Coates' Canons Blog: Business Registration Programs: 10 Questions and Answers

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My colleague Chris McLaughlin has blogged repeatedly about the legal impact of the General Assembly's repeal last year of the statutory authority for most local privilege license taxes ("LPLTs"). (See his blog posts here, here, and here.) Local governments – primarily cities – have lost significant revenue as a result of the repeal. While the loss of revenue is problematic, local officials have raised other concerns associated with the elimination of LPLTs. In particular, they have noted that the demise of most LPLTs has deprived them of an important source of information about who is doing business within their borders. Such information could have a variety of uses relevant to the public's well-being. For example, it could help a city identify the right person to contact about dangerous conditions on business property.

Some local governments are considering business registration programs as a way to keep track of local businesses, and a few have actually moved forward with implementation. These programs lie in uncharted legal territory, and faculty members at the School of Government have received questions about them. This blog post provides answers to 10 of the most common questions.

1. Do cities and counties have statutory authority to implement business registration programs?

I can't be absolutely certain, but I strongly believe they do.

Local governments in North Carolina have only those powers granted to them by the legislature. Consequently, there must be a statutory basis for any action taken by a city or county. Business registration programs are not expressly mentioned in the primary laws governing cities, Chapter 160A, or counties, Chapter 153A. Collectively, however, G.S. 160A-4 and 153A-4 direct the judiciary to interpret these laws broadly. The general ordinance-making power of cities and counties resides in G.S. 160A-174 and 153A-121, respectively. Taken together, the two statutes authorize cities and counties to adopt ordinances that define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of their citizens. Additionally, G.S. 160A-194 and 153A-134 allow local governments, by ordinance and subject to the general laws of the state, to "regulate and license occupations, businesses, trades, professions, and forms of amusement or entertainment and prohibit those that may be inimical to the public health, welfare, safety, order, or convenience."

In *King v. Town of Chapel Hill*, 367 N.C. 400 (2014), the North Carolina Supreme Court held that G.S. 160A-174 is ambiguous and thus must be broadly construed in accordance with G.S. 160A-4. (I have blogged about *King* here and here .) Presumably, the same reasoning would lead the court to conclude that G.S. 160A-194's grant of general regulatory authority over businesses must be interpreted expansively. Because the equivalent county statutes are essentially identical to their city counterparts, the court would almost certainly hold that G.S. 153A-121 and 153A-134 are likewise subject to broad interpretation.

In my view, when broadly construed, the general ordinance-making and business regulation statutes probably furnish cities and counties with adequate legal authority to establish and operate business registration programs, provided that for any such program (1) the city or county can explain how the program safeguards the public health, safety, or welfare and (2) any burdens placed on businesses by the program are rationally related to program's objective(s). *See King*, 367 N.C. at 408-09 (holding that the defendant town's cap on towing fees was not rationally related to the health, safety, or welfare of the public). I must emphasize, though, that neither of our state's appellate courts has ruled on the lawfulness of city or county business registration programs. Until such a ruling comes down, or the General Assembly enacts legislation specifically authorizing such programs, we can't be totally sure of their legality.

2. Does a local government have to act by ordinance when creating a business registration program?

Yes. The general ordinance-making and business regulation statutes all specify that the authority they confer must be exercised "by ordinance." G.S. 160A-174, -194; G.S. 153A-121, -134.

3. May a local government charge a fee as part of its business registration program?

Probably, assuming cities and counties may lawfully implement business registration programs in the first place.

As I explained in a blog post on peddler permit fees, the North Carolina Supreme Court in *Homebuilders Association of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37 (1994), recognized that the authority to operate a regulatory program usually implies the power to impose reasonable fees in support of it. Given this precedent, if G.S. 160A-194 and G.S. 153A-134 said nothing at all about fees, the case for implied authority to impose fees as part of a business registration program would be relatively straightforward. These statutes do mention fees, though, and in so doing they muddy the water. Specifically, G.S. 160A-194 and 153A-134 say that, "[i]n licensing trades, occupations, and professions," a city or county "may, consistent with the general law of the State, require applicants for licenses to be examined and charge a reasonable fee therefor." One could argue that the references to exam fees would be superfluous if the legislature had intended G.S. 160A-194 and 153A-134 to confer implied fee authority on local governments. Put differently, the language about exam fees shows that, if the legislature had wanted to endow cities and counties with any additional fee authority, it could have added wording to that effect; the fact that it didn't, so the argument would go, demonstrates that G.S. 160A-194 and 153A-134 should not be understood to justify the imposition of other fees.

Notwithstanding the exam fee provisions in G.S. 160A-194 and 153A-134, a court that regards the statutes as sufficient authority for business registration programs is likely to find that they also imply the power to impose registration fees. A local government whose fee authority is disputed would stand a good chance of persuading the judge that, in light of *Homebuilders*, the General Assembly should express itself unambiguously if it wishes to deny local governments implied fee authority with respect to their business regulations.

4. Does the law restrict the amount of a business registration fee?

Yes. Although the supreme court recognized the implied fee authority of cities in *Homebuilders*, it stressed that fees imposed pursuant to a local regulatory program must be reasonable. "[A] rough limit to 'reasonableness' [for regulatory fees] is the amount necessary to meet the full cost of the particular agency program." David M. Lawrence, Local Government Finance in North Carolina § 311, at 68 (2d ed. 1990), *cited in Homebuilders*, 336 N.C. at 46. In other words, when a local government relies on implied fee authority, a court will deem the fee unreasonable if it generates income above the amount necessary to fund the regulatory program.

Because the legal limit for a business registration fee turns on the actual cost to a city or county of administering its registration program, the limit can vary from jurisdiction to jurisdiction, depending on the features of each program. For instance, as Chris opines at the bottom of his most recent blog on LPLTs, a registration program that involves neither inspections nor background checks would be relatively inexpensive. Fees above $10 or $20 per business for such a program would run the risk of being classified as unreasonable by a court. Fees could be substantially higher, though, for a program that incorporates inspections or background checks. The bottom line is that a city or county should be prepared to explain how its fee amount is tied to the program's cost.

5. Must a local government amend its business registration ordinance whenever it wishes to adjust its registration fee?

It depends. If the ordinance sets the fee amount, then a city council or board of county commissioners will have to amend the ordinance to change it. On the other hand, if the ordinance states that the fee amount will be set by governing board at designated intervals, annually for example, then the simple adoption of a motion to change the amount would be sufficient.

6. Do the statutes mandate the exemption of any businesses from local registration programs?

It's not clear. As previously noted, G.S. 160A-194 and 153A-134 collectively authorize cities and counties to "regulate and

license occupations, businesses, trades, professions, and forms of amusement or entertainment." The statutes thus cover a broad array of entities. Indeed, the term "businesses" is probably broad enough to encompass the other types of entities listed in the statutes. *See* Black's Law Dictionary 198 (6th ed. 1990) (defining "business" as "[e]mployment, occupation, profession, or commercial activity engaged in for gain or livelihood"). That being said, G.S. 160A-194 and 153A-134 prohibit cities and counties from examining or licensing individuals who hold licenses issued by any of the state's occupational licensing boards. Furthermore, the statutes declare that they do not permit local governments to regulate or license "digital dispatching services for prearranged transportation services for hire." Translation: Cities and counties can't regulate or license Uber or Lyft.

Undoubtedly, neither G.S. 160A-194 nor 153A-134 will sustain an effort to subject digital dispatching services to a local government's registration program. The more difficult question is whether a local government will be on solid ground if it tries to force law firms, doctor's offices, or other enterprises necessarily owned or operated by persons with state-issued occupational licenses to register. Obviously, the more conservative approach would be for a city or county to exempt those enterprises from its registration program. (Chris recommends this approach in his last blog on LPLTs.) A less conservative approach would be to require them to register like other businesses, Uber and Lyft excepted. If it takes the second approach, a local government could argue that its registration requirement doesn't violate G.S. 160A-194 or 153A-134 because no exam is administered and no license is issued as part of its program.

7. Which professions or trades require licenses issued by the state's occupational licensing boards?

I don't know of any one place where this information is readily available. (If you do, please notify me in the comments section.) Of course, physicians, attorneys, and dentists are obvious examples of professionals who operate pursuant to licenses issued by occupational licensing boards, but there are others. A city or county doesn't have to have all of that information to exempt businesses owned or operated by licensed persons from its business registration program, however. The local government can simply include language in its ordinance and on its registration form noting the existence of the exemption and instructing anyone who desires to claim the benefit of the exemption to submit licensure documentation.

8. May a city or county require a business that operates within its borders but is physically located in another jurisdiction to participate in its registration program?

I don't see why not, provided the registration requirements are not unduly burdensome.

This question brings up an important point related to county registration programs. As is true of ordinances adopted in accordance with other statutes in Article 6 of Chapter 153A, business regulations adopted pursuant to G.S. 153A-134 typically apply only in the unincorporated areas of a county. (A city's governing board may by resolution make a county ordinance adopted under any of Article 6's provisions effective inside the city.) G.S. 153A-122. Thus, ordinarily a county may not oblige a business that is located inside one of the county's cities to comply with the county's registration program unless the business operates in the county's unincorporated areas.

Local governments should avoid confusing businesses that operate within their borders but are located elsewhere with itinerant salespeople. The statutes that allow local regulation of individuals in the latter category are G.S. 160A-178 and G.S. 153A-125. As explained in more detail in my blog post on peddler permit fees, G.S. 160A-178 and 153A-125 expressly authorize cities and counties to impose permit requirements on itinerant salespeople and thus impliedly grant them power to charge reasonable fees for the permits.

9. May a local government include nonprofit corporations in its business registration program?

I'm not sure. The text of G.S. 160A-194 and 153A-134 – "occupations, businesses, trades, professions, and forms of amusement or entertainment" – indicates that the legislature had in mind entities engaged in commercial undertakings. Many nonprofits depend primarily or wholly on donations, and some rarely or never sell anything. Yet even if G.S. 160A-194 and 153A-134 don't encompass the power to subject nonprofits to local registration programs, it could be argued that this power exists under the general ordinance-making statutes, so long as a local government can credibly link the registration of nonprofits to the health, safety, or welfare of the public. Of course, a local government could avoid the issue of nonprofits altogether by excluding them from its registration program.

10. Is any legislation pending that could affect the authority of cities or counties to implement business registration programs?

Yes. At least two bills introduced in this session of the General Assembly could have an impact on local business registration programs:

- HB 362 would allow cities to operate business registration programs and to charge registration fees of up to $50. No action has been taken on this bill since March, however, so perhaps it isn't going anywhere.
- HB 739 would delete the language in G.S. 160A-194 permitting cities to charge exam fees when licensing persons for trades, occupations, and professions. If this bill were to pass, it would provide ammunition to anyone inclined to assert that cities have no implied fee authority under G.S. 160A-194. An opponent of registration fees could point to the amendment as evidence that the legislature does not want the statute to be construed to grant any fee authority at all. HB 739 passed the House of Representatives, but it has been stuck in committee in the Senate since April.

It should be apparent from the discussion above that uncertainty remains about the scope of statutory authority for local business registration programs. For this reason, I highly recommend that a city or county consult its attorney before implementing a business registration program of any kind.

Links

- canons.sog.unc.edu/?p=7711
- canons.sog.unc.edu/?p=7730
- canons.sog.unc.edu/?p=7882
- www.ncleg.net/gascripts/Statutes/StatutesTOC.pl?Chapter=0160A
- www.ncleg.net/gascripts/Statutes/StatutesTOC.pl?Chapter=0153A
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-4.html
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- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-174.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-121.html
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- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_153A/Article_6.html
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