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MEMORANDUM

TO: Avon Finance Committee
CC: Avon Town Council; Eric Heil
FROM: Paul Wisor, Town Attorney
DATE: April 1, 2020
RE: COVID 19-Related Legislation

As you are well aware, the COVID-19 pandemic has fundamentally altered the global economy and the way in which society functions. Avon has not been shielded from these impacts, and in many ways has been more acutely affected than other areas of the country and the world. This memorandum sets forth a broad overview of the federal stimulus efforts aimed at stemming the spread of the COVID-19 virus and its associated fallout.

This memorandum not only seeks to address legislative and regulatory impacts on the Town of Avon (the “Town”), but provide perspective on the effect the stimulus legislation may have with respect to the broader Avon community. This larger picture is provided so the Finance Committee may better understand opportunities and burdens facing Avon businesses and employees as the Finance Committee considers various ways to respond to the crisis.

I. Federal Legislation

Efforts to address the COVID-19 pandemic at the federal level have come in the form of three stimulus bills. Phase 1, the Coronavirus Preparedness and Response Supplemental Appropriations Act, provided \$8.3 billion in emergency funding for federal agencies to respond to COVID-19. Phase II, the Families First Coronavirus Response Act (“FFCRA”), contained provisions for paid sick leave, free COVID-19 testing, food assistance, unemployment benefits, and requirements that employers provide additional protection for health care workers. Phase III, also known as the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), deployed \$2 trillion dollars to expand upon the prior phases by providing greater assistance to individuals, small businesses, state and local governments and key industries impacted by COVID-19.

A. Local Government Aid

The CARES Act provides for \$150 billion in aid to states and local governments. Funds will be allocated by the Treasury proportionally, but each state will receive at least \$1.25 billion, and it is estimated Colorado will receive \$2.2 billion. However, the Town will not receive any direct aid from the CARES Act as the legislation only applies to local governments with populations over 500,000. Only Denver and the counties of Adams, Arapahoe, Jefferson, and El Paso will be eligible to draw down some of the 2.2 billion dollars provided from Treasury. The State will receive the remaining share and will be responsible for spending or allocating the remaining funds. There are no requirements for the State to allocate funds to the Town, and it is yet to be determined how the State intends to utilize these funds. As such, the Town cannot count on any CARES Act dollars to either support the Town’s efforts to address the COVID-19 pandemic or otherwise backfill lost revenue.

B. Transportation

The CARES Act provides \$25 billion to public transit agencies. Of this \$25 billion, \$18.7 billion will be allocated to rural communities through what are known as 5311 grants, of which Avon is a recipient.

It is unclear at this time how much exactly the Town will receive, but the Town is eligible for an allocation. These funds are available to reimburse public transit agencies for operating costs to maintain service and lost revenue due to the coronavirus public health emergency, including the purchase of personal protective equipment and paying administrative leave of operations personnel due to reduction in service. Although these specific operating expenses are outlined in the CARES Act, other operating costs may also be eligible.

C. FFCRA

The FFCRA contains two critically important components that impact Avon business and employees as well as the Town: (1) the Emergency Family and Medical Leave Expansion Act (the “FMLA Amendments”) and (2) the Emergency Paid Sick Leave Act (the “Paid Leave Provisions”).

1. FMLA

The FMLA Amendments create an additional emergency category of family and medical leave related to the coronavirus crisis. Specifically, the FMLA Amendments require an employer to provide up to 12 weeks of leave to any employee who has been employed by the employer for 30 calendar days if the employee cannot work (or telework) because he or she has to care for his or her children if the school or place of care for the child has been closed or if the child care provider for the child is unavailable due COVID-19.

Traditionally, the FMLA was not applicable to employers with fewer than 50 employees. However, the FMLA Amendments make the coronavirus provisions of the FMLA applicable to any employer with fewer than 500 employees. Employer is also defined to include public authorities such as local governments. As such, small employers and local governments not traditionally subject to the requirements of the FMLA will now have to provide leave to employees who cannot work for certain coronavirus related reasons. However, certain small businesses can be exempted if the Secretary of Labor issues regulations exempting small employers because “the imposition of such requirements would jeopardize the viability of the business of a going concern.”

The first 10 days of leave provided under the FMLA Amendments can be unpaid. After an unpaid 10 days of leave, employers providing leave pursuant to the FMLA Amendments must pay the eligible employee in “an amount that is not less than two-thirds of an employee’s regular rate of pay.” However, in no event shall such paid leave exceed \$200/day and \$10,000 in the aggregate.

2. Emergency Paid Leave

In addition to the FMLA Amendments, the FFCRA also contains Paid Leave Provisions. The Paid Leave Provisions require employers to provide up to 80 hours of paid sick leave to employees who are unable to work or telework due to a number of COVID-19 related reasons. However, if the employee is a part-time employee, the employer need only provide sick leave for a number of hours equal to the number of hours that such employee works, on average, over a two-week period, not the 80 hours it would need to provide to a full-time employee. Once again, employer is defined to include all private organizations with fewer than 500 employees as well as governmental entities, including the Town. However, unlike the definition of employee under the FMLA Amendments, the Paid Leave Provisions require employers to provide this leave to employees regardless of how long they have been working for the employer. In addition, the employer may not require the employee to use other paid leave before the employee uses the paid sick time provided in the Paid Leave Provisions.

The reasons for which employees may qualify for paid leave under the Paid Leave Provisions are: (1) they are subject to a federal, state, or local quarantine or isolation order relating to COVID-19; (2)

they have been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) they are experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) they are caring for an individual who is subject to a quarantine or self-isolation order or who has been advised to self-quarantine; (5) they are caring for a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or (6) they are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

The amount to be paid by the employer for paid sick leave under the Paid Leave Provisions shall not be less than the employee's rate of regular pay, but in no event shall it exceed \$511 per day or \$5,110 in the aggregate for reasons numbered 1-3 above or \$200 per day and \$2,000 in the aggregate for reasons number 4-6 above.

It should also be noted FFCRA contains provisions providing tax and payroll credits to employers to assist with the obligations imposed by the FFCRA; however, the details and the limitations of the credits are beyond the scope of this memorandum. While the Town has provided unpaid FMLA, the tax credits do not provide relief to the Town for the additional cost of the FMLA Amendments or the Paid Leave Provisions. While most Avon employers will be able to recoup the cost of the FFCRA costs, the Town, at present, cannot.

D. Unemployment Insurance

Under Colorado law, a laid off or furloughed worker is entitled to unemployment payments at a rate of 55% of an unemployed worker's salary, capped at \$561. The CARES Act provides for unemployment benefits that are both increased in amount and extended in time. Individuals who receive unemployment compensation in Colorado will also receive an additional \$600 per week on top of ordinary state-authorized weekly benefits. The additional \$600 will be available only until July 31, 2020. Further, the federal government will fund up to an additional 13 weeks of pandemic emergency unemployment compensation for individuals who remain unemployed after they have exhausted their benefits under state law, up to a maximum of 39 weeks of unemployment compensation to such individuals, an increase from the 26 weeks traditionally available in Colorado. The CARES Act extends eligibility for COVID-19-related benefits to individuals who otherwise would not be eligible for regular unemployment compensation. This includes expanding eligibility to include independent contractors, self-employed individuals and those with a limited work history.

E. Paycheck Protection Program

The CARES Act established the Paycheck Protection Program (the "PPP") which provides loans of up to \$10 million to certain qualified small businesses through the Small Business Administration's (the "SBA's") 7(a) loan program. These loans are intended to be forgivable if the Avon employer maintains employees and otherwise complies with the CARES Act. Congress has appropriated \$349 billion for this program.

The PPP is available to small business concerns as well as 501(c)(3) nonprofits. All such entities must have fewer than 500 employees (full and part-time). The PPP makes no distinction as to the type of for profit business that applies, so construction firms, grocery stores, law firms, architects and salons are all treated the same. The PPP expands allowable uses of 7(a) loans to include employee salaries, paid sick leave, medical leave, mortgage payments, rent payments, utility payments, insurance premiums and interest on any other debt obligations.

Qualifying borrowers are eligible for loans up to 2.5 times their monthly payroll costs, measured over the prior twelve months, or \$10 million, whichever is less. PPP loans do not require collateral from either the business or its owners like other SBA loans. Similarly, PPP loans do not require personal guarantees from owners like other SBA loans.

Loans provided to borrowers under the PPP are subject to forgiveness in the amount spent by the borrower during an eight week period after the origination date of the loan on the following items:

- Payroll costs;
- Interest payment on any mortgage put in place prior to February 15, 2020;
- Payment of any rent on any lease in effect prior to February 15, 2020;
- Payment of any utility charge, provide the utility service commenced prior to February 15, 2020.

Any loan forgiveness amounts will be reduced proportionately by any reduction in employees of the borrower during the first eight weeks of the loan. Note, this does not mean employers cannot separate from employees so long as they are replaced. Amounts forgiven will also be proportionately reduced if an employee's pay is reduced by twenty five percent or more as compared to the most recent quarter of employment.

In the event amounts of the loan are not forgiven, the remaining balance will have a maturity of ten years, and a maximum interest rate of four percent. For principal amounts that exist after any loan forgiveness under the PPP, small businesses may defer payment of remaining principal, interest, and fee balances for at least 6 months and not more than a year. Under the PPP, all borrowers are allowed to apply for deferment and all lenders have to apply complete deferment for all remaining balances for at least 6 months. Thus, businesses under the PPP can get a substantial portion of their loan forgiven in the first 8 weeks after the loan is issued, and not have to make any payments for up to a year.

In an effort to incentivize banks to make loans under the PPP and speed up loan processing, the PPP increases the federal guaranty of such 7(a) loans to 100% for the remainder of 2020 and substantially modifies the procedures and requirements required of lending banks to have their loans guaranteed by the SBA. For example, to assess eligibility lenders are only required to determine whether a business (1) was operational on February 15, 2020, and (2) had employees for whom it paid salaries and payroll taxes, or a paid independent contractor.

F. SBA Disaster Relief Lending

Prior to the establishment of PPP loans through the CARES Act, Congress enhanced the SBA's Economic Injury Disaster Loans ("EIDL") through its Phase I legislation. An EIDL loan offers up to \$2 million per individual business in assistance and can provide economic support to small businesses to help overcome the temporary loss of revenue they are experiencing. These EIDLs may be used to pay fixed debts, payroll, accounts payable and other bills that cannot be paid because of the pandemic's impact. The interest rate on a small business loan is 3.75%. The interest rate for non-profits is 2.75%. SBA offers loans with long-term repayments in order to keep payments affordable, up to a maximum of 30 years. Terms are determined on a case-by-case basis, based upon each borrower's ability to repay.

The CARES Act further expands eligibility for EIDLs to any individual operating as a sole proprietor or independent contractor between January 31, 2020 and December 31, 2020. Until December 31, 2020, the SBA can approve EIDLs based solely on an applicant's credit score or an alternative appropriate method for determining an applicant's ability to repay.

For EIDLs made before December 31, 2020 due to COVID-19, the SBA will waive the requirement for a personal guarantee on advances and EIDLs below \$200,000, the requirement that an applicant needs to have been in business for the one-year period before the disaster as well as the requirement that a business not have

credit available elsewhere. In addition, the CARES Act provides a federally declared emergency qualifies as a new trigger for the EIDL program, thus making EIDLs available nationwide.

G. Direct Individual Aid

The CARES Act allocated \$300 billion towards a one-time stimulus check of \$1,200 to every Avon resident whose 2018 tax return, or 2019 if filed, showed income at or below \$75,000 for an individual or \$150,000 for a married couple. As such, a married couple with an income below \$150,000 would receive \$2,400, with an extra \$500 per child. There's no minimum threshold, so the vast majority of individuals in Avon reporting income in 2018 or 2019 will benefit. Individuals who receive Social Security benefits but don't file tax return are still eligible as well. Direct payments phase down after the \$75,000/\$150,000 caps and disappear completely for people making more than \$99,000 and couples making more than \$198,000.

II. Conclusion

The COVID-19 crisis will continue to impact Avon for the foreseeable future. While certain federal legislation may benefit portions of the Town's operations, the Town should not count on federal funds to assist it through the pandemic. While congressional efforts do not directly address the Town's needs, there is at least hope some stimulus programs will provide a lifeline for businesses as well as individuals. The Town and the Finance Committee should take these programs into consideration as it determines the best way to meet the unique challenges posed by the spread of the COVID-19 virus.