

CITY OF NEWPORT

ORDINANCE NO. 2185

**AN ORDINANCE OF THE CITY OF NEWPORT
IMPOSING A FIVE PERCENT TAX ON THE SALE
OF PREPARED FOOD ITEMS AND BEVERAGES
REFERRING ORDINANCE NO. 2185 TO THE VOTERS AT THE
GENERAL ELECTION TO BE HELD ON NOVEMBER 2, 2021**

WHEREAS, the Newport City Council created a Finance Work Group, by resolution, for the past three years. The task of the Work Group was to create a financial sustainability plan for the City of Newport; and

WHEREAS, the Finance Work Group evaluated a number of methods to provide funding to meet capital outlay and equipment needs and restore some of the positions that were eliminated as part of the 2020/2021 Fiscal Year budget; and

WHEREAS, one of the recommendations of the Finance Work Group was that the City Council consider a prepared food and beverage tax, which would reduce some of the burden of residents to pay for services and facilities that are heavily utilized by visitors to the community, including infrastructure, recreational facilities, and public safety staffing.

THE CITY OF NEWPORT ORDAINS AS FOLLOWS:

Section 1. Chapter 3.35 of the Newport Municipal Code is enacted as follows:

**3.35 IMPOSING A FIVE PERCENT TAX ON THE SALE OF PREPARED FOOD
ITEMS AND BEVERAGES**

- Sections: 3.35.010 Definitions
3.35.020 Tax Imposed
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3.35.010 Definitions

The following words and phrases whenever used in this chapter shall be construed and defined in this section unless, from the context, a different meaning is intended:

- A. "Caterer" means a person who prepares food at a business site, for compensation, for consumption on or off the business premises, but within the corporate limits of the city.
- B. "Combination Facility" has the same meaning as defined in OAR 333-150-0000(4)(i), which the State of Oregon Department of Agriculture licenses or inspects under OAR 333-158-0000.
- C. "Director" means the Finance Director of the City of Newport or designee.
- D. "Food" includes all prepared food items and beverages, excluding alcoholic beverages, served in a restaurant including "takeout," "to go," or delivered orders.
- E. "Operator" means the person who is proprietor of the restaurant, whether in the capacity of owner, lessee, sub-lessee, mortgagee in possession, licensee or any other capacity. Where the operator is a corporation, the term "operator" shall also include each and every member of the Board of Directors of such corporation for the time involved.
- F. "Restaurant" means any establishment required to be licensed as a restaurant, mobile unit, or pushcart by the State of Oregon Health Division and includes any establishment where food or beverage is prepared for consumption by the public or any establishment where the public obtains food or beverage so prepared in form or quantity consumable then and there, whether or not it is consumed within the confines of the premises where prepared, and also includes establishments which prepare food or beverage in consumable form for service outside the premises where prepared. The term "restaurant" includes, but is not limited to, grocery store delis, coffee shops, and caterers; it also includes establishments where such food or beverage is prepared in a combination facility. The term "restaurant" does not include a restaurant licensed by the State of Oregon Health Division as a limited service restaurant.

3.35.020 Tax Imposed

- A. Except for exempt or tax-capped activities specified in Section 3.35.030, the city imposes and levies, in addition to all other taxes, fees, and charges of every kind, a tax upon:
 - 1. All food and beverages sold by restaurants located within the city limits to the public, except for whole cakes, pies, and loaves of bread if purchased for consumption off premises.

2. All food and beverages sold by a caterer for an event located within the city limits, except for exempt events as defined in Section 3.35.030.
 3. The following items sold by combination facilities:
 - a. Salads from salad bars;
 - b. Dispensed soft drinks and coffee;
 - c. Sandwiches or hot prepared foods ready for immediate consumption;
 - d. The following items, including toppings or additions, scooped or otherwise placed into a cone, bowl or other container for immediate consumption whether or not they are consumed within the confines of the premises where scooped or placed: any frozen dessert regulated by the Oregon State Department of Agriculture under ORS 621.311 and any ice cream, ice milk, sherbet, or frozen yogurt. No tax shall be imposed under this subsection, however, on any item whose volume exceeds one-half (1/2) gallon or more;
 - e. Any other food mixed, cooked or processed on the premises in form or quantity for immediate consumption whether or not it is consumed within the confines of the premises where prepared.
 4. The following items sold by combination facilities that are bakeries:
 - a. All those items listed in subsections A.3(a)-(d) of this section;
 - b. All bakery products sold for consumption on the premises;
 - c. All "takeout" or "to go" orders of bakery products prepared on the premises except for whole cakes, pies, and loaves of bread, and any order consisting of six or more bakery products.
 5. Use of a delivery service for any activity under this section, whether an independent delivery service or operator-provided delivery service, does not excuse the operator from the requirement to collect and remit the tax on the food and beverages sold.
- B. Such tax shall be imposed at a rate of five percent (5%) on the total amount charged by the seller for the food and beverages, or for the meal. In the computation of this tax any fraction of one-half (1/2) cent or more shall be treated as one cent.
- C. The taxes collected by the city under this chapter shall be used as follows:
1. Support for expanded Police Department operations.
 2. Support for expanded Fire Department operations.

3. Support for expanded Library operations.
4. Equipment replacement.
5. Reinvestment into parks, trails, facilities, and other infrastructure supported by the General Fund.
6. Up to two percent (2%) for the collection and administration of the tax.
7. Initial funding for prepared food operators to offset costs relating to the collection of the tax on the sale of prepared food items and beverages.
8. Any remaining amounts shall be appropriated for purposes consistent with this chapter unless other purposes are approved by an ordinance referred to, and approved by, the voters of the City of Newport.

3.35.030 Exemptions

The tax levied by Section 3.35.020 shall be capped, at the amount specified, or shall not be collected or assessed on food or beverages:

- A. Sold by public or private schools or colleges except that food sold by independent contractor operators at such schools or colleges shall be subject to the tax imposed by this chapter;
- B. Sold on hospital grounds;
- C. Provided by bed and breakfast establishments to their guests;
- D. Sold in vending machines;
- E. Sold in temporary restaurants, including food stands, booths, street concessions and similar type operations, at special events held by non-profit organizations, government organizations, or service clubs;
- F. Served in connection with overnight or residential facilities - including, but not limited to, convalescent homes, nursing homes, retirement homes and motels - if the food and beverage are provided as part of the cost of sleeping accommodations;
- G. Provided by nonprofit tax-exempt organizations to citizens over 60 years of age as a part of a recognized senior citizen nutritional program;
- H. Sold for resale to the public;
- I. Sold in bulk to the public for non-immediate consumption off the premises including but not limited to ice cream packed in a container of one-half (1/2)

gallon or more;

- J. Which are candy, popcorn, nuts, chips, gum, or other confections but not including ice cream, frozen yogurt, cakes, pies or other desserts;
- K. Sold by an operator at a single food service event located within the City in which restaurant or catering services exceed \$5,000.00, in which case, the applicable food and beverage tax shall not be excused but shall be capped at \$250.00.

3.35.040 Operator's Duties

Each operator shall collect the tax imposed by this chapter, to the same extent and at the same time as the amount for the food or beverage is collected from every purchaser. The amount of tax need not be separately stated from the amount of the food or beverage. Every operator required to collect the tax imposed by this chapter shall be entitled to retain five percent (5%) of all taxes collected to defray the costs of collections and remittance.

3.35.050 Reporting and Remitting

- A. Reporting. Every operator shall, on or before the last day of the month following the end of each calendar quarter (in the months of April, July, October, and January), make a return to the Director, on forms provided by the city, specifying the total sales subject to this chapter, and the amount of tax collected under this chapter. The operator may request, or the Director may establish, shorter reporting periods for any operator if the operator or Director deems it necessary to ensure collection of the tax, and the Director may require further information in the return relevant to payment of the tax. A return shall not be considered filed until is actually received by the Director.
- B. Remitting. At the time the return is filed, the full amount of the tax collected shall be remitted to the Director. Payments received by the Director for application against existing liabilities will be credited toward the period designated by the taxpayer under conditions which are not prejudicial to the interest of the city. A condition which is considered prejudicial is the imminent expiration of the statute of limitations for a period or periods.
- C. Order of Payments. Non-designated payments shall be applied in the order of the oldest liability first, with the payment credited first toward any accrued penalty, then to interest, then to the underlying tax until the payment is exhausted. Crediting of a payment toward a specific reporting period will be first applied against any accrued penalty, then to interest, then to the underlying tax. The Director, when in the Director's discretion determines that it will be in the best interest of the city, may specify that a different order of payment credit should be followed with regard to a particular tax or factual situation. The Director may establish shorter reporting periods for any operator if the Director deems it necessary to ensure collection of the tax, and the Director may require further information in the return relevant to payment of the liability. When a shorter return

period is required, penalties and interest shall be computed according to the shorter return period. Returns and payments are due immediately upon cessation of business for any reason. All taxes collected by operators pursuant to this chapter shall be held in trust for the account of the city until payment is made to the Director. A separate trust bank account is not required in order to comply with this provision.

3.35.060 Penalties and Interest

- A. Any operator who fails to remit any portion of any tax imposed by this chapter within the time required shall pay a penalty of ten percent (10%) of the amount of the tax, in addition to the amount of the tax.
- B. Any operator who fails to remit any delinquent remittance on or before a period of 60 days following the date on which the remittance first became delinquent shall pay a second delinquency penalty of ten percent (10%) of the amount of the tax, in addition to the amount of the tax and the penalty first imposed.
- C. If the Director determines that the nonpayment of any remittance due under this chapter is due to fraud, a penalty of 25 percent of the amount of the tax shall be added to the penalties stated in subsections A. and B. of this section.
- D. In addition to the penalties imposed, any operator who fails to remit any tax imposed by this chapter shall pay interest at the rate of one percent per month or fraction thereof on the amount of the tax, exclusive of penalties, from the date on which the remittance first became delinquent until paid.
- E. Every penalty imposed and such interest as accrues under the provisions of this section shall become a part of the tax required to be paid.
- F. All sums collected pursuant to the penalty provisions in subsections A., B., and C. of this section shall be distributed to the General Fund to offset the costs of auditing and enforcement of this tax.
- G. The Director may waive penalties and interest provided they are shown to be in error.

3.35.070 Failure to Collect and Report Tax - Determination of Tax by Director

If any operator should fail to make, within the time provided in this chapter, any report of the tax required by this chapter, the Director shall proceed in such manner as deemed best to obtain facts and information on which to base the estimate of tax due. As soon as the Director shall procure such facts and information as are able to be obtained, upon which to base the assessment of any tax imposed by this chapter and payable by any operator, the Director shall proceed to determine and assess against such operator the tax, interest, and penalties provided for by this chapter. In case such determination is made, the Director shall give a notice of the amount so assessed by having it served personally or by depositing it in the United States mail, postage prepaid, addressed to

the operator so assessed at the last known place of address. Such operator may make an appeal of such determination as provided 3.35.080. If no appeal is filed, the Director's determination is final and the amount is immediately due and payable.

3.35.080 Appeal

Any operator aggrieved by any decision of the Director with respect to the amount of such tax, interest, and penalties, may appeal to the City Council by filing a written appeal with the Director within 20 days of the serving or mailing of the tax notice or decision of the Director. The City Council shall hear and consider any records and evidence presented bearing upon the Director's determination of amount due, and make findings affirming, reversing, or modifying the determination. The findings of the City Council shall be final and conclusive. Any amount found to be due shall be immediately due and payable.

3.35.090 Records

It shall be the duty of every operator liable for the collection and payment to the city of any tax imposed by this chapter to keep and preserve, for a period of three years, all such records as may be necessary to determine the amount of such tax. The Director shall have the right to inspect all records at all reasonable times.

3.35.100 Refunds

- A. Whenever the amount of any tax, interest, or penalty has been overpaid or paid more than once, or has been erroneously or illegally collected or received by the city under this chapter, it may be refunded provided a claim, in writing, stating under penalty of perjury the specific grounds upon which the claim is founded, is filed with the Director within one year of the date of payment. The claim shall be on forms furnished by the Director.
- B. The Director shall have 20 days from the date of receipt of a claim to review the claim and make a determination in writing as to the validity of the claim. The Director shall notify the claimant in writing of the Director's determination. Such notice shall be mailed to the address provided by claimant on the claim form. In the event a claim is determined by the Director to be a valid claim, an operator may claim a refund, or take as credit against taxes collected and remitted, the amount overpaid, paid more than once, or erroneously or illegally collected or received in a manner prescribed by the Director. The operator shall notify Director of claimant's choice no later than 15 days following the date Director mailed the determination. In the event claimant has not notified the Director of claimant's choice within the 15-day period and the operator is still in business, a credit will be granted against the tax liability for the next reporting period. If the operator is no longer in business, a refund check will be mailed to claimant at the address provided in the claim form.
- C. No refund shall be paid under the provisions of this section unless the claimant established the right by written records showing entitlement to such refund and

the Director acknowledged the validity of the claim.

3.35.110 Actions to Collect

Any tax required to be paid by any operator under the provisions of this chapter shall be deemed a debt owed by the operator to the city. Any such tax collected by an operator which has not been paid to the city shall be deemed a debt owed by the operator to the city. Any person owing money to the city under the provisions of this chapter shall be liable to an action brought in the name of the City of Newport for the recovery of such amount. In lieu of filing an action for the recovery, the City of Newport, when taxes due are more than 30 days delinquent, can submit any outstanding tax to a collection agency, provided that the city has complied with the provisions set forth in ORS 697.105. In the event the city turns over a delinquent tax account to a collection agency, it may add to the amount owing an amount equal to the collection agency fees, not to exceed the greater of \$50.00 or 50 percent of the outstanding tax, penalties, and interest owing.

3.35.120 Violations

A. It is a violation of this chapter for any operator or other person to:

1. Fail or refuse to comply as required herein;
2. Fail or refuse to furnish any return required to be made;
3. Fail or refuse to permit inspection of records;
4. Fail or refuse to furnish a supplemental return or other data required by the Director;
5. Render a false or fraudulent return or claim;
6. Fail, refuse or neglect to remit the tax to the city by the due date.

B. A violation of any provision of this chapter is a civil infraction, with a maximum civil penalty of \$500.00. If a person commits a further violation within 24 months of a judgment that the person has violated this chapter, the maximum civil penalty shall be \$1,000.00. The penalty is in addition to all other remedies, including but not limited to late charges, penalties, and the requirement to pay interest on late payments.

C. Each day during which a violation shall continue shall constitute a separate infraction. If more than one provision of this chapter is violated, each violation of each separate provision shall constitute a separate infraction.

3.35.130 Confidentiality

Except as otherwise required by law, it shall be unlawful for the city, any officer,

employee, or agent to divulge, release, or make known in any manner any financial information submitted or disclosed to the city under the terms of this chapter. Nothing in this chapter shall prohibit:

- A. The disclosure of the names and addresses of any person who is operating a restaurant;
- B. The disclosure of general statistics in a form which would prevent the identification of financial information regarding an individual operator;
- C. Presentation of evidence to the court, or other tribunal having jurisdiction in the prosecution of any criminal or civil claim or an appeal for amount due the city under this chapter;
- D. The disclosure of information when such disclosure of conditionally exempt information is ordered under Oregon public records law procedures;
- E. The disclosure of records related to a business's failure to report and remit the tax when the report or tax is in arrears for over six months or the tax exceeds \$5,000.00, if it is determined that the public interest in disclosure of such records clearly outweighs the interest in confidentiality under ORS 192.345(5).

3.35.140 Examining Books, Records, or Persons

The city, for the purpose of determining the correctness of any tax return, or for the purpose of an estimate of taxes due, may examine or cause to be examined by an agent or representative designated by it for that purpose, any books, papers, records, or memoranda, including copies of the operator's state and federal income tax return, bearing upon the matter of the operator's tax return.

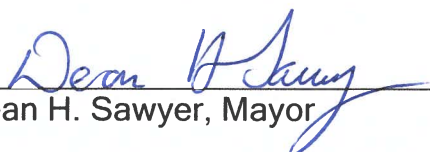
3.35.150 Termination of Tax

This chapter shall expire on July 1, 2027, unless extended by a vote of the electorate of the City of Newport.

Section 2. This ordinance shall be referred to the electors of the City of Newport at the election of Tuesday, November 2, 2021.

Section 3. Effective Date. This ordinance shall be effective on July 1, 2022, and upon certification of the election results if approved by the electors of the City of Newport at the election of November 2, 2021.

Adopted by the Newport City Council on July 19, 2021.



Dean H. Sawyer, Mayor

ATTEST:


Margaret M. Hawker, City Recorder