



City of Grand Island

Tuesday, May 24, 2016

Council Session

Item F-3

#9588 – Consideration of Amending Chapter 23 Article VII of the Grand Island City Code Relative to the Food & Beverage Retailer Occupation Tax

Staff Contact: Marlan Ferguson

Council Agenda Memo

From: Jerry Janulewicz
Meeting: May 24, 2016
Subject: Food and Beverage Retailer Occupation Tax
Presenter(s): Jerry Janulewicz

Background

At the May 2016 primary election, the citizens of Grand Island approved the following ballot question “shall the City of Grand Island impose an occupation tax of one and one half percent (1 ½%) on the sale of all food and beverages presently subject to sales tax in commercial establishments in the City of Grand Island, which occupation tax shall be imposed pursuant to Nebraska Statutes Sections 16-205 and 18-1208?”

Discussion

Pursuant to approval of the above-mentioned ballot issue, a proposed ordinance was prepared for council’s review and consideration. If approved, the ordinance provides for repeal, effective June 30, 2016, of the current occupation tax imposed on food services, drinking places and restaurants (current Chapter 23, Article VII) and, effective July 1, 2016, amends Chapter 23 by adding a new Article VII imposing the new occupation tax on retailers engaged in the sale of food and beverages.

The tax will be imposed at the rate of 1 ½% of the gross proceeds from the sale of food and beverages. Proceeds from sales of food and beverages that are exempt from or not otherwise subject to Nebraska state sales tax are not included in calculating the gross proceeds subject to the occupation tax.

Section 23-65 specifically provides that revenue derived from the Food and Beverages Tax shall be designated for use in the following order:

- (i) To make the City’s quarterly payments to the Nebraska State Fair Support and Improvement Fund as required by Neb Rev. Stat. §§2-108-110;
- (ii) Promote entertainment, agricultural and livestock shows, trade shows and similar events that will attract visitors to Grand Island;
- (iii) Ongoing enhancement and development of recreation and athletic facilities such as hike, bike and recreational trails, ball fields and other community activity needs; and

- (iv) Invest in community development projects and activities that stimulate progress and growth for Grand Island.

Section 3 of the proposed ordinance provides that repeal of the original provisions of Chapter 23, Article VII entitled “Food Service, Drinking Places, and Restaurant Tax.” adopted on September 9, 2008 as Ordinance No. 9189, as amended, shall not operate or be construed to release, forgive, or discharge any occupation tax liability imposed as a result of said Ordinance 9189, as amended, nor any penalties imposed for failure to pay the same, or any liens arising therefrom. Occupation tax returns, assessments, payment, enforcement, administration, recovery, penalties thereon, and liens arising therefrom shall be had and done as set forth by Sections 23-67 through 23-76 as though the same were provided for and imposed by this Ordinance.

Alternatives

It appears that the Council has the following alternatives concerning the issue at hand. The Council may:

1. Move to approve
2. Refer the issue to a Committee
3. Postpone the issue to future date
4. Take no action on the issue

Recommendation

City Administration recommends that the Council approve the ordinance.

Sample Motion

Move to approve Ordinance #9588.

ORDINANCE NO. 9588

An ordinance pertaining to occupation tax; to repeal Chapter 23, Article VII, entitled “Food Service, Drinking Places, and Restaurant Tax,” of the Grand Island City Code; to amended Chapter 23, by adding Article VII, pertaining to food and beverage retailer occupation tax; to provide for survival of claims, penalties and liens for unpaid occupation tax and enforcement thereof; to repeal any ordinance or parts of ordinances in conflict herewith; and to provide for publication and the effective date of this ordinance..

BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA:

SECTION 1. Effective 11:59 p.m., June 30, 2016, Grand Island City Code Chapter 23, Article VII, entitled “Food Service, Drinking Places, and Restaurant Tax”, as amended, is repealed.

SECTION 2. Effective 12:00 a.m., July 1, 2016, Grand Island City Code Chapter 23 is hereby amended to read as follows:

Article VII.

FOOD AND BEVERAGE RETAILER OCCUPATION TAX

§23-64. Definitions

As used in this Article, the following words and phrases shall have the meanings ascribed to them in this section, except where the context clearly indicates or requires a different meaning:

- (A) *Beverage* shall mean all substances, whether in liquid or frozen form, sold for ingestion by humans and are consumed for their taste or nutritional value and contain one-half of one percent or more of alcohol by volume.
- (B) *City* shall mean the City of Grand Island and the area within the corporate limits of the City of Grand Island.
- (C) *Commercial Establishment* shall mean any retail location in the City that sells food or beverages as herein defined.
- (D) *Food* shall mean substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for

Approved as to Form May 20, 2016	by _____ City Attorney
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their taste or nutritional value, excluding beverages as defined herein and tobacco products.

- (E) *Gross Proceeds* shall mean the total amount of consideration, donation, contributions, or monetary charges of any nature paid to obtain food or beverage without any deduction on account of expenses, taxes, or other costs.

Notwithstanding anything herein to the contrary, the term gross proceeds shall not include: (i.) proceeds from the sale of food or beverages exempt from or not otherwise subject to Nebraska Sales and Use Tax as provided by the Nebraska Revenue Act of 1967 as amended from time to time; (ii.) The value of food or beverages furnished by the commercial establishment to employees as part of their compensation when no charge is made to the employee; and (iii.) Tips to an employee of a food services and drinking places when the amount of the tip is wholly in the discretion of the purchaser, whether or not the tip is paid to the employee or added to the bill and if the amount of the tip is turned over to the employee. Amounts that are added to the price of the meal and required to be paid by the purchaser, whether or not designated as a tip or a service charge, shall be exempt as a tip to the extent the mandatory amount does not exceed twenty-five percent (25%) of the food and beverage sales price.

- (F) *Finance Director* shall mean the Finance Director of the City of Grand Island.
- (G) *Person* shall mean any natural person, individual, partnership, association, organization or corporation of any kind or character engaging in retail sales of food or beverages.
- (H) *Retail* shall mean sale for use or consumption and not for resale in any form.
- (I) *Retail location* shall mean any permanent, temporary or mobile place, location or facility where retail sales occur, including, but not limited to, brick and mortar locations, mobile trucks and temporary stands.
- (J) *Sale or to sell* shall mean any transfer of possession for consideration, donation, contributions, or monetary charges of any nature paid to obtain or for access to food or beverage.
- (K) *Taxpayer* shall mean any person operating a commercial establishment herein defined who is required to pay the tax herein imposed.

§23-65. Intent and Purpose of Article

(A) Pursuant to the authority of Nebraska Revised Statute R.R.S. 1943, Section 16-205, the City Council finds, determines and declares that it is appropriate that a tax be imposed on commercial establishments that sell food and beverages as herein defined for the purpose of raising revenues. The foregoing determination is made with due consideration of business in the City and the relation of business to the municipal welfare, together with relation thereof, to expenditures required by the City, and with consideration of just, proper and equitable distribution of the tax burdens within the City and other properly associated matters.

(B) That revenue derived from Grand Island City Code, Article VII - the Food and Beverages Tax shall be designated for use in the following order:

- (i) To make the City's quarterly payments to the Nebraska State Fair Support and Improvement Fund as required by Neb Rev. Stat. §§2-108-110;

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- (ii) Promote entertainment, agricultural and livestock shows, trade shows and similar events that will attract visitors to Grand Island;
- (iii) Ongoing enhancement and development of recreation and athletic facilities such as hike, bike and recreational trails, ball fields and other community activity needs; and
- (iv) Invest in community development projects and activities that stimulate progress and growth for Grand Island.

§23-66. Tax Imposed; Collection of Tax

(A) On or after July 1, 2016 and in each calendar month thereafter there is hereby imposed a food and beverages retailer occupation tax upon each and every person operating a commercial establishment within the City for any period of time during a calendar month. The amount of such tax shall be one and one-half percent (1½%) of all gross receipts for each calendar month derived from the sale of food and beverages subject to this tax.

(B) The person engaged in the sale of food and beverages may but is not required to itemize the tax levied on a bill, receipt, or other invoice to the purchaser, but each person engaged in the sale of food or beverages shall remain liable for the tax imposed by this section.

(C) Gross receipts subject to the tax shall include receipts from the sale of food and beverages but excluding receipts from the sale of food or beverages exempt from or not otherwise subject to Nebraska Sales and Use Tax as provided by the Nebraska Revenue Act of 1967 as amended from time to time..

§23-67. Tax Imposed for Revenue Purposes; Tax Cumulative

(A) The tax imposed by this article is purely for revenue purposes to support the programs of the government of the City. The levy of the tax under this article is in addition to all other fees, taxes, excises and licenses levied and imposed under any contract or any other provisions of this Code or ordinances of the City, in addition to any fee, tax, excise or license imposed by the state.

(B) Payment of the tax imposed by this article shall not relieve the person paying the same from payment of any other tax now or hereafter imposed by contract or ordinance or by this Code, including those imposed for any business or occupation he or she may carry on, unless so provided therein. It is the intent of this Council that the occupational taxes imposed by this article shall be cumulative except where otherwise specifically provided.

§23-68. Return

(A) Each and every person operating a commercial establishment within the City for the calendar month beginning July 2016, and for each and every calendar month thereafter, shall prepare and file, on or before the 25th day of the month, or the next business day should the 25th fall on a Federal holiday or weekend, following on a form prescribed by the Finance Director, a return for the taxable calendar month, and at the same time pay to the Finance Director the tax herein imposed. Any return that is remitted via the United State Postal Service shall be postmarked by the 25th day of the month to be considered an on time filing.

(B) A commercial establishment may make reports and remittances quarterly in lieu of monthly if their monthly remittance would be \$100.00 or less.

§23-69. Suspension or Revocation of Other Licenses

(A) No delinquency in payment of the tax herein provided for by this article and no revocation or conviction for violation of this article shall be grounds for the suspension or revocation of any other license issued to any person engaged in business within the City by the Finance Director or any other official of the City under any licensing provisions of this Code or other ordinances, nor shall the same be grounds for the suspension or revocation of any other license issued by any licensing authority pursuant to the statutes enacted by the State of Nebraska.

§23-70. Failure to File Return; Delinquency; Assessment by Finance Director

(A) If any person neglects or refuses to make a return or payment of the taxes as required by this article, the Finance Director shall make an estimate, based upon such information as may be reasonably available, of the amount of taxes due for the period or periods for which the taxpayer is delinquent, and upon the basis of such estimated amount, compute and assess in addition thereto a penalty equal to ten percent (10%) thereof, together with interest on such delinquent taxes, at the rate of one percent (1%) per month, or fraction thereof from the date when due.

(B) The Finance Director shall give the delinquent taxpayer written notice of such estimated taxes, penalty, and interest, which notice must be served personally or by certified mail.

(C) Such estimate shall thereupon become an assessment, and such assessment shall be final and due and payable from the taxpayer to the Finance Director ten (10) days from the date of service of the notice or the date of mailing by certified mail; however, within such ten (10) day period the delinquent taxpayer may petition the Finance Director for a revision or modification of such assessment and shall, within such ten (10) day period, furnish the Finance Director the facts and correct figures showing the correct amount of such taxes.

(D) Such petition shall be in writing, and the facts and figures submitted shall be submitted in writing and shall be given under oath of the taxpayer.

(E) Thereupon, the Finance Director shall modify such assessment in accordance with the facts which he or she deems correct. Such adjusted assessment shall be made in writing, and notice thereof shall be mailed to the taxpayer within ten (10) days; and all such decisions shall become final upon the expiration of thirty (30) days from the date of service, unless proceedings are commenced within that time for appeal in the District Court of Hall County, Nebraska by the filing of a petition with the Clerk of the Court. This appeal shall be conducted in conformance with the Nebraska Rules of Civil Procedure and Rules of the Court as may be adopted by the Court or enacted by the Legislature.

§23-71. Jeopardy Assessment

(A) If the Finance Director finds that the collection of the tax will be jeopardized by delay, in his or her discretion, he or she may declare the taxable period immediately terminated, determine the tax, and issue notice and demand for payment thereof, and, having done so, the tax shall be due and payable forthwith, and the Finance Director may proceed to collect such tax as hereinafter provided.

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(B) Collection may be stayed if the taxpayer gives such security for payment as shall be reasonably satisfactory to the Finance Director.

§23-72. Administration of Article; Miscellaneous Provisions

(A) Administration by Finance Director. The administration of the provisions of this article are hereby vested in the Finance Director, who shall prescribe forms in conformity with this article for the making of returns, for the ascertainment, assessment and collection of the tax imposed hereunder, and for the proper administration and enforcement hereof. The Finance Director shall adopt such rules and regulation as may be necessary or desirable for the administration and enforcement of this Article.

(B) Duties performed by others. Duties of the Finance Director herein provided may be performed by any qualified person designated by the Finance Director.

(C) Notices to be sent by registered or certified mail. All notices required to be given to the taxpayer under the provisions of this article shall be in writing, and if mailed postpaid by registered or certified mail, return receipt requested, to him or her at his or her last known address shall be sufficient for the purposes of this article.

(D) Duty to keep books and records. It shall be the duty of every taxpayer to keep and preserve suitable records and other books or accounts as may be necessary to determine the amount of tax for which he/she is liable hereunder.

(i) Records of the gross revenue by which this tax is measured shall be kept separate and apart from the records of other sales or receipts in order to facilitate the examination of books and records as necessary for the collection of this tax.

(ii) It shall be the duty of every such taxpayer to keep and preserve for a period of four (4) years all such books, invoices and other records, which shall be open for examination at any time by the Finance Director or his or her duly designated persons. If such person keeps or maintains his books, invoices, accounts or other records, or any thereof, outside of the state, upon demand of the Finance Director he/she shall make the same available at a suitable place within the City, to be designated by the Finance Director, for examination, inspection and audit by the Finance Director or his or her duly authorized persons.

(iii) The Finance Director, in his or her discretion, may make, permit or cause to be made the examination, inspection or audit of books, invoices, accounts or other records so kept or maintained by such person outside of the state at the place where same are kept or maintained or at any place outside the state where the same may be made available, provided such person shall have entered into a binding agreement with the City to reimburse it for all costs and expenses incurred by it in order to have such examination, inspection or audit made in such place.

(E) Investigation of taxpayer's books. For the purpose of ascertaining the correctness of a return, or for the purpose of determining the amount of tax due from any person, the Finance Director or his or her duly authorized persons, may hold investigations and hearings concerning any matters covered by this article; and may examine any relevant books, papers, records or memoranda of any such person; and may require the attendance of such person, or any officer or employee of such person, or of any person having knowledge thereof; and may take testimony and require proof of his or her information. The Finance Director and his or her duly authorized persons shall have power to administer oath to such persons.

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(F) Sale of business. Whenever any taxpayer sells his/her food services, drinking places business, or restaurant or quits engaging in such business, any tax payable under this article shall become immediately due and payable and such person shall immediately make a report and pay the tax due.

(G) Status of unpaid tax and bankruptcy and receivership. Whenever the business or property of any taxpayer subject to this article shall be placed in receivership, bankruptcy or assignment for the benefit of creditors, or seized under distraint for property taxes, all taxes, penalties, and interest imposed by this article and for which the taxpayer is in any way liable under the terms of this article shall be a prior and preferred lien against the property of the taxpayer, except as to pre-existing claims or liens of a bona fide mortgagee, pledgee, judgment creditor or purchaser whose rights shall have attached prior to the filing of the notice as hereinafter provided on the property of the taxpayer, other than the goods, stock in trade, and business fixtures of such taxpayer; and no sheriff, receiver, assignee or other official shall sell the property of any person subject to this article under process or order of any court without first ascertaining from the Finance Director the amount of any taxes due and payable under this article; and if there be any such taxes due, owing and unpaid, it shall be the duty of such officer to first pay the amount of such taxes out of the proceeds of such sale before making payment of any monies to any judgment creditor or other claimants of whatsoever kind or nature, except the cost of the proceedings and other pre-existing claims or liens as above provided.

(H) Release of liens. The tax imposed by this article, together with the interest and penalties herein provided and the cost of collection which may be incurred, shall be and, until paid, remain a first and prior lien, except as otherwise provided by the constitution or statute, superior to all other liens, on all the merchandise, furniture and fixtures, tools and equipment of the taxpayer within the City, and may be foreclosed by seizing under distraint and sale of so much of said merchandise, furniture and fixtures, tools and equipment, as may be necessary to discharge the lien. The lien created by this article shall apply only to tax obligations hereafter incurred. Any lien for taxes as shown on the records of the county clerks and recorders as herein provided shall, upon the payment of all taxes, penalties and interest covered thereby, be released by the Finance Director in the same manner as mortgages or judgments are released.

(I) Statute of Limitations. No suit for collection of any taxes imposed by this article for any interest thereon or penalties with respect thereto may be instituted, or any other action to collect the same shall be commenced, nor shall any notice of lien be filed, or distraint warrant be issued, more than four (4) years after the date on which the tax was or is payable. In case of a false or fraudulent return with intent to evade tax, the tax, together with interest and penalties thereon, may be assessed or proceedings for the collection of such taxes may be begun at any time. Before the expiration of such period of limitation, the taxpayer and the Finance Director may agree in writing to an extension thereof; and the period so agreed on may be extended by subsequent agreement in writing.

(J) Administrative Fee. The Finance Director shall deposit monthly the proceeds of the occupation tax to the special revenue fund, after deducting the amount of refunds made and three percent of the remainder as an administrative fee necessary to defray the cost of collecting the tax and the expenses incident thereto. The Finance Director shall keep full and accurate records of all money received and distributed. All receipts from the three-percent administrative fee shall be deposited in the City's General Fund.

§23-73. Recovery of Unpaid Tax by Action at Law

(A) The Finance Director may also treat any such taxes, penalties or interest due and unpaid as a debt due the City.

(B) In case of failure to pay the taxes, or any portion thereof, or any penalty or interest thereon when due, the Finance Director may recover at law the amount of such taxes, penalties and interest in any court of Hall County, Nebraska or of the county wherein the taxpayer resides or has its principal place of business having jurisdiction of the amounts sought to be collected.

(C) The return of the taxpayer or the assessment made by the Finance Director, as herein provided, shall be prima facie proof of the amount due.

(D) Such actions may be actions and attachments, and writs of attachment may be issued to the constable or sheriff, as the case may be; and in any such proceeding no bond shall be required of the Finance Director except as may be required by statute, nor shall any constable or sheriff require of the Finance Director an indemnifying bond for executing the writ of attachment or writ of execution upon any judgment entered in such proceeding; and, in accordance with the procedure established by statute, if any, the Finance Director may prosecute appeals or writs of error in such cases without the necessity of providing bond therefor;

(E) The city attorney, when requested by the Finance Director may commence an action for the recovery of taxes due under this article; and this remedy shall be in addition to all other existing remedies, or remedies provided in this article.

§23-74. City a Party to Title Actions for Determination of Lien

In any action affecting the title to real estate or the ownership or rights to possession of personal property, the City may be made a party defendant for the purpose of obtaining a judgment or determination of its lien upon the property involved therein.

§23-75. Authority of Finance Director to Waive Penalty

The Finance Director is hereby authorized to waive, for good cause shown, any penalty assessed as in this article provided; and any interest imposed in excess of six percent (6%) per annum shall be deemed a penalty.

§23-76. Penalty

(A) Penalties for deficiencies caused by disregard of rules. If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added ten percent (10%) of the total amount of the deficiency; and in such case interest shall be collected at the rate of one percent (1%) per month, or fraction thereof, on the amount of the deficiency from the time the return was due, from the person required to file the return, which interest in addition shall become due and payable within ten (10) days after written notice and demand by the Finance Director.

(B) Penalties for deficiencies caused by fraud. If any part of the deficiency is due to fraud with the intent to evade the tax, then there shall be added fifty percent (50%) of the total amount of the deficiency, and in such case the whole amount of the tax that is unpaid, including the additions, shall become due and payable ten (10) days after written notice and demand by the Finance Director, and an additional one percent (1%) per month, or fraction thereof, on said amounts shall be added from the date the return was due until paid.

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§23-77. Severability

If any provisions, clause, sentence or paragraph of this article or the application thereof to any person or circumstances shall be held invalid, that invalidity shall not affect the other provisions of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

SECTION 3. The repeal provided herein of the original provisions of Chapter 23, Article VII entitled "Food Service, Drinking Places, and Restaurant Tax." adopted on September 9, 2008 as Ordinance No. 9189, as amended, shall not operate or be construed to release, forgive, or discharge any occupation tax liability imposed as a result of said Ordinance 9189, as amended, nor any penalties imposed for failure to pay the same, or any liens arising therefrom. Occupation tax returns, assessments, payment, enforcement, administration, recovery, penalties thereon, and liens arising therefrom shall be had and done as set forth by Sections 23-67 through 23-76, above, as though the same were provided for and imposed by this Ordinance.

SECTION 4. Any ordinances or parts of ordinances in conflict herewith be, and hereby are, repealed

SECTION 5. This ordinance shall be in force and take effect from and after its passage and publication.

Enacted: May 24, 2016.

Jeremy L. Jensen, Mayor

Attest:

Nicki Stoltenberg, City Clerk Pro Tem