EXHIBIT A

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DoorDash, Inc., Petitioner, vs. City of Anderson, Respondent.	Docket No. 24-ALJ-30-0067-CC **ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court ("Court" or "ALC") pursuant to a Request for a Contested Case Hearing filed by Petitioner DoorDash, Inc. ("Petitioner" or "DoorDash"). The City of Anderson ("Respondent" or "City") issued a business license tax assessment to DoorDash for 2022 and 2023. DoorDash challenges those assessments and penalties and seeks a refund of the payments made under protest.[1] DoorDash asserts it does not "engage in business" in the City because it merely facilitates transactions through a platform operating outside of the City, and, therefore, is not subject the City's business license tax. Additionally, DoorDash asserts the assessments violate the Dormant Commerce Clause[2] of the U.S. Constitution.

Petitioner filed its Request for a Contested Case Hearing on March 21, 2024. This matter was assigned to the undersigned on March 28, 2024.[3] The Court issued an Order for Prehearing Statements on April 8, 2024 and both parties subsequently submitted prehearing statements. DoorDash listed two issues for determination: 1) whether DoorDash was engaged in business within the City such that it was subject to the City's business license tax during the assessment period and 2) whether the assessment against DoorDash violates the Commerce Clause of the U.S. Constitution. The City characterized the issue before the Court to be "whether or not DoorDash, Inc. is subject to the Business License Tax of the City of Anderson." Pursuant to a Consent

[1] Petitioner apparently made payment on the assessment under protest pursuant to S.C. Code Ann. §6-1-410(B) (Supp. 2024).
[2] Article I, Section 8.
[3] The Court has jurisdiction of this matter pursuant to S.C. Code Ann. §§ 1-23-600 (Supp. 2024) and 6-1-410(C) (Supp. 2024).

Scheduling Order the parties both filed motions for summary judgment on September 20, 2024 and each party filed a response in opposition to the other's motion on November 4, 2024. On November 8, 2024, the Court noticed a hearing on the motions for December 11, 2024. A hearing on both motions was conducted on December 11, 2024. Counsel for both parties attended the hearing. No objections were presented by either party as to the Court's consideration of the exhibits submitted with the motions and responses.

DISCUSSION

The Court will address the parties' motions for summary judgment below.

I. Summary Judgment Standard

The South Carolina Rules of Civil Procedure may be applied in the Administrative Law Court at the discretion of the Administrative Law Judge. SCALC Rule 68. The South Carolina Rules of Civil Procedure in turn authorize the entry of summary judgment pursuant to Rule 56. The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. *Singleton v. Sherer,* 377 S.C. 185, 198, 659 S.E.2d 196, 203 (Ct.App. 2008).

Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. *Madison ex rel. Bryant v. Babcock Center, Inc.* 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006), *rehearing denied.* Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Middleborough Horizontal Prop. Regime Council of Co–Owners v. Montedison S.p.A.,* 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct.App.1995) (citing *Baugus v. Wessinger,* 303 S.C. 412, 401 S.E.2d 169 (1991)). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Nelson v. Charleston County Parks & Recreation Comm'n,* 362 S.C. 1, 4, 605 S.E.2d 744, 746 (Ct.App.2004).

However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ summary judgment should be granted. *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). The existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment. *Kitchen Planners, LLC v. Freeman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is

entitled to judgment as a matter of law. Rule 56(c), SCRCP. The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Knight v. Austin*, 396 S.C. 518, 522, 722 S.E.2d 802, 804 (2012).

Here, the parties have filed cross motions for summary judgment. When cross motions are filed, the parties concede that the issues before the court can be decided as a matter of law. *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011); *Mead v. Beaufort Cnty. Assessor*, 419 S.C. 125, 130, 796 S.E.2d 165, 168 (Ct. App. 2016) (explaining that when cross motions for summary judgment have been filed, the court assumes there is no evidence to consider which has not already been filed by the parties).

II. Statement of Undisputed Facts

The following facts are therefore not disputed by the parties:

DoorDash operates an online platform[4] that facilitates the purchase and delivery of goods from participating restaurants and other merchants.[5] DoorDash manages[6] its platform from outside of the City of Anderson and has no place of business or employees within the City. DoorDash has agreements with restaurants and other merchants in the City of Anderson and the food and goods available from these restaurants and merchants are advertised through the platform.[7] Customers can order and pay for goods from participating merchants through the platform.[8]

DoorDash also has agreements with local businesses or individuals, referred to as "Dashers," that provide delivery services between the merchant and customer based on communications received through DoorDash's "Dasher App."[9] Dashers are designated as independent contractors by the parties to the Dasher contract. If a customer requests delivery, the platform identifies a Dasher to make the delivery. Dashers may accept or decline a specific delivery. When a customer orders through the platform, DoorDash collects payment from the

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[4] The DoorDash platform may be accessed via traditional computer and internet browser as well as through a dedicated software application ("App") available for use on smart phones and tablets.

[5] DoorDash acknowledges in its motion that other merchants included convenience, drug, and grocery stores.

[6] The parties use various terms to describe DoorDash's operation, management, conduct, direction, *etc.* of the platform.

[7] The parties did not submit to the Court the contract utilized with merchants although DoorDash did submit the template contracts for customers and independent contractor couriers, *i.e.* Dashers.

[8] As an exhibit to its motion, DoorDash submitted the "Consumer Terms and Conditions – United States (Including Puerto Rico)(effective April 28, 2023) and noted in the motion that "[t]he attached terms are identical in all material respects to the terms in effect throughout the Assessment Period."

[9] As an exhibit to its motion, DoorDash also submitted the "Independent Contractor Agreement, DoorDash Contractors")(last updated April 14, 2023) and noted in the motion that "[t]he attached agreement terms are identical in all material respects to the terms in effect throughout the Assessment Period."

Customer that is transmitted to the participating business, minus a commission for DoorDash, the Dasher, and retains certain fees for use of the platform.

DoorDash provided information to the City showing that it had agreements with 94 restaurants within the City and that DoorDash received gross income of $1,940,388.10 in 2022 and $2,504,028.90 in 2023 from restaurant transactions within the City.[10] The City served a notice of assessment on DoorDash on April 7, 2023 assessing $14,290.80 in business license tax and $4,130.70 in penalties for, collectively, 2022 and 2023. DoorDash submitted a letter on May 4, 2023 requesting an adjustment to the assessment. The parties held an informal conference on May 16, 2023 with the City being represented by its business license official. The City denied the request for adjustment. DoorDash then appealed the final assessment, again on the basis that DoorDash does not conduct business within the City, and the hearing was conducted on September 7, 2023 before the City Manager, serving as Hearing Officer. The City's Decision on Appeal was issued on February 21, 2024 and it denied the relief sought by DoorDash and upheld the assessment decision below.

III. Discussion

The parties have filed cross motions for summary judgment. Generally, DoorDash argues that it is entitled to summary judgment determining: (1) it is not subject to business license tax because it is not doing business within the City; and (2) the City's attempt to impose a tax on it violates the Dormant Commerce Clause. The City's motion for summary judgment argues exactly the opposite – that DoorDash does business within the City as a matter of law, making DoorDash subject to the tax, and that it has constitutionally exercised its taxing authority. Naturally, the specific legal arguments made by the parties overlap. This Order will therefore largely address the arguments presented by issue rather than attempt to address the motions separately.

A. Doing Business Within the City

DoorDash's argument begins with an overview of the statutory scheme and relevant ordinance. Because such an overview is helpful to the legal analysis herein, a discussion of the pertinent authorities is set forth below.

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[10] The May 17, 2023 Notice of Final Assessment states: "Doordash does not dispute the amount of the assessment. Nor does DoorDash dispute the method by which the assessment was calculated using the monthly hospitality figures provided by DoorDash to determine the estimated commission received from 94 restaurant partners located in the City. DoorDash maintains partnerships with other types of retail establishments; commissions received from those partnerships were not included in the assessment calculation."

(1) Legislative Overview

Section 5-7-30 authorizes the City to levy a business license tax on gross income. It provides in relevant part that:

> Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including . . . [the power to] levy a business license tax on gross income.

S.C. Code Ann. § 5-7-30 (Supp. 2024). To this end, the Legislature enacted the Business License Tax Standardization Act (the "Act") which became effective January 1, 2022. S.C. Code Ann. § 6-1-400, *et seq*. (Supp. 2024).

As its name suggests, the Act standardized many requirements of business licenses, including a requirement that municipalities accept the same standard business license application, adopt a standard business license class schedule, use standard software to be developed by the State to allow for tax payment, and, most importantly here, use gross income as the basis for its assessment of business license taxes. *Id.* The Act defines "gross income" as:

> (a) "Gross income" means the gross receipts or gross revenue of a business, received or accrued, for one calendar or fiscal year collected or to be collected from business done within a taxing jurisdiction. For taxing jurisdictions in which the person or business has a domicile, business done within that taxing jurisdiction shall include all gross receipts or revenue received or accrued by such person or business, excepting income earned outside of the taxing jurisdiction on which a license tax is paid by the person or business to some other taxing jurisdiction and fully reported to the taxing jurisdiction. For taxing jurisdictions in which the person or business does not have a domicile, business done within that taxing jurisdiction shall include only gross receipts or revenue received or accrued within such taxing jurisdiction. In all cases, if the taxpayer pays a business license tax to another county or municipality, then the taxpayer's gross income for the purpose of computing the tax within the taxing jurisdiction must be reduced by the amount of gross income taxed in the other county or municipality.

S.C. Code Ann. § 6-1-400(E)(1)(a).

DoorDash acknowledges that the City's ordinance[11] "complies with the requirements of the Act, including adopting the uniform definition of 'gross income.'"[12] Anderson's ordinance generally mandates that:

> [e]very person engaged or intending to engage in any business, calling, occupation, profession, or activity engaged in with the object of gain, benefit, or advantage, in whole or in part within the limits of the City of Anderson, South Carolina, is required to pay an annual license tax for the privilege of doing business and obtain a business license as herein provided

City of Anderson, S.C., Code § 26-36, *et seq*. (Nov 8, 2021, as amended). It also contains the following pertinent definitions:

> *Business* means any business, calling, occupation, profession, or activity engaged in with the object of gain, benefit, or advantage, either directly or indirectly.
>
> *Domicile* means a principal place from which the trade or business of a licensee is conducted, directed, or managed. For purposes of this article, a licensee may be deemed to have more than one domicile.
>
> *Gross income* means the gross receipts or gross revenue of a business, received or accrued, for one calendar or fiscal year collected or to be collected from business done within the municipality. If the licensee has a domicile within the municipality, business done within the municipality shall include all gross receipts or revenue received or accrued by such licensee. If the licensee does not have a domicile within the municipality, business done within the municipality shall include only gross receipts or revenue received or accrued within the municipality. In all cases, if the licensee pays a business license tax to another county or municipality, then the licensee's gross income for the purpose of computing the tax within the municipality must be reduced by the

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[11] Absent specific statutory authorization, state courts cannot take judicial notice of municipal ordinances which must be presented as documentary evidence. *See Robinson v. Brown*, 260 S.C. 104, 107, 194 S.E.2d 249, 250 (1973)(discussing presentation of ordinances as evidence); *City Council of Charleston v. Ashley Phosphate Co*., 34 S.C. 541, 13 S.E. 845 (1891)(discussing dismissal of action for enforcement of ordinance based on deficient pleading of ordinances); *Kincaid v. Landing Dev. Corp*., 289 S.C. 89, 92-93, 344 S.E.2d 869, 872 (Ct. App. 1986)("local ordinances are not subject to judicial notice"). Here, the City submitted the ordinance as an exhibit with its motion, both parties relied on the ordinance for their arguments, and DoorDash raised no objection to it.

[12] While the South Carolina Business License Tax Standardization Act and the City's ordinance are substantially similar and the parties present much discussion of the statute, the operative authority underlying the dispute in this case is the ordinance. Furthermore, as reflected here, DoorDash does not assert a defect in the ordinance relative to the statute.

> amount of revenues or receipts taxed in the other county or municipality and fully reported to the municipality. Gross income for business license tax purposes shall not include taxes collected for a governmental entity, escrow funds, or funds that are the property of a third party. The value of bartered goods or trade-in merchandise shall be included in gross income. The gross receipts or gross revenues for business license purposes may be verified by inspection of returns and reports filed with the Internal Revenue Service, the South Carolina Department of Revenue, the South Carolina Department of Insurance, or other government agencies ...
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> *Person* means any individual, firm, partnership, limited liability partnership, limited liability company, cooperative non-profit membership, corporation, joint venture, association, estate, trust, business trust, receiver, syndicate, holding company, or other group or combination acting as a unit, in the singular or plural, and the agent or employee having charge or control of a business in the absence of the principal.

City of Anderson, S.C., Code § 26-37, *et seq*. (Nov 8, 2021, as amended).

(2) DoorDash Arguments

DoorDash argues that the City is prohibited from levying a business license tax on e-commerce entities which, like DoorDash, lack a physical presence within the City. Stated differently, DoorDash contends that a business license tax cannot be levied on those who are not physically present within the City. DoorDash bases its argument on the following enactments: (1) the definition of gross income found in the Act, which provides that gross income means the gross receipts or gross revenue of a business, received or accrued, for one calendar or fiscal year collected or to be collected "from business done within a taxing jurisdiction"; (2) Anderson's general business license ordinance, which provides that a business license tax is due from those doing business "in whole or in part within the limits of the City of Anderson"; and (3) Anderson's definition of gross income, which mirrors the language of the Act. S.C. Code Ann. § 6-1-400(E)(1)(a); City of Anderson, S.C., Code §§ 26-36 and 26-37.

DoorDash asserts that South Carolina authorities have uniformly construed such language to require physical presence as a prerequisite to taxation. Citing, *Pee Dee Chair, Co. v. Camden*, 165 S.C. 86, 162 S.E. 771 (1932), DoorDash states "'isolated incidental or casual' delivery by the business, without evidence that the business intended to engage in more deliveries in the city, was not sufficient to constitute a taxable 'business' in the city." It next cites *Triplett v. City of Chester*,

209 S.C. 455, 462, 40 S.E.2d 684, 687 (1946) for the proposition that the physical presence of the company's equipment and employees within the city was foundational for the court to find the business license tax applicable. Finally, DoorDash borrows from *Town of Hilton Head Island v. Kigre, Inc.*, 408 S.C. 647, 760 S.E.2d 103 (2014), to assert that the ability to impose a business license tax is based upon manufacturing activity within city limits rather than a business's receipt of income or sales of its products in interstate commerce.

DoorDash states that the "legal standard at issue for doing business within a city requires a physical presence and that there is no support in South Carolina law for the proposition that deriving revenue from the operation of a Platform wholly outside of the state constitutes doing business 'within the municipality' for purposes of the business license tax." DoorDash invites the Court's consideration of a July 26, 2023 opinion from the South Carolina Attorney General's Office discussing a car-sharing platform, Turo, Inc. and the Myrtle Beach business license tax. Op. Att'y Gen., 2023 WL 4918024. At oral argument, DoorDash leaned heavily on this opinion for its discussion suggesting Turo's peer-to-peer car sharing transactions may be found by a court to not be "doing business" in the City of Myrtle Beach.

DoorDash claims the undisputed facts show that it is not physically present within the City of Anderson. It declares that "[t] he business of DoorDash is providing the Platform, which connects customers, restaurants, and courtiers to facilitate transactions" and that "[e]very part of that business is directed from DoorDash's San Francisco headquarters or other locations where DoorDash has employees managing the Platform, none of which are in the City." According to DoorDash, "[e]very facilitation service that DoorDash provides that earns revenue occurs through the Platform, and DoorDash performs these services completely outside of the City." DoorDash summarizes: "It does not have an office in the City, does not maintain any vehicles in the City, does not provide any services in the City, does not employ any salespeople in the City, and does not otherwise operate in the City." Finally, it claims there are no gross receipts subject to the tax because "[a]ll business activities taking place within the City related to the transactions that DoorDash facilitates are performed by *other people* - i.e., restaurants who sell food from their locations within the City, and independently contracted couriers who deliver goods to customers within the City." (emphasis in original).

(3) City of Anderson Arguments

The City's motion is largely structured in counterpoint to that of DoorDash. The City asserts that physical presence is not a requirement for the imposition of a business license tax, and that, even if a physical presence were required, DoorDash is physically present in the City of Anderson. To support its position that a physical presence is not required, the City notes that its ordinance, like the Act, defines the term "gross income" to include receipts from businesses domiciled both within and without the City of Anderson. Additionally, the ordinance contains specific definitions of the terms business, domicile and person which the City asserts support its position. The City also quotes section 26-41(b): "[n]o person shall be exempt from the requirements of the ordinance by reason of the lack of an established place of business within the municipality, unless exempted by state or federal law." According to the City, caselaw has not established physical presence of a business in the taxing jurisdiction is required for a business license tax but actually recognizes continuous or habitual business activity or the intent for such is deemed doing business. *See Wrenn v. City of Hanahan*, 335 S.C. 26, 515 S.E.2d 521 (1999); *Triplett v. City of Chester*, 209 S.C. 455, 40 S.E.2d 684 (1946); *Crosswell & Co., Inc. v. Town of Bishopville*, 172 S.C. 26, 172 S.E. 698 (1934); *Pee Dee Chair, Co. v. City of Camden*, 165 S.C. 86, 162 S.E. 771 (1932). Finally, the City looks to the South Carolina Sales and Use Tax Act, modified after *Wayfair*, and the Act's definition of "marketplace facilitator" to demonstrate the economic nexus between DoorDash and the City.

To support its argument that, even if a physical presence is required, DoorDash is physically present, the City asserts that the actions of both employees *and* independent contractors are sufficient to establish that an entity is "doing business."[13] *See M.B. Kahn Const. Co, Inc. v. Three Rivers Bank & Trust Co.*, 354 S.C. 412, 581 S.E.2d 481 (2003). As the City states, "Through its operation of an online platform, contracts with local restaurants and merchants, and utilization of Dashers inside the City's municipal limits, DoorDash earned a gross income of $1,940, 388.00 for 2022 and $2,504,028.90 for 2023."

In response, DoorDash repeats its argument that the legislative provisions of "within the limits of the City" and "business done within a taxing jurisdiction" require a physical presence. DoorDash accuses the City of confusing the terms "domicile" and "physical presence." DoorDash

[13] At oral argument, the City conceded that Dashers are independent contractors.

attempts to minimize the importance of the ordinance's reference to taxation of entities which are not domiciled in the City by stating that "[t]his provision says nothing about imposing tax on businesses that lack a physical presence in the City."

Turning to caselaw, DoorDash claims "each of the [cases cited by the City] actually show that South Carolina courts require a business to be habitually engaging in activity physically within a jurisdiction for it to be subject to a city's business license tax. Each of these authorities support DoorDash." DoorDash then reviews *Pee Dee Chair Co., Croswell*, *Wrenn,* and *Triplett* as well as the Attorney General opinions referenced in the City's motion. DoorDash points to *Kigre* for support in asserting "engaging in business" requires activity by the business to be physically within the taxing jurisdiction, as distinguished from the location of the customers or "the third parties with whom it contracts." DoorDash then turns to challenge the City's claim for deference in interpretation with a counter principle of tax laws being construed in favor of the taxpayer, citing *Alltel Commc'ns, Inc. v. S.C. Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869 (2012).

For the reasons discussed below, the Court agrees with the City. The Court concludes both that the City's ordinance does not require a physical presence and that, even if a physical presence is required, that requirement is satisfied. It is the opinion of the Court that DoorDash is doing business in the City for the purposes of a business license tax.[14]

Municipalities are authorized by statute to levy a business license tax on gross income. S.C. Code Ann. § 5-7-30 (Supp. 2024)[15]; *Olds v. City of Goose Creek*, 424 S.C. 240, 246, 818 S.E.2d

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[14] The phrase "doing business" has many applications in law which have different standards, such as jurisdictional determinations, domestication statutes, and, as here, taxes. *See generally Troy H. Cribbs & Sons, Inc. v. Cliffstar Corp.,* 273 S.C. 623, 624, 258 S.E.2d 108, 109 (1979) ("No universal formula has been, or is likely to be, devised for determining what constitutes 'doing business' by a foreign corporation with a state in such sense as to subject it to the jurisdiction of the courts of that state."); *Jacobs v. Assoc. of Independent Colleges and Schools*, 265 S.C. 459, 467-68, 219 S.E.2d 837, 840 (1975) (discussing distinction between "doing business" for domestication statutes versus in personam jurisdiction); 18A Fletcher Cyc. Corp. § 8804.10 ("It is generally agreed that subjecting a foreign corporation to a state's taxation statute requires less activity within a state than that required to subject a foreign corporation to a state's qualification statute").

[15] "*Each municipality of the State*, in addition to the powers conferred to its specific form of government, *may enact* regulations, resolutions, and *ordinances, not inconsistent with the Constitution and general law of this State*, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it, *including the authority to ... levy a business license tax on gross income*, but a wholesaler delivering goods to retailers in a municipality is not subject to the business license tax unless he maintains within the corporate limits of the municipality a warehouse or mercantile establishment for the distribution of wholesale goods; and a business engaged in making loans secured by real estate is not subject to the business license tax unless it has premises located within the corporate limits of the municipality and no entity which is exempt from the license tax under another law nor a subsidiary or affiliate of an

5, 9 (2018) (recognizing municipal authority under section 5-7-30 to levy a business license tax on gross income "so long as the ordinances are not 'inconsistent with the Constitution and general law of this State.'"). Furthermore, the recently adopted South Carolina Business License Standardization Act is general law of the State which governs the manner in which business license taxes may be assessed. The Act clearly states that: "[u]nless otherwise specifically provided for by state law, a county or municipality that levies a business license tax must comply with the provisions of this article." S.C. Code Ann. § 6-1-400(A)(1).

To achieve that goal of standardization, the Act adopted several definitions and operational mandates such as uniform taxing periods, state-wide business license application template, taxing formulations, utilization of a state-hosted online tax calculation, reporting, and payment portal, and assessment and appeal procedures. As discussed above, the term "gross income" is defined in the Act.[16] DoorDash conceded in its Motion that "[t]he City's ordinance complies with the requirements of the Act, including adopting the uniform definition of 'gross income.'"

Therefore, the Court now turns to the City's ordinance. Following the Act, the City adopted Ordinance 21-20 on November 8, 2021. The ordinance provides that after January 1, 2022:

> Every person engaged or intending to engage in any business, calling, occupation, profession, or activity engaged in with the object of gain, benefit, or advantage, in whole or in part within the limits of the City of Anderson, South Carolina, is required to pay an annual license tax for the privilege of doing business and obtain a business license as herein provided.

City of Anderson, S.C., Code § 26-36 (Nov 8, 2021, as amended)."[17] The language of this ordinance clearly states that in order for DoorDash to be required to pay an annual business license tax it must: (1) engage in business; (2) in whole or in part within the limits of the City of Anderson.

The Court has little doubt that DoorDash has engaged in business. "Business" is defined as any business, calling, occupation, profession, or activity engaged in with the object of gain,

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exempt entity is subject to the business license tax; and a business engaged in operating a professional sports team as defined in Section 12-6-3360(M)(17) is not subject to the business license tax;" (emphasis added).

[16] The Act also adopted separate definitions for "gross income for agents," "gross income for insurance companies," "gross income for manufactures of goods or materials with a location in a taxing jurisdiction." S.C. Code Ann. § 6-1-400(E)(1)(b)-(d).

[17] The ordinance also adopted additional definitions for the terms "business," "domicile," "gross income" and "person. City of Anderson, S.C., Code § 26-37 (Nov 8, 2021, as amended). These definitions are quoted *supra.* The ordinance's definition of gross income mirrors the definition set forth in the Act.

benefit, or advantage, either directly or indirectly. The facts establish without doubt that DoorDash is providing its service with the object of gain. DoorDash contracted with 94 restaurants plus other merchants in the City and for these restaurants alone, DoorDash reported gross income of $1,940,388.10 in 2022 and $2,504,028.90 in 2023 in the City of Anderson.

The DoorDash Consumer Terms and Conditions agreement represented by DoorDash to have been in effect in 2022 and 2023 between DoorDash and its customers provides, in part:

- "You hereby grant DoorDash (including DoorDash's service providers) a perpetual, irrevocable, transferable, fully paid, royalty-free, non-exclusive, worldwide, fully sublicensable right and license to use, copy, display, publish, modify, remove, publicly perform, translate, create derivative works from, distribute, and/or otherwise use the User Content in connection with DoorDash's business and in all forms now known or hereafter invented (collectively, "Uses"), without notification to an/or approval by you. You further grant DoorDash a license to use your username, first name and last initial, profile photo (if available), and/or other User profile information ... . In the interest of clarity, the license granted to DoorDash herein shall survive termination of the Services or your account." (Paragraph 8(a))

- "pricing may change at any time, in the discretion of DoorDash or the Merchant (depending on which party sets the given price) … DoorDash reserves the right to charge you additional amounts … All Payments will be processed by DoorDash and/or its payment processor … This includes our right to charge any payment method." (Paragraph 12(a))

- "DoorDash may use strikethrough pricing for certain items … and DoorDash's strikethrough price therefor may represent the price that DoorDash, a Merchant, or a third party offered the item for sale for some period of time." (Paragraph 12(b))

- "DoorDash, at its sole discretion, may make promotional offers with different features and different pricing to any User. … are subject to the specific terms that DoorDash establishes for such promotional offer … . DoorDash reserve the right to modify or cancel an offer at any time. … Credits issued to a User's DoorDash or Caviar account may only be redeemed through that respective brand's Services." (Paragraph 12(d))

- "DoorDash may change the fees that DoorDash charges you as we deem necessary or appropriate for our business, including but not limited to Delivery Fees, Service Fees, Small Order Fees,

Expanded Range Fees, Regulatory Response Fees, and Surge Fees. DoorDash may offer different pricing to customers based on a variety of factors, including but not limited to geographic areas or usage." (Paragraph 12(e))

- "Under the referral program ("Referral Program"), DoorDash offers its registered Users in good standing the opportunity to earn gratuitous DoorDash credits as promotional rewards by inviting their eligible friends to register as new DoorDash Users …" (Paragraph 12(f))

- "DoorDash may offer customers the opportunity to purchase DashPass gift subscriptions …" (Paragraph 13)

- "To the extent permitted by law, you agree to indemnify and hold harmless DoorDash … . You agree that the provisions of this Section 18 will survive any termination of your account, this Agreement, or your access to the Technology and/or Services." (Paragraph 18).

The DoorDash Independent Contractor Agreement represented by DoorDash to have been in effect in 2022 and 2023 between DoorDash and its Dashers provides, in part:

- "However, once a Contracted Service Opportunity is accepted, Contractor shall be contractually bound to complete the Contracted Services in accordance with all Consumer and Merchant specifications and the terms laid out in this Agreement." (Paragraph 1.2)

- "Notwithstanding the foregoing, Contractor agrees to maintain both a customer rating and a completion rate found here as of the date this Agreement becomes effective." (Paragraph 3.4)

- "By providing Content, in whatever form and through whatever means, Contractor agrees to the DoorDash Content and Likeness Consent Release and grants DoorDash a non-exclusive, worldwide, royalty-free, irrevocable, perpetual, sub-licensable and transferable license to copy, modify, prepare derivative works of, distribute, publish and otherwise exploit, that Content without limitation." (Paragraph 4)

- "For purchases that involve Consumer or Merchant payment via the DoorDash Platform, DoorDash will process payments made by such Consumers or Merchants and transmit applicable payment for the Contracted Services to Contractor." (Paragraph 7.3)

This case turns instead on the second requirement of the City's ordinance – that DoorDash do its business "in whole or in part" within the City. The Court is called upon to determine whether the ordinance's reference to doing business in whole or in part within the City requires DoorDash or its employees to be physically present in the City to be subject to the business license tax.

This determination is one of statutory construction. *See Multi-Cinema, Ltd. v. S.C. Tax Comm'n*, 292 S.C. 411, 413, 357 S.E.2d 6, 7 (1987) ("The usual rules of statutory construction apply to the interpretation of tax statutes"). In performing this task, the Court is charged as follows:

> The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the [legislative body]. If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning.

Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001). "[L]anguage must also be read in a sense which 'harmonizes with its subject matter and accords with its general purpose.'" *Mun. Ass'n of S.C. v. AT&T Communications of Southern States, Inc.*, 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (internal quotations omitted).

The City asserts that the Court should give deference to the City's interpretation of its own ordinance. DoorDash claims no deference is warranted and that any substantial doubt in the application of the tax should be construed in favor of the taxpayer.[18] *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012) (acknowledging the "usual rules of statutory construction apply to the interpretation of tax statutes" subject to "the settled principle that any substantial doubt in the application of a tax statute must be resolved in favor of the taxpayer").

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[18] Ordinances may be rooted in police or taxing powers depending on the underlying authority and function of the ordinance. *See State v. Life Ins. Co. of Georgia,* 254 S.C. 286, 291-92, 175 S.E.2d 203, 206 (1970); *State v. Columbia*, 6 S.C. 1, 6 (1874) (discussing business license police power and taxation characteristics). "The business license required by this article is for the purpose of providing such regulation as may be required for the business subject thereto and for the purpose of raising revenue for the general fund through a privilege tax." City of Anderson, S.C., Code § 26-38 (Nov 8, 2021, as amended). Although a business license ordinance may have some attributes of both functions, it has primarily been viewed to be an excise tax. *See Carter v. Linder,* 303 S.C. 119, 122, 399 S.E.2d 423, 424 (1990) ("A license tax upon persons and businesses is an excise tax on the privilege of doing business"); *State v. Columbia*, 6 S.C. 1, 6 (1874) (commenting that business license has "been long employed for the purpose of imposing .. taxation for the purpose of revenue"). Therefore, following this line and DoorDash's claim of taxpayer deference in any ambiguity, DoorDash has committed itself to an ordinance-as-tax theory rather than police power theory in challenging the application of the ordinance.

However, neither rule of preference is reached where, as here, there is no ambiguity. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning); *see McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.").

The language of the Ordinance unambiguously rejects a requirement that a business be physically present within the taxing jurisdiction to be subject to a business license tax. The Ordinance's definition of gross income clearly contemplates that businesses may be subject to a business license tax even if they are not domiciled in the City. It specifies that:

> [i]f the licensee has a domicile within the municipality, business done within the municipality shall include all gross receipts or revenue received or accrued by such licensee. If the licensee does not have a domicile within the municipality, business done within the municipality shall include only gross receipts or revenue received or accrued within the municipality.

City of Anderson, S.C., Code § 26-37, *et seq.* (Nov 8, 2021, as amended). Domicile is in turn defined as a principal place from which the trade or business of a licensee is conducted, directed, or managed. *Id.* A business may therefore be subject to a business license tax in the City even if it lacks a place of business or office from which the business is managed.

The Ordinance also specifically defines the terms "business" and "person." "Business means any business, calling, occupation, profession, or activity engaged in with the object of gain, benefit, or advantage, either directly *or indirectly*" (emphasis added). *Id.* "Person means any individual, firm, partnership, limited liability partnership, limited liability company, cooperative non-profit membership, corporation, joint venture, association, … syndicate, holding company, or other group or combination acting as a unit, in the singular or plural, and the agent or employee having charge or control of a business in the absence of the principal" (emphasis added).[19] *Id.* The

[19] The South Carolina Supreme Court previously construed the clause "or other group or combination acting as a unit," as used in S.C. Code Ann. § 12-36-30 to be a "catch-all phrase" that does not alter the legal status of any specifically listed entities. *S.C. Dep't of Revenue v. Anonymous Co. A*, 401 S.C. 513, 519, 678 S.E.2d 255, 258 (2009) (discussing that two corporations with close business dealings are not a single "person" under the Sales and Use Tax Act).

Ordinance's use of the word "indirectly" cannot be ignored, and, as a result the Ordinance requires those who indirectly engage in for-profit activities in whole or in part within the City of Anderson to obtain a business license and pay the appropriate license tax.

The word "indirectly" is not defined by the Ordinance. As Michigan's Supreme Court has explained:

> "[i]ndirectly" is the adverbial form of "indirect," and the parties do not disagree that the common meaning of the term, as stated in plaintiff's brief, "connotes a pathway that is not straight, i.e., a course that does not proceed along a single line from one point to another but, instead, proceeds through an intermediate point." *New Oxford American Dictionary* (3d ed.) defines the adverb "indirectly" as "**1** in a way that is not directly caused by something; incidentally: *the losses indirectly affect us all.* **2** without having had direct experience; at second hand: *I heard of the damage indirectly.* **3** through implication; obliquely: *both writers refer, if only indirectly, to a wealth of other art.*" In relevant part, *Merriam–Webster's Collegiate Dictionary* (11th ed.) defines the adjective "indirect" as: "not direct: as **a** (1): deviating from a direct line or course: roundabout (2): not going straight to the point <an [indirect] accusation> ... **c:** not directly aimed at or achieved <[indirect] consequences>." *New Oxford* also has definitions of "indirect" that are similar to *Merriam–Webster's,* but notably includes, "**not done directly; conducted through intermediaries**." This is consistent with its definitions of "indirectly": all three of the examples given by *New Oxford* involve an intermediary and are closer in context than the "pathway" or "course" definitions.

Labelle Mgt v. Treas Dep't, 888 N.W.2d 260, 266 (Mich. 2016) (italics emphasis in original) (bold emphasis added); *see also Whirlpool Corp. v. Ziebert*, 539 N.W.2d 883, 886 (Wis. 1995) ("[t]he term 'direct' is defined as: '[i]mmediate; proximate; by the shortest course; without circuity; operating by an immediate connection or relation, instead of operating through a medium; the opposite of indirect.' Black's Law Dictionary 459 (6th ed. 1990) . . . The term 'indirect' is defined as: '[n]ot direct in relation or connection; not having an immediate bearing or application; not related in the natural way.' Black's Law Dictionary 773").

In the Court's view, a business with a physical presence in a particular jurisdiction, either through the existence of an office or facility or the presence of employees or agents, does business "directly" in that jurisdiction. Conversely, a business without a physical presence in a particular jurisdiction but which generates revenue from that jurisdiction through the use of intermediaries

does business indirectly in that jurisdiction. What other purpose could the term "indirectly" have if not to include within the City's taxing authority businesses who do not themselves physically engage in commerce in the City but instead arrange for others to do so on their behalf?

DoorDash also cites to the Ordinance's definition of "gross income," which provides in pertinent part that:

> *Gross income* means the gross receipts or gross revenue of a business, received or accrued, for one calendar or fiscal year collected or to be collected from business done within the municipality. If the licensee has a domicile within the municipality, business done within the municipality shall include all gross receipts or revenue received or accrued by such licensee. If the licensee does not have a domicile within the municipality, business done within the municipality shall include only gross receipts or revenue received or accrued within the municipality. In all cases, if the licensee pays a business license tax to another county or municipality, then the licensee's gross income for the purpose of computing the tax within the municipality must be reduced by the amount of revenues or receipts taxed in the other county or municipality and fully reported to the municipality. Gross income for business license tax purposes shall not include taxes collected for a governmental entity, escrow funds, or funds that are the property of a third party. The value of bartered goods or trade-in merchandise shall be included in gross income. The gross receipts or gross revenues for business license purposes may be verified by inspection of returns and reports filed with the Internal Revenue Service, the South Carolina Department of Revenue, the South Carolina Department of Insurance, or other government agencies ...

City of Anderson, S.C., Code § 26-37. DoorDash contends that the portion of the definition of gross income which includes gross revenue from "business done within the municipality" is a second statutory source for a requirement that a taxpayer must be physically present in the City in order to be subject to the business license tax. This argument, like DoorDash's argument regarding the language of Section 26-36, ignores the fact that "business" is a defined term, which expressly provides that "business" includes any business engaged in with the object of gain "either directly or indirectly." As discussed above, this definition unambiguously includes within the scope of those subject to taxation, anyone who does business indirectly within the City. No physical presence is therefore statutorily required as a prerequisite to taxation.

The decision of our supreme court in *Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011) is also instructive.[20] Travelscape is an online travel company offering hotel reservations through the website Expedia.com. *Id.*, 391 S.C. at 95, 705 S.E.2d at 30. One question before the court in *Travelscape* was whether Travelscape conducted business "within the State" of South Carolina, a prerequisite to a duty to collect sales tax on transactions involving South Carolina hotels. The applicable statute provided that "[t]he taxes imposed by this section are imposed on every person engaged or continuing *within this State* in the business of furnishing accommodations to transients for consideration." S.C. Code Ann. § 12–36–920(E) (emphasis added). Travelscape argued that the phrase "within the State" in the applicable statute modified the term "every person" and thus imposed the tax only on entities having a physical presence in South Carolina. *Travelscape,* 391 S.C. at 102, 705 S.E.2d at 35. Travelscape neither owned nor operated hotels in South Carolina.

The South Carolina Supreme Court rejected this argument. It stated that:

> We find the language and sentence structure of subsection (E) reveals that "within this State" modifies the preceding terms "engaged or continuing." As such, the phrase "within this State" imposes the sales tax on those entities engaged or continuing in the

[20] DoorDash attempts to distinguish *Travelscape* on the basis that it involved the imposition of a state sales tax rather than a local business license tax. While this distinction is factually correct, it is immaterial. DoorDash has not explained how the policies or procedures involved in collection of a sale tax are such that cases interpreting language in sales tax statutes should be construed differently than language in business license ordinances. In fact, to the extent that such a difference exists, the Court believes such a difference would require that business license tax ordinances be construed more liberally than sales tax statutes, a difference which works against the construction advanced by DoorDash here. Prior to *Wayfair*, courts discussing a physical presence requirement associated with the imposition of sales tax commented on the administrative burden of sales tax remittance. *See generally*, *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298, 303 (1992), overruled by *Wayfair*, (discussing advances in technology easing the burden of tax compliance) and *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill.*, 386 U.S. 753, 759-60 (1967), overruled by *Quill* and *Wayfair*, (discussing the "variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements"). The high administrative burden necessitated an equally high showing of that substantial nexus exists, and a physical presence requirement was imposed to provide ease and certainty in these situations. As the *Quill* court acknowledges, the former physical presence rule was specifically associated with sales and use taxes and not other types of taxes. *Id.*, 504 U.S. at 314 ("we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes"); *see also Geoffrey, Inc. v. S.C. Tax Comm'n*, 313 S.C. 15, 23 at n. 4, 437 S.E.2d 13, 18 at n.4(1993)(citing *Quill* for the same point). In *Wayfair*, the court discussed the association between business size, volume of sales, technology, and the demise of the physical presence rule. *Id.*, 585 U.S. at 186-87. Those sales tax considerations are not necessarily present for a business license tax. For example, a business license tax would be paid once per year versus sales tax payments being remitted to the taxing authority several times throughout the year and a business license assessment requires a single computation while sales tax must be calculated for each taxable transaction and have corresponding levels of records to maintain. Because the administrative burden is lower in business license tax cases than in sales tax cases, there would be no need to impose a physical presence requirement. The elimination of such a requirement in sales tax cases necessarily means that a physical presence is not required in cases with lesser administrative burdens.

> business of furnishing accommodations in South Carolina, without regard to whether the entities maintain offices or otherwise reside in this State.

Id., 391 S.C. at 102-03, 705 S.E.2d at 35. Accordingly, it held that Travelscape could be subject to the tax even though it had no physical presence in South Carolina.

The language of the City's business license tax ordinance is similar. Again, the ordinance provides that:

> Every person engaged or intending to engage in any business, calling, occupation, profession, or activity engaged in with the object of gain, benefit, or advantage, in whole or in part within the limits of the City of Anderson, South Carolina, is required to pay an annual license tax for the privilege of doing business and obtain a business license as herein provided.

City of Anderson, S.C., Code § 26-36 (Nov 8, 2021, as amended). As did the South Carolina Supreme Court in *Travelscape*, the Court here concludes that the phrase "in whole or in part within the limits of the City of Anderson" modifies the preceding terms "engaged or intending to engage in any business . . ." rather than the term "[e]very person." *Travelscape* therefore compels the conclusion that no physical presence in the City of Anderson is required for the imposition of a business license tax.

DoorDash's citation to the *Pee Dee Chair*, *Triplett* and *Kigre,* does not alter the Court's conclusion that physical presence is not required. *Pee Dee Chair* is a 1932 decision from the South Carolina Supreme Court. In that case, Pee Dee Chair Company appealed the City of Camden's imposition of a business license tax. Pee Dee Chair was principally located in Darlington, South Carolina. The company manufactured furniture and sold it wholesale to various retailers. It did not maintain an office in Camden but did make a single delivery of its furniture within the City of Camden during the applicable tax year.

The court in *Pee Dee Chair* held that it was improper to impose a business license tax on the company given its limited contact with the taxing jurisdiction. 165 S.C. at 86, 162 S.E. at 774. It stated:

> While, as suggested, a single act might, under some conditions, constitute the carrying on of a "business" within the contemplation of a license tax statute or ordinance (see the Tennessee case of Trentham v. Moore, 111 Tenn. 346, 76 S. W. 904), we find nothing in the circumstances of the case at bar to bring it within such

> class. Admittedly, only one load of chairs was delivered, and there is no suggestion that plaintiff intended to make any further deliveries. There is nothing whatever in the record to show that the delivery relied upon as constituting a taxable "business" was other than it appears on the surface, an isolated incidental or casual one, and there is an utter lack of circumstances to "raise a presumption of other such acts" or to indicate any intention on plaintiff's part to engage in the business of hauling merchandise by trucks in the city of Camden.

Id.

In the Court's view, *Pee Dee Chair* is not a case which materially addresses the physical presence argument advanced by DoorDash.[21] It was undisputed that Pee Dee Chair had been physically present in Camden – it had made a furniture delivery within the City.[22] Rather, the focus of the decision was whether Pee Dee Chair's contacts with the City of Camden were systematic and continuous enough so that the company could be considered to be "doing business" in Camden[23] rather than whether that business was conducted in whole or in part within the city.

Tripplet was also an appeal of a business license tax paid under protest. The Respondent was a licensed general contractor who resided in Chester. He established a central office located in Chester at which the books of the company were kept, administrative and executive work was performed, and equipment was stored between jobs. However, all actual construction work was performed outside of the City of Chester.

The court in *Triplett* stated:

> We are unable to agree with the soundness of respondent's contention that no part of his business was conducted within the corporate limits of Chester. It is the privilege of doing business within the municipality that is sought to be taxed. The administrative and executive work, an indispensable phase of respondent's business, was conducted in the office established, maintained and operated in the City. His equipment when not in use was stored in the City. This portion of his business enjoyed all the advantages

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[21] The words "physical presence" or "physically present" appear nowhere in the opinion.

[22] The circumstances giving rise to the legal proceedings in this case deserve mention. When Pee Dee Chair's driver made a delivery to Camden, he was arrested by local police on the grounds that he was engaged in business without a license. The City and the company later negotiated dismissal of the charge upon payment to the City by the company of a $50 business license tax. Pee Dee Chair paid that tax under protest and initiated legal proceedings to recover the tax payment.

[23] Obviously, if Pee Dee Chair had in fact maintained a physical office in Camden, it would have had a systematic and continuous contact with the City sufficient to satisfy the definition of "doing business." Because it did not, the court in *Pee Dee Chair* examined the sufficiency of its other contacts with the City of Camden.

> afforded by the municipal government of Chester to any other business conducted within its corporate limits. We cannot dissociate the managerial features of the business which were conducted within the City, along with the storing of equipment, from the manual execution of the work which was done without the City. All are essential functions of the general contracting business in which respondent is engaged. It frequently happens that there is a business located within a municipality that does not do *all* of its business within the corporate limits of such town or city.

209 S.C. at 459. 40 S.E.2d at 685 (emphasis in original). DoorDash relies on the portion of this quoted text which discusses the court's inability to dissociate the managerial features of the business from the manual execution of the work which was done outside the city. It suggests that *Tripplet* stands for the proposition that a company is only physically present where its administrative and managerial work are performed, which, DoorDash states, is in California.

The Court does not agree with this reading of *Tripplett* for a number of reasons. Again, physical presence within the taxing jurisdiction was not the issue in *Tripplet*. There was no dispute that Tripplet maintained an office in Chester and performed work in Chester. The question in *Tripplet*, like the question in *Pee Dee Chair*, was whether Tripplet's contacts with Chester were sufficient to support the imposition of a business license tax. The Court views the holding in *Tripplet* as stating merely that administrative and executive work counts as work for the purpose of doing business, and that, therefore the contractor's contacts with Chester were sufficient. The court in *Tripplet* would not ignore these contacts simply because construction work was performed elsewhere.

The Court believes that construing *Tripplet* to mean a business can be subject to a business license tax only where its managerial or executive functions are performed stretches the holding in *Tripplet* too far. The court in *Tripplet* did not address whether it would be appropriate for jurisdictions in which the construction work was performed to assess a business license tax against the construction company.[24] Notably, it expressly acknowledged that not all work of a business occurs at the location of the managerial office when it stated that it "[i]frequently happens that there is a business located within a municipality that does not do all of its business within the corporate limits of such town or city."

[24] The Court also notes that *Pee Dee Chair* is more than ninety years old and that *Triplett* is almost eighty years old. Both cases could not have contemplated today's e-commerce environment.

Kigre was a constitutional challenge by Kigre, Inc. to the Town of Hilton Head's business license ordinance. Kigre argued that a tax based on gross income, which expressly included income from interstate commerce, was unconstitutional under *Complete Auto Transit, Inc., v. Brady, Chairman, Mississippi Tax Commission*, 430 U.S. 274 (1977). At the time, Kigre did not pay a business license tax to any other municipality in South Carolina, or, for that matter, anywhere else in the world.

The South Carolina Supreme Court held that the ordinance at issue was constitutional. It concluded that the business license tax in question was not a tax on "gross income." Rather, "gross income" was merely the basis on which the tax was graduated or calculated. *Kigre,* 408 S.C. at 651, 760 S.E.2d at 104. Elaborating on this distinction, the court stated:

> [w]e emphasize that the business license fee is an excise tax—not an income or a sales tax. A business license fee is a tax on the privilege of doing business within the Town, and *therefore, it is the manufacturing activity of Appellant Kigre, Inc. ("Kigre"), which occurs wholly within the Town limits, and not Kigre's receipt of income or sales of its products in interstate commerce that is the business activity being taxed.* Kigre has no other manufacturing facility and pays no license fee to any other taxing jurisdiction. *See Carter v. Linder,* 303 S.C. 119, 123, 399 S.E.2d 423, 425 (1990) (finding "[a] business license fee is an excise tax on the owner for the privilege of doing business").

Id., 408 S.C. at 649, 760 S.E.2d 103, 103 (2014) (emphasis added). DoorDash seizes upon the italicized text to argue that a physical presence within the taxing jurisdiction is required in order to impose a business license tax.

The Court disagrees with this interpretation of *Kigre*. Once again, whether a physical presence in a particular jurisdiction is a prerequisite to a municipalities' ability to impose a business license tax was not the question before the court in *Kigre*. It was undisputed that *Kigre* was physically present. The issue in *Kigre* was whether a municipality could tax a company's gross income, including income from interstate commerce.

Moreover, the text on which DoorDash relies does not support DoorDash's argument. It falls far short of conditioning the imposition of a business license tax upon a physical presence within the taxing jurisdiction. In the Court's view, the language in *Kigre* simply mentions the fact that, in that case, the manufacturing activity occurred in the Town of Hilton Head, without attempting to address the import of that fact.

Finally, the Court notes that the ordinance in question in this case specifically provides that a business is subject to taxation for business conducted "in whole or in part" within the City of Anderson. This language weakens DoorDash's argument that activity must be taken wholly within City limits for purposes of taxation.

DoorDash also places great weight on an Attorney General's Opinion issued to the Honorable Cody Mitchell in 2023. 2023 WL 4918024 (S.C.A.G. July 26, 2023). In the opinion, the Attorney General was asked to address whether the City of Myrtle Beach's business license ordinance applied to Turo, Inc. and its hosts. Turo is a California technology company that offers a car sharing platform. It does not own the vehicles shared through its platform and has no offices or employees in the City of Myrtle Beach. The platform allows hosts and guests to share automobiles on terms agreed upon by the parties rather than Turo.

Addressing whether Turo would be required to have business licenses, the Attorney General made the following statements:

> - Regarding Turo, you indicate it does not have an office in City, does not maintain vehicles in City, does not employ any salespeople in City, or own any property in City. While Turo is not required to be a resident of City to be subject to its business license tax, the information you provide indicates Turo has no physical presence in City. Additionally, the information you provided does not include evidence that Turo intends to conduct business in City. Without a physical presence or evidence of additional activity within City or intent to conduct business in City, a court may find Turo is not doing business within City. However, a court, not this Office, would need to make this determination based on facts available to it.
>
> - Based on the information provided in your letter, it does not appear that Turo has a physical presence in City or engages in regular business-related activity in City. However, whether Turo is doing business within City is a question of fact that must ultimately be determined by a court that can consider all the evidence surrounding Turo's activities in relation to City. Moreover, as for Turo's Hosts, a court would have to evaluate their activity in relation to City on a case-by-case basis to determine if they are doing business in City.

Id. at *5 & *7, respectively. From these statements and some similarities between the method of business operations used by Turo and DoorDash, DoorDash asserts that the South Carolina Attorney General has both rejected the factual arguments advanced by the City in this case and

concluded that physical presence is necessary for the imposition of a business license tax in South Carolina.

Opinions of the Attorney General are not ordinarily disregarded without sound reason, *Price v. Watt*, 280 S.C. 510, 513 at n. 1, 313 S.E.2d 58, 60 at n. 1 (Ct.App. 1984), but they are not binding. *See Charleston Cnty. Sch. Dist. v. Harrell,* 393 S.C. 552, 560–61, 713 S.E.2d 604, 609 (2011) ("Attorney General opinions, while persuasive, are not binding upon this Court"). Because the Court disagrees with DoorDash's reading of the opinion and because the Attorney General's office was not free to consider facts which might dictate a contrary result, the Court is not persuaded by DoorDash's reliance on the opinion.

First, the Court does not read the Attorney General's opinion concerning Turo as broadly as does DoorDash. The opinion stated that in the absence of both a physical presence in the city and an intention to do business in the city, "a court *may* find Turo is not doing business within City." 2023 WL 4918024 at * 5 (emphasis added). The word "may" is used to express only a possibility and differs in substance from other terms such as "would" or "should" which connote a greater degree of certainty. In any event, the Attorney General repeatedly cautioned that it could not make a factual determination regarding whether the situation presented in the opinion would constitute doing business within the city. It stated that "a court, not this Office, would need to make this determination based on facts available to it." 2023 WL 4918024 at * 5.

Second, the Attorney General's office did not, as DoorDash argued at the hearing, conduct any sort of investigation into the facts in reaching its conclusion. No factual investigation occurred. The opinion considered only the facts outlined in the letter requesting the opinion. The opinion itself states "we look to the facts you provide us." 2023 WL 4918024 at * 1. The Attorney General's office therefore did not have before it the factual arguments made by the City here.

Third, while both Turo and DoorDash use an electronic platform to conduct business, there are a number of factual distinctions between the business method utilized by Turo and that used by DoorDash. Turo's platform allows hosts and guests to transact on their own terms. Hosts set prices and availability and hosts and guests mutually decide on a location for the vehicle exchange. Turo is not involved in the decisions between hosts and guests on such matters as prices, availability, and location. In contrast:

- DoorDash has the ability to set the price paid by customers by charging additional amounts, using strike though pricing and by offering promotions and discounts to customers. (DoorDash Consumer Terms and Conditions paragraphs 12(a),(b),(d)&(e)).
- DoorDash markets and sells its own product – an annual DoorDash pass or membership – directly to customers. (DoorDash Consumer Terms and Conditions paragraph 13).
- DoorDash has contracts with at least 94 restaurants in the City of Anderson and, presumably, a large number of drivers who reside in and deliver food within the City of Anderson. (Notice of Final Assessment).

The Court cannot speculate what result would have been reached by the Attorney General's office had it considered these facts which were not present in the Turo opinion, but it is reasonable to believe that these facts might have affected the decision reached by the Attorney General.

In summary, the Court concludes that a physical presence is not required by the Ordinance or statute.[25]

B. Commerce Clause

DoorDash asserts that the City's attempt to assess a business license tax against it violates the dormant Commerce Clause. As the South Carolina Supreme Court recently explained:

> [t]he Commerce Clause of the United States Constitution affirmatively grants Congress the power to regulate interstate commerce. *See* U.S. Const. art. I, § 8, cl. 3 (providing Congress "shall have Power ... [t]o regulate Commerce ... among the several States"). Because the Constitution bestows authority over interstate commerce to Congress alone, the Commerce Clause impliedly limits states' regulatory powers in that arena. This implied "negative" aspect of the Commerce Clause limiting the states' ability to regulate interstate commerce is commonly referred to as the dormant Commerce Clause. Broadly speaking, the dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." As a result, "[A] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State."

[25] The Court's conclusion that a physical presence is not required for imposition of a business license tax is dispositive of DoorDash's challenge, with the exception of constitutional arguments addressed below. As a result, it is not necessary to address the City's alternative argument that, even if a physical presence is required, DoorDash is physically present within the City.

Orthofix, Inc. v. S.C. Dep't of Revenue, 443 S.C. 138, 144–45, 903 S.E.2d 496, 500 (2024) (internal citations omitted). As the United States Supreme Court explained in *Complete Auto Transit*, a privilege tax, like the tax in question here, will ordinarily be deemed not to violate the dormant Commerce Clause when:

(1) it is applied to an interstate activity with a substantial nexus with the taxing State;

(2) is fairly apportioned,

(3) does not discriminate against interstate commerce, and

(4) is fairly related to the services provided by the taxing jurisdiction.

430 U.S. 274 (1977).[26]

DoorDash principally relies on *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018). In *Wayfair*, the State of South Dakota attempted to require Wayfair to collect sales tax on sales made to South Dakota residents. Wayfair maintained no offices or employees in South Dakota – its sales to South Dakota residents were e-commerce sales. Historically, attempts to require a business engaged in interstate commerce to collect sales tax were rejected when the business lacked a physical presence in the taxing jurisdiction. Such a presence was deemed necessary to establish that the business had the substantial nexus required by *Complete Auto* for purposes of the Commerce Clause. *See, e.g., Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill.*, 386 U.S. 753, 758 (1967), *overruled by Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298 (1992) and *Wayfair*, ("[i]n order to uphold the power of [a State] to impose use tax burdens on [a retailer] in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it"); *Quill*, 504 U.S. at 306-308 (noting flaws with the bright-line rule requiring a physical presence for imposition of sales and use taxes on interstate activity but nevertheless retaining the bright-line rule).

[26] These requirements set forth in *Complete Auto* will be referred to herein as the *Complete Auto* factors.

Wayfair dealt specifically with the substantial nexus requirement *Complete Auto*.[27] It noted that the physical presence rule was an artificial construct which had been repeatedly criticized and failed to account for the realities of modern e-commerce. Ultimately, the court concluded that a physical presence requirement was both unsound and incorrect. It overruled prior precedent and eliminated the physical presence requirement in sales tax cases. The *Wayfair* court stated that a substantial nexus may be established by both physical *and* virtual contacts.

It explained that:

> Modern precedents rest upon two primary principles that mark the boundaries of a Stat's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face a virtually *per se* rule of invalidity. State laws that regulate even-handedly to effectuate a legitimate local public interest ... will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Although subject to exceptions and variations, [citations to examples], these two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause.

585 U.S. at 173-4 (internal quotations and citations omitted).

Here, DoorDash relies on the second of these two principles. It specifically argues that imposing a business license tax upon it when it has no physical presence[28] in the City of Anderson imposes an undue burden on interstate commerce. According to DoorDash, the *Wayfair* court reaffirmed the need to analyze whether a tax obligation imposed undue burdens on interstate commerce and cited the balancing framework balancing framework of *Pike v. Bruce Church, Inc.*, 397 U.S. 137(1970). DoorDash argues that *Pike* is an independent means by which a commerce clause challenge can be made. The City argues that *Complete Auto* is the sole test.

It is unclear whether the Supreme Court intended to create in *Pike* a balancing test under which a privilege license tax could be deemed unconstitutional which is separate and apart from the *Complete Auto* test. *See Wayfair,* 585 U.S. at 174 (referring to the "now-accepted framework

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[27] As discussed herein, the *Wayfair* court concluded that a physical presence was no longer required and then remanded the case to the lower court for consideration of the remaining *Complete Auto* factors. *Wayfair*, 585 U.S. at 188-89.

[28] To the extent this argument relies on the assumption that DoorDash has no physical presence in Anderson, that argument fails at this juncture. The Court has not yet determined whether or not DoorDash is physically present within the City.

for state taxation in *Complete Auto Transit*"); *compare Glob. Hookah Distributors, Inc. v. Dep't of Revenue*, 24 Or. Tax 562, 602–03 (2021) ("[t]he Court in *Wayfair* suggested that the 'balancing framework' of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L.Ed. 2d 174 (1970) may be relevant in determining whether the Commerce Clause forbids imposition of a particular state tax") *with Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979) (when the *Complete Auto* factors are satisfied, "no impermissible burden on interstate commerce will be found").[29] The Court will therefore address the constitutionality of the tax under both frameworks.

However, before those issues are addressed, the Court must first discuss the City's objection to the Court's consideration of the Commerce Clause argument. The City argues that the Court cannot reach DoorDash's argument because it lacks the power to address facial challenges to the constitutionality of the City ordinance. It is of course "well settled in this State that [Administrative Law Judges], as part of the executive branch, are without power to pass on the constitutional validity of a statute or regulation." *Travelscape*, 391 S.C. at 108, 705 S.E.2d at 38. In response, DoorDash insists that its challenged is an "as applied" challenge rather than a facial challenge. These arguments are discussed more fully below.

(1) Facial vs As Applied Challenge

"[I]n analyzing a facial challenge to the constitutional validity of a statute, a court 'considers only the text of the measure itself and not its application to the particular circumstances of an individual.'" *Doe v. State*, 421 S.C. 490, 502, 808 S.E.2d 807, 813 (2017) (citing 16 C.J.S. *Constitutional Law* § 163, at 161 (2015)). In contrast, an as-applied challenge is a claim based on the "particular context in which [challenger] has acted, or in which [challenger] proposes to act." *Id.*, 421 S.C. at 503, 808 S.E.2d at 813 (internal quotation and citation removed). While these principles seem to be easily applied at first blush, the characterization of a constitutional challenge as facial or as-applied is not always clear. *Id.*

The Court construes DoorDash's particular challenge to the Ordinance to be an as-applied challenge for two reasons. First, a facial challenge asserts that a statute or ordinance is unconstitutional in *all* its applications. *See Williams v. Pryor*, 240 F.3d 944, 953 (11th Cir. 2001). DoorDash does not assert that the City lacks the authority to impose a business license tax of any kind or that the City cannot lawfully impose a business license tax upon others under the existing

[29] As discussed *infra*, the United States Supreme Court has narrowed the applicability of *Pike* since its decision in *Wayfair*.

ordinance. DoorDash argues instead that a business license tax cannot be imposed upon it by the City because DoorDash lacks a physical presence in the City of Anderson.

Second, the South Carolina Supreme has previously concluded that a similar challenge to a tax statute was an as-applied challenge. In *Travelscape*, *supra*, the petitioner asserted a dormant Commerce Clause challenge to a state statute which required it to remit sales tax on the gross proceeds it received from providing hotel reservations in South Carolina. Travelscape specifically challenged the statute on the grounds that, according to Travelscape, it failed to satisfy the four factors outlined in *Complete Auto.* Travelscape, like DoorDash, had no offices or employees located in South Carolina and conducted business electronically. The South Carolina Supreme Court concluded that such a challenge was an as-applied challenge. *Id.*, 391 S.C. at 108-110, 705 S.E.2d at 38-39. The Court sees no reason to treat DoorDash's Commerce Clause challenge in this case differently.

(2) *Complete Auto*

The City argues that *Complete Auto* is the controlling test for challenges to privilege taxes under the dormant Commerce Clause and further that DoorDash has not made an argument involving the *Complete Auto* factors. Indeed, DoorDash indicated at oral argument that it is not making an argument under *Complete Auto* and instead is only making an argument under *Pike*. Because DoorDash has the burden to establish the ordinance is unconstitutional, *see Kigre*, 408 S.C. at 650, 760 S.E.2d at 104 ("A municipal ordinance is a legislative enactment and is presumed to be constitutional. The burden of providing the invalidity of an ordinance is on the party attacking it"), DoorDash's concession can be viewed as ending the *Complete Auto* inquiry in the City's favor.

Even had DoorDash asserted a *Complete Auto* argument, the Court would conclude that the City's ordinance is not invalid under *Complete Auto*. The application of the relevant factors is discussed below.

- Substantial Nexus

While DoorDash has no offices or employees in Anderson and its computers and servers are located in California, a physical presence in the taxing jurisdiction is no longer required to establish a substantial nexus for purposes of Commerce Clause analysis. *Wayfair*, 585 U.S. at

188-89.[30] Rather, "the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing [jurisdiction]. [S]uch a nexus is established when the taxpayer [or collector] avails itself of the substantial privilege of carrying on business in that jurisdiction" (internal quotations and citation omitted). *Id.*, 585 U.S. at 188. In applying that test, the court found the "nexus is clearly sufficient based on both the economic and virtual contacts" where the respondents exceeded the statutory threshold of a) $100,000 of goods or services or b) 200 or more separate transactions on an annual basis. *Id.*

DoorDash has extensive economic and virtual contacts with the City of Anderson. DoorDash's services can be obtained in Anderson through the use of its app or its website. It has contracts with 94 restaurants and an unknown number of Dashers located in the City. DoorDash received gross income of $1,940,388.10 in 2022 and $2,504,028.90 in 2023 from restaurant transactions within the City.

Additionally and alternatively, the South Carolina Supreme Court's decision in *Travelscape* indicates that DoorDash's Dashers or drivers who are present in Anderson are also sufficient to establish a substantial nexus even though they are not employees. In *Travelscape*, the court stated that "[f]or Commerce Clause nexus purposes, it simply does not matter that [taxpayer] specifically disclaims any agency relationship with the [persons] in the contracts it enters into." *Id.*, 391 S.C. at 107, 705 S.E.2d at 37; *see Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 250 (1987) ("Although the salesmen were not employees of [out-of-state taxpayer], we determined that such a fine distinction is without constitutional significance." (internal quotations removed)); *Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960) (upholding tax where seller's in-state solicitation was performed by independent contractors); *see also M.B. Kahn Const. Co, Inc. v. Three Rivers Bank & Trust Co.*, 354 S.C. 412, 415-16, 581 S.E.2d 481, 483 (2003) ("The fact that someone is employed as an independent contractor does not negate the fact that he may be acting as an agent."). The court noted that "[w]ithout the [local business] actually providing the [local service] to the customer, [taxpayer] would be entirely unable to conduct business within the [taxing jurisdiction]." *Id.*, 391 S.C. at 107, 705 S.E.2d at 37.

[30] Indeed, there is some question as to whether a physical presence was ever required for tax cases which did not involve the collection and remittance of sales or use tax.

The Court concludes that DoorDash has a substantial nexus to the City.[31] This conclusion is in line with what appears to be the modern trend. The decisions in *Wayfair*[32] and *Travelscape* reflect that the courts are adapting to modern e-commerce business models, like the model used by DoorDash.

- Fairly Apportioned

This factor of the *Complete Auto* test assesses whether a tax is both internally and externally consistent. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 192 (1995). "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Id.* at 185. This test:

> simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

Id.

External consistency looks to the economic justification for the taxing jurisdiction's claim upon the value taxed to discover whether a tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State. *Id.* The threat of real multiple taxation may indicate impermissible overreaching. *Id.*

The definition of gross income used by the ordinance here specifically provides that:

> For taxing jurisdictions in which the person or business does not have a domicile, business done within that taxing jurisdiction shall include only gross receipts or revenue received or accrued within such taxing jurisdiction. In all cases, if the taxpayer pays a business license tax to another county or municipality, then the taxpayer's gross income for the purpose of computing the tax within the taxing

[31] Again, DoorDash does not argue that it lacks a substantial nexus.

[32] "Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause." *Wayfair*, 585 U.S. at 176. "Further, the real world implementation of Commerce Clause doctrines now makes it manifest that the physical presence rule as defined by *Quill* must give way to the "far-reaching systemic and structural changes in the economy" and "many other societal dimensions" caused by the Cyber Age." *Id* at. 184.

> jurisdiction must be reduced by the amount of gross income taxed in the other county or municipality.

City of Anderson, S.C., Code § 26-27; *accord* S.C. Code Ann. § 6-1-400(E)(1)(a). This language apportions the payment of business license taxes between jurisdictions and appears to prevent double taxation. In the absence of any counterargument by DoorDash, the Court concludes that the City's ordinance is fairly apportioned for purposes of the Commerce Clause.

- Discrimination

A legislative enactment may not ordinarily discriminate against interstate commerce. For example, a State "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 549–50 (2015) (citing *Armco Inc. v. Hardesty,* 467 U.S. 638, 642, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984). "'Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of 'multiple taxation.'" *Id.* at 549-60 (citing *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959)).

The Court concludes that the ordinance does not facially discriminate against interstate commerce. Nothing in the ordinance favors intrastate or local commerce over interstate commerce. Notably, the ordinance in question is a local ordinance rather than a state law. A company indirectly doing business in the City of Anderson is subject to the business license tax even if it is a South Carolina company. Were DoorDash headquartered in Charleston, South Carolina rather than California, its obligations under the City's ordinance would be exactly the same. The tax provides no direct benefit to local businesses or South Carolina residents at the expense of out-of-state businesses.

- Fair Relation

This factor of the *Complete Auto* test asks whether the privilege tax assessed is fairly related to the services provided by the taxing jurisdiction. As the United States Supreme Court explained in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995):

> The fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity. If the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event. Interstate commerce may thus be

> made to pay its fair share of state expenses and " 'contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct "benefit." ' " The bus terminal may not catch fire during the sale, and no robbery there may be foiled while the buyer is getting his ticket, but police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of a tax. *Complete Auto* 's fourth criterion asks only that the measure of the tax be reasonably related to the taxpayer's presence or activities in the State.

Id., 514 U.S. at 199-200.

The relevant inquiry under the fourth prong of the Complete Auto test is not the amount of the tax or the value of "the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong" of the *Complete Auto* test. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625 (1981). Under the first prong, the interstate business must have a substantial nexus with the State before any tax may be levied on it." *Id.* After this prong is satisfied, the fourth factor of the *Complete Auto* test imposes "the additional limitation that the measure of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden.'" *Id.*, 453 U.S. at 626. The "just share of state tax burden" includes sharing in the cost of providing "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.' " *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980).

The City argues that DoorDash receives the benefit of the privilege of doing business in the City. Additionally, in the Court's view, DoorDash receives the benefit of City services even though it has no office or agent in the City. Just as Travelscape was in the business of providing hotel rooms in South Carolina, DoorDash is in the business of selling food in Anderson, South Carolina. The food preparation and delivery services upon which DoorDash's income depends are enhanced by services provided by the City, including police protection and traffic regulation. In the absence of any argument by DoorDash, the Court cannot conclude that the business license tax is not fairly related.

(3) *Pike* Undue Burden

The Court now turns to the undue burden test as articulated in *Pike* as follows:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, [ ], but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens.

397 U.S. at 142 (internal citations omitted). Based on *Wayfair*, DoorDash argues that the ordinance may be invalidated under this test even if the *Complete Auto* factors are satisfied. *See, e.g., N. Am. Meat Inst. v. Becerra,* 420 F. Supp.3d 1014, 1034 (C.D. Cal. 2019), *aff'd*, 825 F. App'x 518 (9th Cir. 2020) (addressing claim that California Proposition 12 violated the Commerce Clause under *Pike*).

However, the United States Supreme Court recently narrowed the availability of *Pike* for such challenges. *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023); *see also Truesdell v. Friedlander*, 80 F.4th 762, 774 (2023) ("the controlling plurality in *National Pork Producers* recently imposed important constraints on the *Pike* inquiry"). In *National Pork Producers*, California adopted a law banning the in-state sale of certain pork products derived from breeding pigs cruelly confined in small stalls. Two groups challenged the constitutionality of this law as a violation of the dormant Commerce Clause. They argued, in part, that the law was unconstitutional under *Pike* because the law unduly burdened interstate commerce when compared to the putative local benefits of the law.

The Supreme Court was openly critical of this argument. It emphasized that there is little daylight between traditional anti-discrimination jurisprudence under the dormant Commerce Clause and the *Pike* analysis. *National Pork Products*, 598 U.S. at 377. It explained that the primary import of *Pike* and its progeny was to serve "as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose." *Id.*

Justice Gorsuch rejected the claimants' attempt to change *Pike* from a way to test for purposeful discrimination against out-of-state interests into a tool by which judges could strike down duly enacted laws based on their own balancing of relevant costs and benefits. *Id.*, 598 U.S. at 380. Addressing the claimants' request that it invalidate the legislation at issue under the *Pike* balancing test, the Justice stated:

> That we can hardly do. Whatever other judicial authorities the Commerce Clause may imply, that kind of freewheeling power is not among them. Petitioners point to nothing in the Constitution's text or history that supports such a project. And our cases have expressly cautioned against judges using the dormant Commerce Clause as "a roving license for federal courts to decide what activities are appropriate for state and local government to undertake."

Id.

Justice Gorsuch also noted that judges are not institutionally suited to draw reliable conclusions of the kind necessary to satisfy the *Pike* test, assuming the test is an independent basis on which to invalidate a statute. *Id.* He further stated that asking a judge to compare the tangible cost imposed upon interstate commerce by legislation to the intangible benefits a taxing jurisdiction might receive from the legislation is like being asked to decide "whether a particular line is longer than a particular rock is heavy." *Id.*, 598 U.S. at 381. He concluded by suggesting that judges should instead defer to the balancing of interests done by the legislative body when enacting the legislation. *See id.*, 598 U.S. at 382-383.

Lower courts have had varied reactions to *National Pork Products*. Some courts have refused to consider *Pike* as an independent means by which to invalidate a state or ordinance. *E.g., Triumph Foods, LLC v. Campbell*, 715 F. Supp. 3d 143, 151(D. Mass. 2024) (declining to engage in *Pike* balancing). Others have ruled that while *National Pork Products* did not eliminate the *Pike* balancing test in the absence of discrimination, the decision has raised the bar, making it very difficult to invalidate a law under the *Pike* test without proof of discriminatory intent. *E.g., Montana v. City of Portland*, No. 3:23-cv-00219-YY, 2024 WL 3326230, at *1-2 (D. Or. July 5, 2024). Because the survival of *Pike* balancing has not yet been adjudicated by the United States Supreme Court or a superior South Carolina court, the Court will proceed to conduct the balancing test.

Initially, a statute or ordinance is even-handed when it is not an attempt to foster economic protectionism, or, stated differently, when it does not discriminate between interstate and intrastate

commerce. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981) (concluding a statute was even-handed "[s]ince the statute does not discriminate between interstate and intrastate commerce"). DoorDash does not appear to argue that the City's ordinance discriminates between interstate and intrastate commerce. Indeed, as the Court observed, *infra*, the ordinance does not do so. It applies equally to all -- residents of the City of Anderson, South Carolina residents who do not reside in Anderson, and all others. The Court accordingly concludes that the ordinance regulates even-handedly.

The ordinance also furthers a "legitimate local public interest." The ordinance itself recites that it was enacted for two reasons – to raise revenue and to protect public safety. City of Anderson, S.C., Code § 26-38. DoorDash makes no argument that the City's business license tax does not effectuate a legitimate public interest. Moreover, excise taxes imposed through business license ordinances have long been recognized as lawful and reasonable. *See generally*, *Carter v. Linder,* 303 S.C. 119, 122, 399 S.E.2d 423, 424 (1990) ("[a] license tax upon persons and businesses is an excise tax on the privilege of doing business"); *State v. Columbia*, 6 S.C. 1, 7 (1874) ("a tax upon business and avocations was a legitimate mode of exercising the taxing power").

DoorDash's argument appears to rest solely on the final element of the *Pike* balancing test – is the burden on interstate commerce "clearly excessive in relation to the putative local benefits?" Some burden is permissible. The Commerce Clause does not "relieve those engaged in interstate commerce from their just share of [taxing jurisdiction] tax burden even though it increased the cost of doing business." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938) (cited favorably in *Complete Auto Transit*, 430 U.S. at 288); *accord Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 748 (1978) ("All tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity"). Moreover, only a "a small number" of cases "have invalidated state laws ... that appear to have been genuinely nondiscriminatory" in nature under *Pike*. *National Pork Products*, 598 U.S. at 392 (Sotomayor, J., concurring in part). Those cases invalidating nondiscriminatory laws have almost always involved the regulation of instrumentalities of interstate transportation, such as trucks and trains. *Id.* at 379 n.2.

DoorDash does not argue that the burden of complying with the City's ordinance itself is excessive. Rather, DoorDash argues that the cumulative burden it would face if the City and every other similar taxing jurisdiction were permitted to impose a business license tax would be excessive. For the reasons stated below, the Court concludes that DoorDash has not carried its burden on this issue.

The *Pike* balancing test compares the burden placed on interstate commerce by an enactment with the putative benefits locally received as a result of the enactment. However, the cost or burden side of the *Pike* analysis:

> does not consider *all* burdens that a state law might impose; it considers only *interstate-commerce* burdens. This limit means that the costs incurred by specific interstate *businesses*—in contrast to interstate *commerce* generally—do not matter.

Truesdell v. Friedlander, 80 F.4th 762, 774 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 1344, 218 L. Ed. 2d 422 (2024), and *cert. denied*, 144 S. Ct. 1346, 218 L. Ed. 2d 422 (2024) (emphasis in original). Moreover, the incidental burdens on interstate commerce considered are only those burdens which exceed the burdens on intrastate commerce. *V-1 Oil Co. v. Utah State Dep't of Pub. Safety*, 131 F.3d 1415, 1425(10th Cir. 1997); *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994); *Forever Fencing, Inc. v. Bd. of Cnty. Commissioners of Leavenworth Cnty.*, 2024 WL 3084973, at *3 (10th Cir. June 21, 2024). As the Tenth Circuit has stated, such incidental burdens might "include the disruption of [interstate] travel and shipping due to a lack of uniformity in state laws, impacts on commerce beyond the borders of the defendant [S]tate, and impacts that fall more heavily on out-of-state interests." *V-1 Oil Co.*, 131 F.3d at 1425 (internal citations and quotation marks omitted).

DoorDash's undue burden argument focuses not on the burden associated with complying with the City's business license ordinance, but the burden which might be suffered if other cities and counties across the county impose similar requirements. After careful consideration of the applicable law and the evidence submitted, the Court concludes that DoorDash's showing is insufficient for a number of reasons.[33] First, it complains about burdens which it might suffer rather

[33] Ordinarily, the fact that a party moving for summary judgment has not carried its burden would prompt the Court to simply deny the motion for summary judgment. In this case, however, the parties submitted cross motions for summary judgment, thereby conceding that the issues raised should be decided as a matter of law and entitling the Court to assume there is no further evidence to consider. The Court directly questioned the parties at the hearing about

than those which might be imposed upon interstate commerce generally. Such an individualized inquiry is not the focus of Commerce Clause jurisprudence. *Truesdell,* 80 F.4th at 774.

Second, DoorDash's argument does not identify any burdens upon interstate commerce which might exceed those placed upon intrastate commerce by the ordinance. *V-1 Oil Co.*, 131 F.3d at 1425 (the incidental burdens on interstate commerce considered are only those burdens which exceed the burdens on intrastate commerce); *see United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007)("'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.""); *N. Virginia Hemp & Agric., LLC v. Virginia,* 125 F.4th 472, 496-97 (4th Cir. 2025) (when a law does not discriminate against out-of-state interests, it places no undue burden on them either); *see also Western Live Stock v. Bureau of* Revenue, 303 U.S. 250, 254 (1938) ("[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business. Even interstate business must pay its way and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business") (internal citations omitted). As discussed above, the ordinance applies to all who do business in the City of Anderson equally, whether those businesses are located in Anderson, the State of South Carolina, or elsewhere.

Third, DoorDash has neither presented evidence of the burden it says it will face nor made a showing regarding local benefits. Such evidence might have been in the form an expert opinion or affidavit regarding the nature of the work required, the time or personnel costs to be incurred, and the administrative of compliance. The affidavit DoorDash did provide is silent on what, if any, burden the City's assessment creates and the arguments of counsel cannot be taken as evidence. *See McManus v. Bank of Greenwood*, 171 S.C. 84, 84, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003)("Arguments made by counsel are not evidence."). Furthermore, to the extent DoorDash urged the Court at oral argument to consider ordinances of other jurisdictions to manifest a potential administrative burden for DoorDash, the Court cannot do so. *See Robinson v.*

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the rulings to be made given that that the parties had filed cross motions for summary judgment and both parties indicated that the Court had enough before it to make a dispositive ruling and requested that the Court do so.

Brown, 260 S.C. 104, 107, 194 S.E.2d 249, 250 (1973) (discussing presentation of ordinances as evidence); *City Council of Charleston v. Ashley Phosphate Co.*, 34 S.C. 541, 13 S.E. 845 (1891) (discussing dismissal of action for enforcement of ordinance based on deficient pleading of ordinances); *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 92-93, 344 S.E.2d 869, 872 872 (Ct. App. 1986) ("local ordinances are not subject to judicial notice"). DoorDash's argument is wholly speculative. As other courts have stated, "'[c]onjecture ... cannot take the place of proof' in a dormant Commerce Clause analysis." *Am. Trucking Associations, Inc. v. Rhode Island Tpk. & Bridge Auth.*, 123 F.4th 27, 39(1st Cir. 2024).

In urging the Court to invalidate the ordinance as applied to it, DoorDash argues that the factors mitigating against a finding of unconstitutionality in *Wayfair* are not present here. The mitigating factors discussed in *Wayfair* may be more properly viewed as dicta than a holding of the court, but, in any event, the *Wayfair* court did discuss "several features [of the South Dakota statute] that appear designed to prevent discrimination or undue burdens upon interstate commerce." *Id.* at 189. These factors were: statutorily established thresholds for collection of sales tax if the out-of-state business had $200,000 in transactions per year or greater than 200 separate transactions; South Dakota's participation in the Streamlined Sales and Use Tax Agreement; no retroactivity in the South Dakota sales tax collection duty. *Id.*

Consideration of these factors does not alter the Court's conclusion. South Dakota's threshold of $200,000 in sales per year is well surpassed by DoorDash's gross income of $1,940,388.10 in 2022 and $2,504,028.90 in 2023 which, again, was associated only with DoorDash restaurant transactions within the City and does not reflect income from non-restaurant merchants. The *Wayfair* court explained the principle that protection for undue burden under the Dorman Commerce Clause is rooted in part to protect small business, not highly sophisticated and successful international businesses. *Id.* at 187.

DoorDash's argument about South Dakota's threshold of 200 transactions faces a similar problem. Given the amount of gross income received by DoorDash during the period in question, it is manifest that DoorDash is far exceeding such a transaction threshold.

Third, just as South Dakota eased the administrative burden of compliance by its participation in a multi-state Streamlined Sales and Use Tax Agreement, South Carolina has reduced the administrative burden of compliance with its municipalities business license regimes by enacting the Business License Standardization Act. The City specifically argues that the Act

simplifies the administrative burden for all resident and nonresident businesses subject to local business licenses in the State by allowing use of an electronic portal, use of a standard license application and allowing use of an on-line payment system.

Finally, the South Dakota statute in *Wayfair* ensured that no obligation to remit the sales tax may be applied retroactively. One commentator described this feature and its import to the *Wayfair* court as follows:

> One of the more significant questions posed at the *Wayfair* oral argument and in the parties' briefs was whether the striking of the physical presence rule would be retroactive in its effect. It had been widely thought after *Quill* that a primary reason that North Dakota lost that case was because the State's attorney told the Court that, if the State won, it would seek retroactive taxes. In *Wayfair*, the State of South Dakota and the states that joined South Dakota as amici knew that the Court would be concerned with this issue and attempted to address it. But it was nonetheless generally assumed by the parties that if *Wayfair* overturned *Quill*, the ruling would be retroactive. *Wayfair* fulfilled this expectation. The Court did not declare an exception to the general jurisprudential rule that its constitutional holdings are given retroactive effect. Rather, it made clear that, post-*Wayfair*, the physical presence rule would not apply to prior tax periods. Instead, the Court suggested that retroactive assertions of tax jurisdiction could potentially raise other constitutional issues.

Michael T. Fatale, *Wayfair, What's Fair, and Undue Burden*, 22 Chap. L. Rev. 19, 34–35 (2019). Stated differently, the possibility that a tax might be retroactively assessed under a new statute raises a Due Process concern rather than a Commerce Clause concern. In any event, the provisions which the Court has ruled do not require a physical presence for the imposition of a business license tax existed long before the years in which DoorDash was assessed a business license tax and are not being applied retroactively.

In conclusion, having found that DoorDash has not established that the City's ordinance violates the Commerce Clause under either the *Complete Auto* test or the *Pike* balancing test, the Court concludes that the ordinance is constitutional as applied to DoorDash. *Complete Auto*, 430 U.S. at 274 (a privilege tax will not violate the commerce clause so long as the taxpayer has a substantial nexus with the taxing State, the tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State); *Pike*, 397 U.S. at 142 (a statute "will be upheld" unless the burden imposed on such commerce is clearly excessive

in relation to the putative local benefits"); *see Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals,* 440 S.C. 266, 278, 890 S.E.2d 748, 754 (2023)("A municipal ordinance is a legislative enactment and is presumed to be constitutional.") .

ORDER

IT IS THEREFORE ORDERED that the City's motion for summary judgment is **GRANTED** to the extent that the City's ordinance does not require physical presence as a prerequisite to assessment of a business license tax. DoorDash's motion for summary judgment is denied to the extent that it sought a ruling that the City's ordinance did require physical presence as a prerequisite to assessment of a business license tax.

IT IS FURTHER ORDERED that the City's motion for summary judgment is **DENIED** to the extent that the City asserted the Court lacked the ability to entertain DoorDash's commerce clause argument.

IT IS FURTHER ORDERED that the City's motion for summary judgment is **GRANTED** to the extent that it sought a ruling that its ordinance was not unconstitutional as applied to DoorDash. DoorDash's opposing motion for summary judgment is **DENIED.**

IT IS FURTHER ORDERED that, except as otherwise set forth herein, all other aspects of the parties' motions for summary judgment are **DENIED.**[34]

THEREFORE, this contested case is resolved in favor of the City as provided above.

AND IT IS SO ORDERED.

The Honorable Robert L. Reibold
Administrative Law Judge

February 7, 2025
Columbia, South Carolina

[34] The Court specifically did not reach the question of whether DoorDash can be considered to be physically present in Anderson. As the Court's ruling on the construction of the ordinance was dispositive, a ruling on this motion was not necessary. *See generally Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)(holding the appellate court need not address the remaining issues when disposition of a prior issue is dispositive).

CERTIFICATE OF SERVICE

I, Jared Thompson, hereby certify that I have on this date served this order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

Jared Thompson
Judicial Law Clerk

February 7, 2025
Columbia, South Carolina