

ORDINANCE NO. 1417

AN ORDINANCE OF THE CITY OF DES MOINES, WASHINGTON amending chapter 3.84 of the Des Moines Municipal Code, establishing new sections, providing for business and occupation tax administrative provisions, prescribing penalties, providing a required referendum procedure, and codifying new and amended sections in chapter 3.84 DMMC.

WHEREAS, RCW 35A.82.020 authorizes code cities to impose business licensing requirements and excises upon business transacted within such a city to the extent permitted by the general law, and

WHEREAS, the City has acted upon this authority by enacting business licensing and other requirements which are set forth in Titles 3 and 5 of the Des Moines Municipal Code, and

WHEREAS, the City Council desires to maintain an essential level of community services such as public safety, transportation, culture and recreation and therefore intends to raise revenues through this means, and

WHEREAS, RCW 35.21.710 authorizes cities to levy and collect a tax not to exceed two-tenths of one percent (.2%) on the gross income of persons doing business within the City, and

WHEREAS, the Washington State Legislature has approved EHB 2030 which requires that, effective January 1, 2005, all cities levying or planning to levy a general business and occupation tax must revise their ordinances or adopt ordinances to be consistent with the "model ordinance" for municipal gross receipts business and occupation tax created through the Washington Association of Cities; now, therefore,

**THE CITY COUNCIL OF THE CITY OF DES MOINES ORDAINS AS FOLLOWS:**

**Sec 1.** A new section is added to chapter 3.84 DMMC to read as follows:

**Administrative provisions--Purpose.** The purpose of this ordinance is to provide for the administrative procedures for the Business and Occupation Tax as codified in chapter 3.84 of the Des Moines Municipal Code, setting administrative fees and prescribing penalties for non-compliance with the provisions of chapter 3.84 DMMC.

**Sec. 2.** A new section is added to chapter 3.84 DMMC to read as follows:

**Administrative provisions--Application of section stated.** The provisions of this section shall apply with respect to the taxes imposed under chapter 3.84 DMMC and under other titles, chapters, and sections in such manner and to such extent as indicated in each such title, chapter or section.

**Sec. 3.** DMMC 3.84.030 and section 3 of Ordinance No. 1355 as amended by section 4 of Ordinance No. 1416 are amended to read as follows:

**Definitions.**

(1) **Use of words and phrases.** As used in this ordinance, unless the context or subject matter clearly requires otherwise, the words or phrases defined in this section shall have the indicated meanings. Words in the singular number shall include the plural, and the plural shall include the singular.

(2) **"Advance," "Reimbursement."**

(a) **"Advance"** means money or credits received by a taxpayer from a customer or client with which the taxpayer is to pay costs or fees on behalf of the customer or client.

(b) **"Reimbursement"** means money or credits received from a customer or client to repay the taxpayer for money or credits expended by the taxpayer in payment of costs or fees of the customer or client.

(3) **"Agricultural product"** means any product of plant cultivation or animal husbandry including, but not limited to: a product of horticulture, grain cultivation, vermiculture, viticulture, or aquaculture as defined in RCW 15.85.020; plantation Christmas trees; turf; or any animal including but not limited to an animal that is a private sector cultured aquatic product as defined in RCW 15.85.020, or a bird, or insect, or the substances obtained from such an animal. "Agricultural product" does not include animals intended to be pets.

(4) **"Business"** includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.

(5) **"Business and occupation tax" or "gross receipts tax"** means a tax imposed on or measured by the value of products, the gross income of the business, or the gross proceeds of sales, as the case may be, and that is the legal liability of the business.

(6) **"Commercial or industrial use"** means the following uses of products, including by-products, by the extractor or manufacturer thereof:

(a) Any use as a consumer; and

(b) The manufacturing of articles, substances or commodities.

(7) **"Competitive telephone service"** means the providing by any person of telecommunications equipment or apparatus, or services related to that equipment or apparatus such as repair or maintenance service, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW and for which a separate charge is made.

(8) **"Consumer"** means the following:

(a) Any person who purchases, acquires, owns, holds, or uses any tangible or intangible personal property irrespective of the nature of the person's business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for a consumer other than for the purpose of:

(i) Resale as tangible or intangible personal property in the regular course of business;

(ii) Incorporating such property as an ingredient or component of real or personal property when installing, repairing, cleaning, altering, imprinting, improving, constructing, or decorating such real or personal property of or for consumers;

(iii) Incorporating such property as an ingredient or component of a new product or as a chemical used in processing a new product when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new product; or

(iv) Consuming the property in producing ferrosilicon which is subsequently used in producing magnesium for sale, if the primary purpose of such property is to create a chemical reaction directly through contact with an ingredient of ferrosilicon;

(b) Any person engaged in any business activity taxable under DMMC 3.84.060, *Imposition of the tax--Tax or fee levied*;

(c) Any person who purchases, acquires, or uses any competitive telephone service as herein defined, other than for resale in the regular course of business;

(d) Any person who purchases, acquires, or uses any personal, business, or professional service defined as a retail sale or retail

service in this section, other than for resale in the regular course of business;

(e) Any person who is an end user of software;

(f) Any person engaged in the business of "public road construction" in respect to tangible personal property when that person incorporates the tangible personal property as an ingredient or component of a publicly-owned street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle by installing, placing or spreading the property in or upon the right-of-way of a publicly-owned street, place, road, highway, easement, bridge, tunnel, or trestle or in or upon the site of a publicly-owned mass public transportation terminal or parking facility;

(g) Any person who is an owner, lessee or has the right of possession to or an easement in real property which is being constructed, repaired, decorated, improved, or otherwise altered by a person engaged in business;

(h) Any person who is an owner, lessee, or has the right of possession to personal property which is being constructed, repaired, improved, cleaned, imprinted, or otherwise altered by a person engaged in business;

(i) Any person engaged in "government contracting." Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person;

(j) Nothing contained in this or any other subsection of this section shall be construed to modify any other definition of "consumer."

(9) **"Day care homes in residences"** means child and adult day care facilities in residences otherwise occupied as private homes.

(10) **"Director"** means the Finance Director of the City or any officer, agent or employee of the City designated by the City Manager to act on the Director's behalf.

(11) **"Delivery"** means the transfer of possession of tangible personal property between the seller and the buyer or the buyer's representative. Delivery to an employee of a buyer is considered delivery to the buyer.

Transfer of possession of tangible personal property occurs when the buyer or the buyer's representative first takes physical control of the property or exercises dominion and control over the property. Dominion and control means the buyer has the ability to put the property to the buyer's own purposes. It means the buyer or the buyer's representative has made the final decision to accept or reject the property, and the seller has no further right to possession of the property and the buyer has no right to return the property to the seller, other than under a warranty contract. A buyer does not exercise dominion and control over tangible personal property merely by arranging for shipment of the property from the seller to itself. A buyer's representative is a person, other than an employee of the buyer, who is authorized in writing by the buyer to receive tangible personal property and take dominion and control by making the final decision to accept or reject the property. Neither a shipping company nor a seller can serve as a buyer's representative. It is immaterial where the contract of sale is negotiated or where the buyer obtains title to the property. Delivery terms and other provisions of the Uniform Commercial Code (Title 62A RCW) do not determine when or where delivery of tangible personal property occurs for purposes of taxation.

(12) **"Eligible gross receipts tax"** means a tax which:

(a) Is imposed on the act or privilege of engaging in business activities within DMMC 3.84.060, *Imposition of the tax--Tax or fee levied*; and

(b) Is measured by the gross volume of business, in terms of gross receipts and is not an income tax or value added tax; and

(c) Is not, pursuant to law or custom, separately stated from the sales price; and

(d) Is not a sales or use tax, business license fee, franchise fee, royalty or severance tax measured by volume or weight, or concession charge, or payment for the use and enjoyment of property, property right or a privilege; and

(e) Is a tax imposed by a local jurisdiction, whether within or without the State of Washington, and not by a Country, State, Province, or any other non-local jurisdiction above the County level.

(13) **"Engaging in business."**

(a) The term **"engaging in business"** means commencing, conducting, or continuing in business, and also the exercise of corporate or franchise powers, as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business.

(b) This section sets forth examples of activities that constitute engaging in business in the City, and establishes safe harbors for certain of those activities so that a person who meets the criteria may engage in de minimus business activities in the City without having to register and obtain a business license or pay City business and occupation taxes. The activities listed in this section are illustrative only and are not intended to narrow the definition of "engaging in business" in subsection (13)(a) of this section. If an activity is not listed, whether it constitutes engaging in business in the City shall be determined by considering all the facts and circumstances and applicable law.

(c) Without being all inclusive, any one of the following activities conducted within the City by a person, or its employee, agent, representative, independent contractor, broker or another acting on its behalf constitutes engaging in business and requires a person to register and obtain a business license.

(i) Owning, renting, leasing, maintaining, or having the right to use, or using, tangible personal property, intangible personal property, or real property permanently or temporarily located in the City.

(ii) Owning, renting, leasing, using, or maintaining, an office, place of business, or other establishment in the City.

(iii) Soliciting sales.

(iv) Making repairs or providing maintenance or service to real or tangible personal property, including warranty work and property maintenance.

(v) Providing technical assistance or service, including quality control, product inspections, warranty work, or similar services on or in connection with tangible personal property sold by the person or on its behalf.

(vi) Installing, constructing, or supervising installation or construction of, real or tangible personal property.

(vii) Soliciting, negotiating, or approving franchise, license, or other similar agreements.

(viii) Collecting current or delinquent accounts.

(ix) Picking up and transporting tangible personal property, solid waste, construction debris, or excavated materials.

(x) Providing disinfecting and pest control services, employment and labor pool services, home nursing care, janitorial services, appraising, landscape architectural services, security system services, surveying, and real estate services including the listing of homes and managing real property.

(xi) Rendering professional services such as those provided by accountants, architects, attorneys, auctioneers, consultants, engineers, professional athletes, barbers, baseball clubs and other sports organizations, chemists, consultants, psychologists, court reporters, dentists, doctors, detectives, laboratory operators, teachers, veterinarians.

(xii) Meeting with customers or potential customers, even when no sales or orders are solicited at the meetings.

(xiii) Training or recruiting agents, representatives, independent contractors, brokers or others, domiciled or operating on a job in the City, acting on its behalf, or for customers or potential customers.

(xiv) Investigating, resolving, or otherwise assisting in resolving customer complaints.

(xv) In-store stocking or manipulating products or goods, sold to and owned by a customer, regardless of where sale and delivery of the goods took place.

(xvi) Delivering goods in vehicles owned, rented, leased, used, or maintained by the person or another acting on its behalf.

(xvii) Accepting or executing a contract with the City, irrespective of whether

goods or services are delivered within or without the City, or whether the person's office or place of business is within or without the City.

(d) If a person, or its employee, agent, representative, independent contractor, broker or another acting on the person's behalf, engages in no other activities in or with the City but the following, it need not register and obtain a business license and pay tax.

(i) Meeting with suppliers of goods and services as a customer.

(ii) Meeting with government representatives in their official capacity, other than those performing contracting or purchasing functions.

(iii) Attending meetings, such as board meetings, retreats, seminars, and conferences, or other meetings wherein the person does not provide training in connection with tangible personal property sold by the person or on its behalf.

(iv) Renting tangible or intangible property as a customer when the property is not used in the City.

(v) Attending, but not participating in a "trade show" or "multiple vendor events". Persons participating at a trade show shall review the City's trade show or multiple vendor event ordinances.

(vi) Conducting advertising through the mail.

(vii) Soliciting sales by phone from a location outside the City.

(e) A seller located outside the City merely delivering goods into the City by means of common carrier is not required to register and obtain a business license, provided that it engages in no other business activities in the City. Such activities do not include those in subsection (d). The City expressly intends that engaging in business include any activity sufficient to establish nexus for purposes of applying the tax under the law and the constitutions of the United States and the State of Washington. Nexus is presumed to continue as long as the taxpayer benefits from the activity that constituted the original nexus generating contact or subsequent contacts.

(14) **"Extracting"** is the activity engaged in by an extractor and is reportable under the extracting classification.

(15) **"Extractor"** means every person who from the person's own land or from the land of another under a right or license granted by lease or contract, either directly or by contracting with others for the necessary labor or mechanical services, for sale or for commercial or industrial use, mines, quarries, takes or produces coal, oil, natural gas, ore, stone, sand, gravel, clay, mineral or other natural resource product; or fells, cuts or takes timber, Christmas trees, other than plantation Christmas trees, or other natural products; or takes fish, shellfish, or other sea or inland water foods or products. "Extractor" does not include persons performing under contract the necessary labor or mechanical services for others; or persons meeting the definition of farmer.

(16) **"Extractor for hire"** means a person who performs under contract necessary labor or mechanical services for an extractor.

(17) **"Farmer"** means any person engaged in the business of growing or producing, upon the person's own lands or upon the lands in which the person has a present right of possession, any agricultural product whatsoever for sale. "Farmer" does not include a person using such products as ingredients in a manufacturing process, or a person growing or producing such products for the person's own consumption. "Farmer" does not include a person selling any animal or substance obtained there from in connection with the person's business of operating a stockyard or a slaughter or packing house. "Farmer" does not include any person in respect to the business of taking, cultivating, or raising timber.

(18) **"Gross income of the business"** means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

(19) **"Gross proceeds of sales"** means the

value proceeding or accruing from the sale of tangible personal property or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

(20) **"In this City"** or **"within this City"** includes all federal areas lying within the corporate city limits of the City of Des Moines.

(21) **"Manufacturing"** means the activity conducted by a manufacturer and is reported under the manufacturing classification.

(22) **"Manufacturer", "to manufacture"**.

(a) **"Manufacturer"** means every person who, either directly or by contracting with others for the necessary labor or mechanical services, manufactures for sale or for commercial or industrial use from the person's own materials or ingredients any products. When the owner of equipment or facilities furnishes, or sells to the customer prior to manufacture, materials or ingredients equal to less than twenty percent (20%) of the total value of all materials or ingredients that become a part of the finished product, the owner of the equipment or facilities will be deemed to be a processor for hire, and not a manufacturer. A business not located in this City that is the owner of materials or ingredients processed for it in this City by a processor for hire shall be deemed to be engaged in business as a manufacturer in this City.

(b) **"To manufacture"** means all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials or ingredients so that as a result thereof a new, different or useful product is produced for sale or commercial or industrial use, and shall include:

(i) The production of special made or custom made articles;

(ii) The production of dental appliances, devices, restorations, substitutes, or other dental laboratory products by a dental laboratory or dental technician;

(iii) Crushing and/or blending of rock, sand, stone, gravel, or ore; and

(iv) The producing of articles for sale, or for commercial or industrial use from raw materials or prepared materials by giving such

materials, articles, and substances of trade or commerce new forms, qualities, properties or combinations including, but not limited to, such activities as making, fabricating, processing, refining, mixing, slaughtering, packing, aging, curing, mild curing, preserving, canning, and the preparing and freezing of fresh fruits and vegetables.

**"To manufacture"** shall not include the production of computer software if the computer software is delivered from the seller to the purchaser by means other than tangible storage media, including the delivery by use of a tangible storage media where the tangible storage media is not physically transferred to the purchaser.

(23) **"Newspaper", "Magazine", "Periodical."**

(a) **"Newspaper"** means a publication offered for sale regularly at stated intervals at least once a week and printed on newsprint in tabloid or broadsheet format folded loosely together without stapling, glue, or any other binding of any kind.

(b) **"Magazine, or periodical"** means any printed publication, other than a newspaper, issued and offered for sale regularly at stated intervals at least once every three (3) months, including any supplement or special edition of the publication. Any publication meeting this definition qualifies regardless of its content.

(24) **"Office" or "place of business"** means a fixed location or permanent facility where the regular business of the person is conducted and which is either owned by the person or over which the person exercises legal dominion and control. The regular business of the person is presumed conducted at a location:

(a) Whose address the person uses as its business mailing address; and

(b) Containing a telephone line listed in a public telephone directory or other similar publication under the business name; and

(c) Where the person holds itself out to the general public as conducting its regular business through signage or other means; and

(d) Where the person is required to obtain any appropriate state and local business license or registration unless they are exempted by law from such requirement.

A vehicle such as a pick-up, van, truck, boat or other motor vehicle is not an office or place of business. A post office box is not an office

or place of business. If a person has no office or place of business, the person's home or apartment within the City will be deemed the place of business. If a person has an office or place of business, the person's home is not an office or place of business unless it meets the criteria for office or place of business above.

(25) **"Person"** means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, co-partnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the State of Washington, corporation, limited liability company, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, non-profit, or otherwise and the United States or any instrumentality thereof.

(26) **"Precious metal bullion"** means any precious metal which has been put through a process of smelting or refining, including, but not limited to, gold, silver, platinum, rhodium, and palladium, and which is in such state or condition that its value depends upon its contents and not upon its form. For purposes of this section, "monetized bullion" means coins or other forms of money manufactured from gold, silver, or other metals and heretofore, now, or hereafter used as a medium of exchange under the laws of this state, the United States, or any foreign nation, but does not include coins or money sold to be manufactured into jewelry or works of art.

(27) **"Processing for hire"** means the performance of labor and mechanical services upon materials or ingredients belonging to others so that as a result a new, different or useful product is produced for sale, or commercial or industrial use. A processor for hire is any person who would be a manufacturer if that person were performing the labor and mechanical services upon that person's own materials or ingredients. If a person furnishes, or sells to the customer prior to manufacture, materials or ingredients equal to twenty percent (20%) or more of the total value of all materials or ingredients that become a part of the finished product the person will be deemed to be a manufacturer and not a processor for hire.

(28) **"Product", "Byproduct."**

(a) **"Product"** means a tangible personal property, including articles, substances, or commodities created, brought forth, extracted, or manufactured by human or mechanical effort.

(b) **"Byproduct"** means any additional product, other than the principal or intended product, which results from extracting or manufacturing activities and which has a market value, without regard to whether or not such additional product was an expected or intended result of the extracting or manufacturing activities.

(29) **"Reporting Period"** means:

(a) A one-month period beginning the first day of each calendar month (monthly); or

(b) A three-month period beginning the first day of January, April, July or October of each year (quarterly); or

(c) A twelve-month period beginning the first day of January of each year (annual).

(30) **"Retailing"** means the activity of engaging in making sales at retail and is reported under the retailing classification.

(31) **"Retail Service"** shall include the sale of or charge made for personal, business, or professional services including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities:

(a) Amusement and recreation services including but not limited to golf, pool, billiards, skating, bowling, swimming, bungee jumping, ski lifts and tows, basketball, racquet ball, handball, squash, tennis, batting cages, day trips for sightseeing purposes, and others, when provided to consumers. "Amusement and recreation services" also include the provision of related facilities such as basketball courts, tennis courts, handball courts, swimming pools, and charges made for providing the opportunity to dance. The term "amusement and recreation services" does not include instructional lessons to learn a particular activity such as tennis lessons, swimming lessons, or archery lessons;

(b) Abstract, title insurance, and escrow services;

(c) Credit bureau services;

(d) Automobile parking and storage garage services;

(e) Landscape maintenance and horticultural services but excluding (i) horticultural services provided to farmers and (ii) pruning, trimming, repairing, removing, and clearing of trees and brush near electric transmission or distribution lines or equipment, if performed by or at the direction of an electric utility;

(f) Service charges associated with tickets to professional sporting events; and

(g) The following personal services: Physical fitness services, tanning salon services, tattoo parlor services, steam bath services, turkish bath services, escort services, and dating services.

(h) The term shall also include the renting or leasing of tangible personal property to consumers and the rental of equipment with an operator.

(32) **"Return"** means any document a person is required by the City to file to satisfy or establish a tax or fee obligation that is administered or collected by the City and that has a statutorily defined due date.

(33) **"Royalties"** means compensation for the use of intangible property, such as copyrights, patents, licenses, franchises, trademarks, tradenames, and similar items.

(34) **"Sale," "casual or isolated sale."**

(a) **"Sale"** means any transfer of the ownership of, title to, or possession of, property for a valuable consideration and includes any activity classified as a "sale at retail," "retail sale," or "retail service." It includes renting or leasing, conditional sale contracts, leases with option to purchase, and any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It also includes the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.

(b) **"Casual or isolated sale"** means a sale made by a person who is not engaged in the business of selling the type of property involved on a routine or continuous basis.

(35) **"Sale at retail," "retail sale."**

(a) **"Sale at retail" or "retail sale"** means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers, other than a sale to a person who presents a resale certificate under RCW 82.04.470 and who:

(i) Purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person; or

(ii) Installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property without intervening use by such person; or

(iii) Purchases for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or is a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale; or

(iv) Purchases for the purpose of consuming the property purchased in producing ferrosilicon which is subsequently used in producing magnesium for sale, if the primary purpose of such property is to create a chemical reaction directly through contact with an ingredient of ferrosilicon; or

(v) Purchases for the purpose of providing the property to consumers as part of competitive telephone service, as defined in RCW 82.04.065.

The term shall include every sale of tangible personal property which is used or consumed or to be used or consumed in the performance of any activity classified as a "sale at retail" or "retail sale" even though such property is resold or utilized as provided in (i), (ii), (iii), (iv) or (v) of this subsection following such use.

(vi) Purchases for the purpose of satisfying the person's obligations under an extended warranty as defined in subsection (g) of this section, if such tangible personal property replaces or becomes an ingredient or component of property covered by the extended warranty without intervening use by such person.

(b) **"Sale at retail"** or **"retail sale"** also means every sale of tangible personal property to persons engaged in any business activity which is taxable under section 5(1)(g) of this ordinance.

(c) **"Sale at retail"** or **"retail sale"** shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following:

(i) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, including charges made for the mere use of facilities in respect thereto, but excluding charges made for the use of coin-operated laundry facilities when such facilities are situated in an apartment house, rooming house, or mobile home park for the exclusive use of the tenants thereof, and also excluding sales of laundry service to nonprofit health care facilities, and excluding services rendered in respect to live animals, birds and insects;

(ii) The constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth excepting the mere leveling of land used in commercial farming or agriculture;

(iii) The charge for labor and services rendered in respect to constructing, repairing, or improving any structure upon, above, or under any real property owned by an owner who conveys the property by title, possession, or any other means to the person performing such construction, repair, or improvement for the purpose of performing such construction, repair, or improvement and the property is then reconveyed by title, possession, or any other means to the original owner;

(iv) The sale of or charge made for labor and services rendered in respect to the cleaning, fumigating, razing or moving of existing buildings or structures, but shall not include the charge made for janitorial services; and for purposes of this section the term "janitorial services" shall mean those cleaning and caretaking services ordinarily performed by commercial janitor service businesses including, but not limited to, wall and window washing, floor cleaning and waxing, and the cleaning in place of rugs, drapes and upholstery. The term "janitorial services" does not include painting, papering, repairing, furnace or septic tank cleaning, snow removal or sandblasting;

(v) The sale of or charge made for labor and services rendered in respect to automobile towing and similar automotive transportation services, but not in respect to those required to report and pay taxes under chapter 82.16 RCW;

(vi) The sale of and charge made for the furnishing of lodging and all other services, except telephone business and cable service, by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same. For the purposes of this subsection, it shall be presumed that the sale of and charge made for the furnishing of lodging for a continuous period of one month or more to a person is a rental or lease of real property and not a mere license to enjoy the same;

(vii) The sale of or charge made for tangible personal property, labor and services to persons taxable under (i), (ii), (iii), (ix), (v), and (vi) of this subsection when such sales or charges are for property, labor and services which are used or consumed in whole or in part by such persons in the performance of any activity defined as a "sale at retail" or "retail sale" even though such property, labor and services may be resold after such use or consumption. Nothing contained in this subsection shall be construed to modify subsection (34)(a) of this section and nothing contained in subsection (33)(a) of this section shall be construed to modify this subsection.

(d) **"Sale at retail"** or **"retail sale"** shall also include the providing of competitive telephone service to consumers.

(e) **"Sale at retail"** or **"retail sale"** shall also include the sale of canned software other than a sale to a person who presents a resale certificate under RCW 82.04.470, regardless of the method of delivery to the end user, but shall not include custom software or the customization of canned software.

(f) **"Sale at retail"** or **"retail sale"** shall also include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state, the State of Washington, or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind. (Public road construction)

(g) **"Sale at retail"** or **"retail sale"** shall also include the sale of or charge made for an extended warranty to a consumer. For purposes of this subsection, "extended warranty" means an agreement for a specified duration to perform the replacement or repair of tangible personal property at no additional charge or a reduced charge for tangible personal property, labor, or both, or to provide indemnification for the replacement or repair of tangible personal property, based on the occurrence of specified events. The term "extended warranty" does not include an agreement, otherwise meeting the definition of extended warranty in this subsection, if no separate charge is made for the agreement and the value of the agreement is included in the sales price of the tangible personal property covered by the agreement.

(h) **"Sale at retail"** or **"retail sale"** shall also include the sale of or charge made for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing, or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation (government contracting).

(i) **"Sale at retail" or "retail sale"** shall not include the sale of services or charges made for the clearing of land and the moving of earth of or for the United States, any instrumentality thereof, or a county or city housing authority. Nor shall the term include the sale of services or charges made for cleaning up for the United States, or its instrumentalities, radioactive waste and other byproducts of weapons production and nuclear research and development.

(j) **"Sale at retail" or "retail sale"** shall not include the sale of or charge made for labor and services rendered for environmental remedial action.

(36) **"Sale at wholesale" or "wholesale sale"** means any sale of tangible personal property which is not a retail sale, and any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property and retail services, if such charge is expressly defined as a retail sale or retail service when rendered to or for consumers. Sale at wholesale also includes the sale of telephone business to another telecommunications company as defined in RCW 80.04.010 for the purpose of resale, as contemplated by RCW 35.21.715.

(37) **"Services."** At such time as chapter 82.04 RCW defines **"services"**, that definition shall apply. Until such time as chapter 82.04 RCW shall define **"services"**, **"services"** means all business activities not defined elsewhere in this section.

(38) **"Software", "canned software," "custom software," "customization of canned software," "master copies," "retained rights."**

(a) **"Canned software"** means software that is created for sale to more than one (1) person. For purposes of this ordinance, canned software is deemed to be tangible personal property regardless of the method of delivery-tangible media (e.g., disk or installed on hardware) or intangible (e.g., electronically over telecommunications paths).

(b) **"Customer software"** means software created for a single person.

(c) **"Customization of canned software"** means any alteration, modification, or development of applications using or incorporating canned software to specific individualized requirements of a single person. Customization of canned software includes individualized configuration of software to work

with other software and computer hardware but does not include routine installation. Customization of canned software does not change the underlying character or taxability of the original canned software.

(d) **"Master copies"** of software means copies of software from which a software developer, author, inventor, publisher, licensor, sublicensor, or distributor makes copies for sale or license. The software encoded on a master copy and the media upon which the software resides are both ingredients of the master copy.

(e) **"Retained rights"** means any and all rights, including intellectual property rights such as those rights arising from copyrights, patents, and trade secret laws, that are owned or are held under contract or license by a software developer, author, inventor, publisher, licensor, sublicensor, or distributor.

(f) **"Software"** means any information, program, or routine, or any set of one (1) or more programs, routines, or collections of information used, or intended for use, to convey information that causes one or more computers or pieces of computer-related peripheral equipment, or any combination thereof, to perform a task or set of tasks. "Software" includes the associated documentation, materials, or ingredients regardless of the media upon which that documentation is provided, that describes the code and its use, operation, and maintenance and that typically is delivered with the code to the consumer. All software is classified as either canned or custom.

(39) **"Successor"** means any person to whom a taxpayer quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys, directly or indirectly, in bulk and not in the ordinary course of the taxpayer's business, any part of the materials, supplies, merchandise, inventory, fixtures, or equipment of the taxpayer. Any person obligated to fulfill the terms of a contract shall be deemed a successor to any contractor defaulting in the performance of any contract as to which such person is a surety or guarantor.

(40) **"Tax year"** or **"taxable year"** means the calendar year.

(41) **"Taxpayer"** means any "person", as herein defined, required to have a business license under this chapter or liable for the collection of any tax or fee under this chapter, or who engages in any business or who performs any act

for which a tax or fee is imposed by this chapter.

(42) **"Tuition fee"** includes library, laboratory, health service and other special fees, and amounts charged for room and board by an educational institution when the property or service for which such charges are made is furnished exclusively to the students or faculty of such institution. "Educational institution," as used in this section, means only those institutions created or generally accredited as such by the state and includes educational programs that such educational institution cosponsors with a non-profit organization, as defined by the Internal Revenue Code Section 501(c)(3), as hereafter amended, if such educational institution grants college credit for coursework successfully completed through the educational program, or an approved branch campus of a foreign degree-granting institution in compliance with Chapter 28B.90 RCW, and in accordance with RCW 82.04.4332 or defined as a degree-granting institution under RCW 28B.85.010(3) and accredited by an accrediting association recognized by the United States secretary of education, and offering to students an educational program of a general academic in nature or those institutions which are not operated for profit and which are privately endowed under a deed of trust to offer instruction in trade, industry, and agriculture, but not including specialty schools, business colleges, other trade schools, or similar institutions.

(43) **"Value proceeding or accruing"** means the consideration, whether money, credits, rights, or other, property expressed in terms of money, a person is entitled to receive or which is actually received or accrued. The term shall be applied, in each case, on a cash receipts or accrual basis according to which method of accounting is regularly employed in keeping the books of the taxpayer.

(44) **"Value of products."**

(a) The "value of products", including by-products, extracted or manufactured, shall be determined by the gross proceeds derived from the sale thereof whether such sale is at wholesale or at retail, to which shall be added all subsidies and bonuses received from the purchaser or from any other person with respect to the extraction, manufacture, or sale of such products or by-products by the seller.

(b) Where such products, including by-products, are extracted or manufactured for commercial or industrial use; and where such products, including by-products, are shipped, transported or transferred out of the City, or to another person, without prior sale or are sold under circumstances such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale; the value shall correspond as nearly as possible to the gross proceeds from sales in this state of similar products of like quality and character, and in similar quantities by other taxpayers, plus the amount of subsidies or bonuses ordinarily payable by the purchaser or by any third person with respect to the extraction, manufacture, or sale of such products. In the absence of sales of similar products as a guide to value, such value may be determined upon a cost basis. In such cases, there shall be included every item of cost attributable to the particular article or article extracted or manufactured, including direct and indirect overhead costs. The Director may prescribe rules for the purpose of ascertaining such values.

(c) Notwithstanding subsection (b) above, the value of a product manufactured or produced for purposes of serving as a prototype for the development of a new or improved product shall correspond to (a) the retail selling price of such new or improved product when first offered for sale; or (b) the value of materials incorporated into the prototype in cases in which the new or improved product is not offered for sale.

(45) **"Wholesaling"** means engaging in the activity of making sales at wholesale, and is reported under the wholesaling classification.

(46) **Chapter 82.32 RCW references.** Where provisions of Chapter 82.32 RCW are incorporated in section 8 of this ordinance, **"Department"** as used in RCW 82.32 shall refer to the **Finance Director** as defined in section 3 of this ordinance and **"warrant"** as used in RCW 82.32 shall mean **"citation or criminal complaint."**

**Sec. 4.** A new section is added to chapter 3.84 DMMC to read as follows:

**Administrative provisions - Registration/license certificates.** See chapter 5.04 DMMC.

**Sec. 5.** DMMC 3.84.130 and section 13 of Ordinance No. 1355 are amended to read as follows:

**Administrative provisions--When due and payable - Reporting periods - Monthly, quarterly, and annual returns - Threshold provisions or relief from filing requirements - Computing time periods - Failure to file returns.**

(1) Other than any annual license fee or registration fee assessed this chapter, the tax imposed by this chapter shall be due and payable in quarterly installments. At the Director's discretion, businesses may be assigned to a monthly or annual reporting period depending on the tax amount owing or type of tax. Tax payments are due on or before the last day of the next month following the end of the assigned reporting period covered by the return.

(2) Taxes shall be paid as provided in this section and accompanied by a return on forms as prescribed by the Director. The return shall be signed by the taxpayer personally or by a responsible officer or agent of the taxpayer. The individual signing the return shall swear or affirm that the information in the return is complete and true.

(3) Tax returns must be filed and returned by the due date whether or not any tax is owed.

(4) For purposes of the tax imposed by DMMC 3.84.060, *Imposition of the tax--Tax or fee levied*, and as codified in chapter 3.84 DMMC, any person whose value of products, gross proceeds of sales, or gross income of the business, subject to tax after all allowable deductions, is equal to or less than Fifty Thousand Dollars (\$50,000) in the current calendar year, shall file a return, declare no tax due on their return, and submit the return to the Director. The gross receipts and deduction amounts shall be entered on the tax return even though no tax may be due.

(5) A taxpayer that commences to engage in business activity shall file a return and pay the tax or fee for the portion of the reporting period during which the taxpayer is engaged in business activity.

(6) Except as otherwise specifically provided by any other provision of this section, in computing any period of days prescribed by this section the day of the act or event from which the designated period of time runs shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or City or Federal legal holiday, in which case the last

day of such period shall be the next succeeding day which is neither a Saturday, Sunday, or City or Federal legal holiday.

(7) If any taxpayer fails, neglects or refuses to make a return as and when required in this section, the Director is authorized to determine the amount of the tax or fees payable by obtaining facts and information upon which to base the Director's estimate of the tax or fees due. Such assessment shall be deemed prima facie correct and shall be the amount of tax owed to the City by the taxpayer. The Director shall notify the taxpayer by mail of the amount of tax so determined, together with any penalty, interest, and fees due; the total of such amounts shall thereupon become immediately due and payable.

**Sec. 6.** DMMC 3.84.180 and section 18 of Ordinance No. 1355 are amended to read as follows:

**Administrative provisions--Underpayment of tax, interest, or penalty - Interest.**

(1) If, upon examination of any returns, or from other information obtained by the Director, it appears that a tax or penalty less than that properly due has been paid, the Director shall assess the additional amount found to be due and shall add thereto interest on the tax only. The Director shall notify the person by mail of the additional amount, which shall become due and shall be paid within thirty (30) days from the date of the notice, or within such time as the Director may provide in writing.

**(2) Interest computation for shortages or delinquencies.**

(a) For tax periods after December 31, 2004 the Director shall compute interest in accordance with RCW 82.32.050 as it now exists or as it may be amended.

(b) If section 2 (a) is held to be invalid, then the provisions of RCW 82.32.050 existing at the effective date of this ordinance shall apply.

**Sec. 7.** DMMC 3.84.200 and section 20 of Ordinance No. 1355 are amended to read as follows:

**Administrative provisions--Overpayment of tax, penalty, or interest - Credit or refund - Interest rate - Statute of limitations.**

(1) If, upon receipt of an application for a refund, or during an audit or examination of

the taxpayer's records and tax returns, the Director determines that the amount of tax, penalty, or interest paid is in excess of that properly due, the excess amount shall be credited to the taxpayer's account or shall be refunded to the taxpayer. Except as provided in subsection (2) of this section, no refund or credit shall be made for taxes, penalties, or interest paid more than four (4) years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

(2) The execution of a written waiver shall extend the time for applying for, or making a refund or credit of any taxes paid during, or attributable to, the years covered by the waiver if, prior to the expiration of the waiver period, an application for refund of such taxes is made by the taxpayer or the Director discovers that a refund or credit is due.

(3) Refunds shall be made by means of vouchers approved by the Director and by the issuance of a City check or warrants drawn upon and payable from such funds as the City may provide.

(4) Any final judgment for which a recovery is granted by any court of competent jurisdiction for tax, penalties, interest, or costs paid by any person shall be paid in the same manner, as provided in subsection 3 of this section, upon the filing with the Director a certified copy of the order or judgment of the court.

**(5) Interest computation for refunds or credits.**

(a) For tax periods after December 31, 2004 the Director shall compute interest on refunds or credits of amounts paid or other recovery allowed a taxpayer in accordance with RCW 82.32.060 as it now exists or as it may be amended.

(b) If section 7(5)(a) is held to be invalid, then the provisions of RCW 82.32.060 existing at the effective date of this ordinance shall apply.

**Sec. 8. Administrative provisions--Late payment - Disregard of written instructions - Evasion - Penalties.** DMMC 3.84.210 and section 21 of Ordinance No. 1355 are amended to read as follows:

(1) If payment of any tax due on a return to be filed by a taxpayer is not received by the Director by the due date, the Director shall add a

penalty in accordance with RCW 82.32.090(1), as it now exists or as it may be amended.

(2) If the Director determines that any tax has been substantially underpaid as defined in RCW 82.32.090(2), there shall be added a penalty in accordance with RCW 82.32.090(2), as it now exists or as it may be amended.

(3) If a citation or criminal complaint is issued by the Director for the collection of taxes, fees, assessments, interest or penalties, there shall be added thereto a penalty in accordance with RCW 82.32.090(3), as it now exists or as it may be amended.

(4) If the Director finds that a person has engaged in any business or performed any act upon which a tax is imposed under this title and that person has not obtained from the Director a license as required by chapter 5.04 of the DMMC, the Director shall impose a penalty in accordance with RCW 82.32.090(4), as it now exists or as it may be amended. No penalty shall be imposed under this subsection (4) if the person who has engaged in business without a license obtains a license prior to being notified by the Director of the need to be licensed.

(5) If the Director determines that all or any part of a deficiency resulted from the taxpayer's failure to follow specific written tax reporting instructions, there shall be assessed a penalty in accordance with RCW 82.32.090(5), as it now exists or as it may be amended.

(6) If the Director finds that all or any part of the deficiency resulted from an intent to evade the tax payable, the Director shall assess a penalty in accordance with RCW 82.32.090(6), as it now exists or as it may be amended.

(7) The penalties imposed under subsections (1) through (5) above can each be imposed on the same tax found to be due. This subsection does not prohibit or restrict the application of other penalties authorized by law.

(8) The Director shall not impose both the evasion penalty and the penalty for disregarding specific written instructions on the same tax found to be due.

(9) For the purposes of this section, "return" means any document a person is required by the City of Des Moines to file to satisfy or establish a tax or fee obligation that is

administered or collected by the City, and that has a statutorily defined due date.

(10) If incorporation into the DMMC of future changes to RCW 82.32.090 is deemed invalid, then the provisions of RCW 82.32.090 existing at the time this ordinance is effective shall apply.

**Sec. 9.** DMMC 3.84.220 and section 23 of Ordinance No. 1355 are amended to read as follows:

**Administrative provisions--Cancellation of penalties.**

(1) The Director may cancel any penalties imposed under subsection 8(1) of this ordinance if the taxpayer shows that its failure to timely file or pay the tax was due to reasonable cause and not willful neglect. Willful neglect is presumed unless the taxpayer shows that it exercised ordinary business care and prudence in making arrangements to file the return and pay the tax but was, nevertheless, due to circumstances beyond the taxpayer's control, unable to file or pay by the due date. The Director has no authority to cancel any other penalties or to cancel penalties for any other reason except as provided in section 9(3) of this ordinance.

(2) A request for cancellation of penalties must be received by the Director within 30 days after the date the Department mails the notice that the penalties are due. The request must be in writing and contain competent proof of all pertinent facts supporting a reasonable cause determination. In all cases the burden of proving the facts rests upon the taxpayer.

(3) The Director may cancel the penalties in section 8(1) of this ordinance one time if a person:

(a) Is not currently licensed and filing returns,

(b) Was unaware of its responsibility to file and pay tax, and

(c) Obtained business licenses and filed past due tax returns within 30 days after being notified by the Department.

(4) The Director shall not cancel any interest charged upon amounts due.

**Sec. 10.** A new section is added to chapter 3.84 DMMC to read as follows:

**Administrative provisions--Review of administrative appeal decision.** The taxpayer or the City may obtain review of the administrative decision as set forth in chapter 18.94 DMMC.

**Sec. 11.** A new section is added to DMMC 3.84 to read as follows:

**Public disclosure - Confidentiality - Information sharing.**

(1) **Definitions.** For purposes of this section, unless a different meaning is clearly established by context, the following definitions apply:

(a) **"Disclose"** means to make known to any person in any manner.

(b) **"Tax information"** means:

(i) A taxpayer's identity;

(ii) The nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemption, credits, assets, liability, net worth, tax liability deficiencies, over assessments, or tax payments, whether taken from the taxpayer's books and records or any other source;

(iii) Whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing; or

(iv) Other data received by, recorded by, prepared by, or provided to the Director with respect to a taxpayer.

**PROVIDED**, that tax information shall not include data, material, or documents that do not disclose information related to a specific or identifiable taxpayer.

(2) Tax returns and information may be **"public records"** as that term is defined in RCW 42.17.020. The Director shall not disclose tax information if disclosure would violate RCW Chapter 42.17 or any other law prohibiting disclosure.

(3) Tax information may be disclosed to the following:

(a) The Mayor, City Manager, members of the City Council, City Attorney, City Clerk, or their authorized designees, for official purposes;

(b) Any agency or officer of the United States of America, the State of Washington, or a tax department of any state, county, city or town, provided that the agency or officer grants substantially similar privileges to the City, and further provided that the agency or officer shall not further disclose the tax information except as authorized in this section;

(c) The taxpayer to whom it pertains or to such



**Sec. 14. Effective date.** This ordinance shall take effect and be in full force five (5) days after its passage, approval, and publication in accordance with law.

**PASSED BY** the City Council of the City of Des Moines this 29th day of November, 2007 and signed in authentication thereof this 29th day of November, 2007.

  
M A Y O R

APPROVED AS TO FORM:

  
\_\_\_\_\_  
City Attorney

ATTEST:

  
\_\_\_\_\_  
City Clerk

Published: December 7, 2007

LEGAL NOTICE  
SUMMARY OF ADOPTED ORDINANCE  
CITY OF DES MOINES

ORDINANCE NO. 1417, Adopted November 29, 2007.

DESCRIPTION OF MAIN POINTS OF THE ORDINANCE:

This ordinance relates to taxes, amends chapter 3.84 of the Des Moines Municipal Code, establishes new sections, provides for business and occupation tax administrative provisions, prescribes penalties, provides a required referendum procedure, and codifies new and amended sections in chapter 3.84 DMMC.

The full text of the ordinance will be mailed without cost upon request.

Denis Staab  
City Clerk

Published: December 7, 2007