Coates' Canons Blog: Legal Authority for Peddler Permit Fees

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The General Assembly's enactment of Session Law 2014-3 will eventually result in the elimination of nearly all local privilege license taxes. (My colleague Chris McLaughlin has blogged about the impact of S.L. 2014-3 on local governments here and here.) School of Government faculty members have received inquiries from local officials worried that S.L. 2014-3 applies to the fees that cities and counties charge for permits issued to peddlers and other itinerant salespeople ("peddler permit fees"). This blog post examines the legal basis for peddler permit fees and explains why S.L. 2014-3 does not curtail the authority of local governments to impose them.

Legal Authority for Peddler Permit Fees

Cities have express statutory authority over the activities of peddlers and other itinerant salespeople pursuant to G.S. 160A-178, while G.S. 153A-125 confers essentially the same powers on counties. Collectively, the two statutes allow local governments to adopt ordinances that "regulate, restrict, or prohibit . . . the business activities of itinerant merchants, salesmen, promoters, drummers, peddlers, flea market operators and flea market vendors and hawkers." (Note: Commercial speech enjoys constitutional protection, and thus, significant constitutional limitations apply to the powers granted by G.S. 160A-178 and 153A-125. A discussion of those limitations lies beyond the scope of this blog post, however.)

Many of the terms used in G.S. 160A-178 and 153A-125 are largely synonymous. The General Assembly has elsewhere defined a peddler as "a person who travels from place to place with an inventory of goods for sale at retail, and who delivers the identical goods that he carries with him." G.S. 105-53(a) (repealed Session Laws 1996, Second Extra Session, c. 14, s. 17). This definition is essentially the same one found in a prominent law dictionary, which also uses the term peddler to define "hawker." *Black's Law Dictionary* 719, 1131 (6th ed. 1990). Likewise, a "drummer" has been defined as a "traveling salesman." *Webster's New World Dictionary and Thesaurus* 194 (2d. ed. 2013). The chief factor that seems to distinguish most of the individuals covered by G.S. 160A-178 and 153A-125 from other salespeople is the absence of fixed places of business within the jurisdictions where they attempt to sell their products.

The statutes provide examples of the conditions that local governments may impose on itinerant salespeople. For instance, cities and counties may require peddlers to apply for and receive permits, to abide by reasonable restrictions as to when and where they may conduct business, and to post adequate bonds to protect the public from fraud.

Both cities and counties have long required itinerant salespeople to pay fees in order to obtain peddler permits. Yet only counties have express statutory authority to impose such fees. *See* G.S. 153A-125 ("A county may charge a fee for a permit issued pursuant to [an itinerant merchant] ordinance.") There is no mention of permit fees in the city statute.

The presence of a fee provision in G.S. 153A-125 and the lack of one in G.S. 160A-178 might lead some to infer that cities have no legal basis on which to charge peddler permit fees. It seems pretty clear to me, though, that cities do indeed have such power, notwithstanding the omission of a fee provision in the city statute. In the first place, the case law indicates that the power to charge reasonable fees is implicit in the authority to regulate itinerant salespeople. Moreover, nothing in the statutory history of G.S. 160A-178 and 153A-125 demonstrates that the General Assembly intended its explicit grant of fee authority to counties to be interpeted to deny that power to cities.

Implied Fee Authority

"[I]t is well accepted that . . . the power to carry on a regulatory program necessarily includes the power to make charges incident thereto." David M. Lawrence, *Local Government Finance in North Carolina* § 311, at 67 (2d ed. 1990). Put differently, the authority to impose fees "is implied by the power of [a] local [government] to engage in the regulatory activity." Kara A. Millonzi, Revenue Sources, in *Introduction to Local Government Finance* 85, 95 (Kara A. Millonzi ed., 2014).

The North Carolina Supreme Court has endorsed the principle of implied fee authority for local governments. In *Homebuilders Association of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37 (1994), the plaintiff challenged the legality of a fee schedule that Charlotte had adopted to defray the expense of municipal services involving zoning and subdivision matters. (Rezoning reviews and condominium plat reviews were just two of the many services included in the fee schedule.) The plaintiff argued that Charlotte had no power to charge the fees listed on the schedule because no statute expressly allowed it to do so.

Rejecting the plaintiff's argument, the supreme court upheld the fee schedule. State law unquestionably authorized municipalities to regulate the zoning and subdivision of land, and the court approvingly observed that "[t]he generally accepted rule today seems to be that the municipal power to regulate an activity implies the power to impose a fee in an amount sufficient to cover the cost of regulation." *Homebuilders*, 336 N.C. at 42.

The supreme court emphasized that fees must be reasonable to be lawful. "[A] rough limit to 'reasonableness' [for fees] is the amount necessary to meet the full cost of the particular agency program." Lawrence, *Local Government Finance in North Carolina* § 311, at 68, *cited in Homebuilders*, 336 N.C. at 46. The court concluded that the fees at issue in *Homebuilders* could not be deemed unreasonable inasmuch as the evidence showed that they approximated the cost of regulation.

Although the supreme court later struck down local government fees in *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805 (1999), and *Lanvale Properties, LLC v. County of Cabarrus*, 366 N.C. 142 (2012), the rulings in those two cases do not undermine the principle of implied fee authority recognized in *Homebuilders*. In *Smith Chapel* the court held that some of the fees Durham was using to fund its stormwater management program were impermissible under a statutory provision that specifically addressed the power of cities to impose fees for stormwater and drainage systems. In *Lanvale* the court invalidated Cabarrus County's practice of conditioning the approval of housing development applications on the payment of contributions in amounts set by the county. The purpose of the contributions was to help finance public school expansion, so contribution amounts bore no relationship to the expense of administering zoning and subdivision regulations. Thus, unlike the fees upheld in *Homebuilders*, the *Smith Chapel* fees were not imposed in reliance on a city's implied fee authority, and the *Lanvale* fees did not reflect the cost of the regulatory program.

Statutory History

The General Assembly enacted G.S. 160A-178 in 1963, though the provisions of that statute initially appeared as a subsection of another statute which set forth the general corporate powers of cities. S.L. 1963-780. The legislature passed G.S. 153A-125 in 1967, though it too first showed up as part of another statute. S.L. 1967-80. In their original forms, neither G.S. 160A-178 nor 153A-125 said anything about peddler permit fees.

In 1971 the legislature revised and consolidated the principal city statutes into Chapter 160A of the General Statutes, at which time G.S. 160A-178 acquired its current number. In 1973 the primary county statutes were revised and consolidated into Chapter 153A, and G.S. 153A-125 became a standalone provision. It was then that the General Assembly added language to the county statute allowing counties to charge peddler permit fees.

Here is why this timeline matters. Suppose for a moment that passage of the county statute with its fee provision had preceded adoption of the city statute. It would be hard to avoid the conclusion that the legislature, having already granted fee authority to counties, made a conscious decision to withhold that power from cities. Since the city statute came first, however, it seems likely that, if the General Assembly had wished to restrict peddler permit fees to counties, the insertion of the fee provision in G.S. 153A-125 would have been accompanied by an amendment to G.S. 160A-178 directing cities to issue peddler permits free-of-charge. Given the absence of such a mandate in the city statute, I think that *Homebuilders* controls and cities therefore have implied authority to require the payment of reasonable fees for peddler permits.

(Non)Impact of S.L. 2014-3 on Peddler Permit Fees

With the passage of S.L. 2014-3, most local privilege license taxes will be a thing of the past after the current fiscal year. Nonetheless, the new law has no bearing on the power of cities and counties to impose peddler permit fees because (1) regulatory fees and privilege license taxes are legally distinct and (2) S.L. 2014-3 does not refer to peddler permit fees.

Regulatory Fees v. Privilege License Taxes

In the local government context, the usual purpose of a fee is to defray the cost of administering a regulatory program. As noted in *Homebuilders*, the revenue generated by a fee generally may not exceed the cost of the regulatory program for which it is charged. (Zoning-related fees are a classic example of regulatory fees. They help offset the cost to a city or county of administering its development regulations.)

In contrast to regulatory fees, privilege license taxes are a form of taxation. The North Carolina Supreme Court has (somewhat redundantly) described a privilege license tax as “a tax on the privilege of engaging in business” within a jurisdiction. *Great Atlantic & Pacific Tea Co. v. Maxwell*, 199 N.C. 433 (1930). Because it is intended to be “a revenue-generating measure” and not a regulatory tool, a privilege license tax “should not be used to regulate otherwise legitimate businesses.” William A. Campbell, *North Carolina City and County Privilege License Taxes* 3 (5th ed. 2000).

S.L. 2014-3 and Peddler Permit Fees

The General Assembly understands the difference between privilege license taxes and regulatory fees. Prior to S.L. 2014-3, the distinction was obvious in the laws that governed local taxation and regulation of itinerant salespeople. Separate provisions authorized cities and counties to levy privilege license taxes on persons who qualified as peddlers or itinerant merchants under a state privilege tax statute. *See* G.S. 105-53; 153A-152; 160A-211. This power to tax existed alongside but apart from the power of local governments to regulate the activities of itinerant salespeople. *See* G.S. 153A-125; 160A-178. A city or county might levy privilege license taxes on peddlers and itinerant merchants, even if it did not require itinerant salespeople to obtain permits or otherwise regulate their activities. Alternatively, a local government could require itinerant salespeople to obtain and pay for permits, even if it did not subject peddlers and itinerant merchants to privilege license taxes. The maximum privilege license tax that a city or county could levy on a peddler or itinerant merchant was established by statute. (The tax on peddlers who traveled by vehicle was limited to $25 – $10 for peddlers who traveled on foot – while the tax on itinerant merchants was capped at $100.) No statute set the upper limit for peddler permit fees: the cost of regulation determined the maximum amount that a local government could charge.

Session Law 2014-3 seeks to accomplish the General Assembly’s goal of eliminating most local privilege license taxes by repealing or substantially amending the statutes that formerly granted local governments the power to levy them. No reference is made in the new law to peddler permit fees or to G.S. 160A-178 or 153A-125. It does not delete or amend the sentence in G.S. 153A-125 expressly allowing counties to impose such fees, and the implied authority of cities to do the same is not mentioned. There is no reason to assume that the legislature erroneously believed that ending the local privilege license tax would bring about the demise of peddler permit fees. Consequently, the best reading of S.L. 2014-3 appears to be that, while the General Assembly unmistakably meant to end nearly all local privilege license taxes, it had no intention of disturbing the authority of cities and counties to impose fee requirements on itinerant salespeople.

Conclusion

Both cities and counties have the power to condition the issuance of a peddler permit on the payment of a reasonable fee. Although S.L. 2014-3 spells the eventual end of most local privilege license taxes, the law leaves the authority of local governments to impose peddler permit fees intact.

Links

- www.ncga.state.nc.us/EnactedLegislation/SessionLaws/HTML/2013-2014/SL2014-3.html
- canons.sog.unc.edu/?p=7711
- canons.sog.unc.edu/?p=7730

- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-178
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-125