article and not otherwise defined in this ordinance shall have the meanings ascribed to them in articles nine, ten, fifteen, fifteen-a and fifteen-b, chapter eleven of the Code of West Virginia.

(b) As used in this section:

(1) “Business” includes all activities engaged in or caused to be engaged in by any person with the object of gain or economic benefit, direct or indirect, and all activities of the state and its political subdivisions which involve sales of tangible personal property or the rendering of services when those service activities compete with or may compete with the activities of other persons.

(2) “City” or “this City” means the City of Fairmont, West Virginia.

(3) “Code of West Virginia” or “West Virginia Code” means the Code of West Virginia, 1931, as amended.

(4) “Consumer” means any person purchasing tangible personal property, custom software or a taxable service from a retailer as defined in West Virginia Code §11-15A-1(b)(7) or from a seller as defined in West Virginia Code §11-15B-2.

(5) “Person” means any individual, partnership, association, corporation, limited liability company, limited liability partnership or any other legal entity, including this state or its political subdivisions or an agency of either, or the guardian, trustee, committee, executor or administrator of any person.

(6) “Purchase” means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration;

(7) “Purchase price” means the measure subject to the taxes imposed by this article and has the same meaning as sales price;

(8) “Purchaser” means a person to whom a sale of personal property is made or to whom a service is furnished.

(9) “Retail Sale” or “sale at retail” mean “retail sale” and “sales at retail” as defined in West Virginia Code §11-15B-2.

(10) “Retailer” means and includes every person engaging in the business of selling, leasing or renting tangible personal property or custom software or furnishing a taxable service for use within the meaning of this article, or in the business of selling, at auction, tangible personal property or custom software owned by the person or others for use in the City: *Provided*, That when in the opinion of the Tax Commissioner it is necessary for the efficient administration of the use tax imposed pursuant to this article to regard any salespersons, representative, truckers, peddlers or canvassers as the agents of the dealers, distributors, supervisors, employees or persons under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of the dealers, distributors, supervisors, employers or persons, the Tax Commissioner may so regard them and may regard the dealers, distributors, supervisors, employers, or persons as retailers for purposes of the use taxes.

(11) “Retailer engaging in business in the city” or any like term, unless otherwise limited by federal statute, means and includes, but is not limited to:

(A) Any retailer having or maintaining, occupying or using, within the City, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent (by whatever name called) operating within the City under the authority of the retailer or its subsidiary, irrespective of whether the place of business or agent is located in the City permanently or temporarily, or whether the retailer or subsidiary is admitted to do business within this state pursuant to West Virginia Code §§31D-15-1 et seq. or West Virginia Code §§31E-14-1 et seq.; or

(B) Any retailer that is related to, or part of a unitary business with, a person, entity or business that, without regard to whether the retailer is admitted to do business in this state pursuant to West Virginia Code §§31D-15-1 et seq. or West Virginia Code §§31E-14-1 et seq., is a subsidiary of the retailer, or is related to, or unitary with, the retailer as a related entity, a related member or part of a unitary business, all as defined in West Virginia Code §§11-24-3a that:

(i) Pursuant to an agreement with or in cooperation with the related retailer, maintains an office, distribution house, sales house, warehouse or other place of business in the City;

(ii) Performs services in the City in connection with the tangible personal or services sold by the retailer, or any related entity, related member or part of the unitary business;

(iii) By an agent, or representative (by whatever name called), or employee, performs services in the City in connection with tangible personal property or services sold by the retailer, or any related entity, related member or part of the unitary business; or

(iv) Directly or indirectly, through or by an agent, representative or employee located in, or present in, the City, solicits business in the City for or on behalf of the retailer, or any related entity, related member or part of the unitary business.

(C) For purposes of paragraph (B) of this subdivision, the term “service” means and includes, but is not limited to, customer support services, help desk services, call center services, repair service, engineering service, installation service, assembly service, delivery service by means other than common carrier or the United States Postal Service, technical assistance services, the service of investigating, handling or otherwise assisting in resolving customer issues or complaints while in the City, the service of operating a mail order business or telephone, Internet or other remote order business from facilities located within the City, the service of operating a website or Internet-based business from a location within the City imposing the use tax, or any other service.

(12) “Sale,” “sales” or “selling” have the meaning ascribed to those terms in West Virginia Code §§11-15B-2.

(13) “Sales price” has the meaning ascribed to that term in West Virginia Code §§ 11-15B-2.

(14) “Sales tax” means the tax levied under section 764-3 of this article

(15) “Service” or “selected service” have the meaning ascribed to those terms in West Virginia Code §§11-15-2 and 11-15B-2.

(16) “State sales tax” means the tax levied by West Virginia Code §§11-15-1 et seq.

(17) “State use tax” means the tax levied by West Virginia Code §§11-15A-1 et seq.

(18) “Tax” means the taxes imposed by this article and includes additions to tax, interest and penalties levied under West Virginia Tax Procedures and Administration Act, West Virginia Code §§11-10-1 et seq.

(19) “Tax Commissioner” means the State Tax Commissioner or his or her delegate. The term “delegate” in the phrase “or his or her delegate,” when used in reference to the Tax Commissioner, means any officer or employee of the State Tax Division duly authorized by the Tax Commissioner directly, or indirectly by one or more redelegations of authority to perform the functions mentioned or described in articles fifteen or fifteen-b, chapter eleven of the Code of West Virginia, 1931, as amended, or the rules promulgated under those articles.

(20) “Ultimate consumer” or “consumer” means a person who uses or consumes services or personal property.

(21) “Use” for purposes of the tax imposed by section 764-4 of this article means and includes:

(A) The exercise by any person of any right or power over tangible personal property or custom software incident to the ownership, possession or enjoyment of the property, or by any transaction in which possession of or the exercise of any right or power over tangible personal property, custom software or the result of a taxable service is acquired for a consideration, including any lease, rental or conditional sale of tangible personal property or custom software; or

(B) The use or enjoyment in this state of the result of a taxable service. As used in this definition, “enjoyment” includes a purchaser’s right to direct the disposition of the property or the use of the taxable service, whether or not the purchaser has possession of the property.

The term “use” does not include the keeping, retaining or exercising any right or power over tangible personal property, custom software or the result of a taxable service for the purpose of subsequently transporting it outside the City for use thereafter solely outside this City.

(22) “Use tax” means the tax imposed by section 764-4 of this article.

(23) “Vendor” means any person furnishing services taxed by this article or making sales of tangible personal property or custom software. “Vendor” and “seller” are used interchangeably in this article.

Section 764-3. Imposition of consumers’ sales and service tax.

For the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services, a vendor doing business in this City shall collect from the purchaser the taxes imposed by this section and pay the amount of taxes collected to the tax commissioner at the same time and in the same manner as the consumers sales and service tax imposed by West Virginia §§11-15-1 et seq. The rate of tax shall be one percent of the sales price, as defined in West Virginia Code §11-15B-2, of the tangible personal property, custom software or taxable service purchased.

Section 764-4. Imposition of use tax.

An excise tax is hereby levied and imposed on the use in this City of tangible personal property, custom software or taxable services, to be collected and paid to the tax commissioner in the same manner that the state use tax imposed by West Virginia Code §§11-15A-1 et seq. is collected. The rate of tax shall be one percent of the purchase price, as defined in West Virginia Code §11-15B-2, of the tangible personal property, custom software or taxable service used within the City.

Section 764-5. Calculation of tax on fractional parts of a dollar.

The tax computation under section 764-3 and section 764-4 shall be carried to the third decimal place and the tax rounded up to the next whole cent whenever the third decimal place is greater than four and rounded down to the lower whole cent whenever the third decimal place is

four or less. The vendor may elect to compute the tax due on a transaction on a per item basis or on an invoice basis provided the method used is consistently used during the reporting period but the method used shall be the same as that used for purposes of computing the state sales or use tax.

Section 764-6. State and local sales and use tax bases.

The taxable base of the taxes imposed by section 764-3 and 764-4 of this article shall be identical to the sales and use tax base of this state except as provided in section 764-7 of this article unless otherwise prohibited by federal law as required by West Virginia Code §11-15B-34.

Section 764-7. Exceptions.

The taxes imposed by this article do not apply to:

- (a) The sale or use of motor fuel, as defined in West Virginia Code §§11-14C-1 et seq.
- (b) The sale or use of motor vehicles subject to the tax imposed by West Virginia Code §11-15-3c.
- (c) The purchase or use of any tangible personal property, custom software or service that the City is prohibited from taxing under the laws of this State or the laws of the United States.
- (d) The tax imposed by section 764-3 does not apply to any transaction that is exempt from the tax imposed by West Virginia Code §11-15-1 et seq., except that the exemption provided under West Virginia Code §11-15-9f does not apply to municipal sales and use taxes.
- (e) The tax imposed by section 764-4 does not apply to any purchase upon which the tax imposed by section 764-3 has been paid or which is exempt from the tax imposed by West Virginia Code § 11-15A-1 et seq., except that the exemption provided under West Virginia Code §11-15-9f does not apply to municipal sales and use taxes.

(f) The municipal sales and service tax and use tax imposed herein applies solely to tangible personal property, custom software and services that are sourced to the municipality. The municipal sales and service tax and use tax imposed herein are subject to the sourcing rules set forth in West Virginia Code §11-15B-1 et seq.

Section 764-8. Credit for local sales tax lawfully paid to another municipality.

(a) A person is entitled to a credit against the use tax imposed by section 764-4 of this article on the use of a particular item of tangible personal property, custom software or taxable service equal to the amount, if any, of sales tax lawfully paid to another municipality for the acquisition of that property, custom software or service; *Provided*, that the amount of credit allowed may not exceed that amount of use tax imposed by section 764-4 on the use of the tangible personal property, custom software or taxable service in this City.

(b) For purposes of this section:

(1) “Sales tax” includes a sales tax or compensating use tax lawfully imposed on the use of tangible personal property, custom software or a service by the municipality in which the sale occurred; and

(2) “Municipality” means a municipality, as defined in West Virginia Code §8-1-2, or a comparable unit of local government in another state.

(c) No credit is allowed under this section for payment of any sales or use taxes imposed by this state or any other state. For purposes of this paragraph, “state” includes the fifty states of the United States and the District of Columbia but does not include any of the several territories organized by Congress.

Section 764-9. Local rate and boundary changes.

(a) The State is required by West Virginia Code §11-15B-35 to maintain a database of all jurisdictions levying a sales or use tax in this state. The City shall furnish the tax commissioner with information the State requires for that database that will allow the State to maintain a database that assigns each five-digit and nine-digit zip code within the State to the proper tax rates and jurisdictions. The State must apply the lowest combined tax rate imposed in the zip code area if the area includes more than one tax rate in any level of taxing jurisdictions: *Provided*, that, when sales are sourced to a physical location within the municipal boundaries of the City, the seller shall collect the tax imposed by section 764-3 of this article.

(b) Whenever boundaries of the City change, whether by annexation or de-annexation, the City collector shall promptly notify the tax commissioner in writing of the change in boundaries and provide the tax commissioner with the nine-digit zip code or codes for the addresses located within the boundaries of the City as well as the area annexed or de-annexed, a certified copy of the Ordinance adding or detaching territory from the City, which must reflect the effective date of the change, a map of the City clearly showing the territory added or detached and any other information the tax commissioner may require or is required by West Virginia Code R. §110-28-8.

Section 764-10. State level administration.

(a) The tax commissioner is responsible for administering, collecting and enforcing the taxes imposed by this article as provided in West Virginia Code §11-15B-33. The City may enter into an agreement with the tax commissioner that will allow employees of the City auditing a vendor with a physical location in the City for compliance with the City's business and occupation

tax to also audit that location for compliance with the sales and use tax laws of this State and this City and to share that information with the tax commissioner.

(b) The tax commissioner may retain from collections of the taxes imposed by this article the fee allowed by West Virginia Code §11-10-11c, or by any other state law or legislative rule.

(c) The tax commissioner shall deposit all the proceeds from collection of the taxes imposed by this article, minus any fee for collecting, enforcing and administering taxes retained under section 764-10, in the subaccount for this City established in “municipal sales and service tax and use tax fund,” an interest bearing account created in the state treasury pursuant to West Virginia Code §8-13C-7. All moneys collected and deposited in the subaccount for the City shall be remitted at least quarterly by the state treasurer to the City Finance Director, as provided by West Virginia Code §8-13C-7.

Section 764-11. Administrative procedures.

Each and every provision of the West Virginia Tax Procedure and Administration Act set forth in West Virginia Code §§11-10-1 et seq. applies to the administration, collection and enforcement of the sales and use taxes imposed pursuant to this article.

Section 764-12. Criminal penalties.

Each and every provision of the West Virginia Tax Crimes and Penalties Act set forth in West Virginia Code §§11-9-1 et seq. applies to the administration, collection and enforcement of the sales and use taxes imposed pursuant to this article; Provided, that the criminal penalties imposed upon conviction for a criminal violation of this article may not exceed the maximum penalties allowed by law for that violation.

Section 764-13. Automatic updating.

Any amendments to articles nine, ten, fifteen, fifteen-a and fifteen-b, chapter eleven of the Code of West Virginia shall automatically apply to a sales or use tax imposed pursuant to this article, to the extent applicable.

Section 764-14. Deposit of taxes collected in special revenue fund.

(a) There is hereby established a special revenue fund in the City treasury which shall be designated and known as the City Sales and Use Tax Fund. The City Sales and Use Tax Fund shall consist of (1) all revenues received from collection of the City's sales and use taxes, including any interest, additions to tax and penalties deposited with the City Finance Director; (2) all appropriations to the fund; (3) all interest earned from investment of the fund; and (4) any gifts, grants or contributions received and placed by the City into the City Sales and Use Tax Account. Revenues in the City Sales and Use Tax Fund shall not be treated by any person to be a general revenue of the City. Revenues in the City Sales and Use Tax Fund shall be disbursed in the manner and consistent with the priorities set forth for in subsection (b) below.

(b) Revenues in the City Sales and Use Tax Fund shall be used: (i) first, to satisfy the debt service requirements each fiscal year on Sales and Use Tax Revenue Bonds, if any issued by, or other such obligations incurred by, the City, from time to time; and (ii) second, after providing for payment of first priority items, any unencumbered revenue in the City Sales and Use Tax Fund may periodically be transferred as necessary or convenient to the City's general revenue account to be earmarked for distribution in amounts consistent with the City's budgetary process.

Section 764-15. Taxes imposed in addition to State Consumers Sales and Service and Use Taxes.

The municipal sales and service tax and municipal use tax imposed pursuant to this article shall be in addition to the Consumer Sales And Service Tax and Use Tax imposed pursuant to West Virginia Code Chapter 11, Articles 15 and 15A, on sales made and services rendered and on the use of tangible personal property, custom software, or taxable services within the boundaries of the City and, except as exempted or excepted, all sales made and services rendered and on the use of tangible personal property, custom software, or taxable services within the boundaries of the City shall remain subject to the tax levied by those Articles of the West Virginia Code. Further, the municipal sales and service tax and municipal use tax imposed pursuant to this article shall be imposed in addition to any tax imposed pursuant to the provisions of West Virginia Code §7-22-1, §8-13-6, §8-13-7, and §8-38-12.

Section 764-16. Effective date.

This ordinance shall take effect July 1, 2016.

Upon its adoption, the City attorney shall forthwith provide the tax commissioner with a certified copy of this ordinance along with the nine-digit zip code file for addresses located within the boundaries of the City and such other information as the Tax Commissioner may need to administer, collect and enforce the taxes imposed by this article.

Collecting and remitting by vendors of the taxes imposed by this article and payment of those taxes by purchasers shall begin and first apply to sales and purchases made on and after the first day of July, 2016 as provided in a legislative rule promulgated by the Tax Commission and codified as W. Va. Code St. R. § 110-28-1 et seq.

Section 764-17. Severability:

If any section, sentence, clause, section or phrase of this ordinance shall be declared invalid or rendered inoperable for any reasons whatsoever, such invalidity or inoperability shall not affect the remaining portions of this Ordinance which shall continue in full force and effect, and to this end the provisions of this ordinance are hereby declared to be severable.

Adopted this the 8th day of September, 2015


MAYOR

ATTEST:

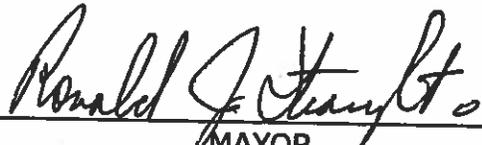

INTERIM CITY CLERK

WE, the undersigned officials of the City of Fairmont, West Virginia, do hereby certify that Ordinance No. 1655:

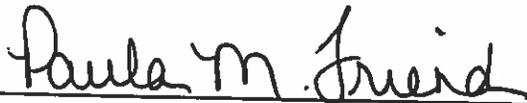
AN ORDINANCE OF THE COUNCIL OF THE CITY OF FAIRMONT ENACTED, IN PART, PURSUANT TO THE PROVISIONS OF WEST VIRGINIA CODE §8-1-5a MUNICIPAL HOME RULE PILOT PROGRAM, AND THE CITY OF FAIRMONT'S APPROVED HOME RULE PLAN DATED OCTOBER 6, 2014, TO PROVIDE FOR THE IMPOSITION, ADMINISTRATION, COLLECTION, AND ENFORCEMENT OF A CONSUMERS SALES AND SERVICE TAX AND A COMPLIMENTARY USE TAX

was introduced and publicly read in its entirety at the Regular Meeting of Council held August 25, 2015 and was published in the Times-West Virginian on August 31, 2015, pursuant to Charter provisions Section 2.13(d); a public hearing was held on September 8, 2015. There being no request that the proposed Ordinance be read in its entirety for a second time, the Clerk read the title only and copies were available to the public as required by Ordinance No. 499. The Ordinance was duly adopted pursuant to the Charter of the City of Fairmont and West Virginia Code; signed by the undersigned officials and filed in the office of the City Clerk.

Adopted by Council of the City of Fairmont, West Virginia, this the 8th day of September, 2015.

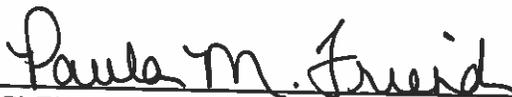

MAYOR

ATTEST:

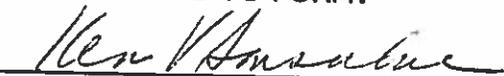

INTERIM CITY CLERK

A TRUE COPY:


MAYOR, CITY OF FAIRMONT, WEST VIRGINIA


CLERK, CITY OF FAIRMONT, WEST VIRGINIA

APPROVED AS TO FORM:


ATTORNEY, CITY OF FAIRMONT, WEST VIRGINIA