# Coates' Canons Blog: More Questions and Answers about the New Privilege License Law

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The General Assembly's decision to eliminate local privilege licenses in S.L. 2014-3 left many unanswered questions. I tackled some of the big ones in my first blog post on the new law last month. Today I address a few more privilege license questions plus one regarding the law's impact on local occupancy taxes.

***If my city's privilege license tax year begins before July 1, 2014, may my city levy 2014 privilege license taxes on businesses that do not have physical locations in the city?***

Technically yes, but I advise against it.

Section 12.2 of S.L. 2014-3 added a requirement that a city may levy privilege license taxes ("PLTs") on a business only if that business is "physically located" in the city. This same section prohibited any increase in city PLT rates from 2013 to 2014. However, this section applies only to PLT years that begin on or after July 1, 2014.

Technically, if your city's PLT year begins before July 1, 2014 then your city may levy 2014 PLTs without concern over the physical location requirement or the rate limitation.

But I know that wasn't the intent of the General Assembly. If cities skirt the new PLT requirements using this technicality, the legislature may choose to change the effective date of Section 12.2. Such a move would require those cities that ignored the requirements to cut refund checks to potentially many, many businesses.

In my view, it's not worth the effort. I think all cities should assume that the physical location requirement and the rate limitation apply to all 2014 PLTs, regardless of when a particular city's PLT year begins.

***Can you explain more about the physical location requirement? I'm confused.***

Join the club. The legislation did not provide any explanation of what it means to be "physically located" in a city, which means nobody really knows. I did my best to interpret this requirement in my previous post.

Here are a few specific examples based on questions I've been getting since the bill passed.

**Redbox DVD rental kiosks**

I think the "physical location" requirement should be satisfied by the presence of the kiosk in your city and by the fact that the transactions being taxed—DVD rentals—occur at the kiosk. I don't think it matters where Redbox maintains its offices and warehouses.

But remember that nobody knows exactly what constitutes a physical location under the new law. The conservative approach would be to exempt Redboxes from PLTs unless Redbox has an actual office or warehouse in your city.

I think either approach—taxing Redboxes or considering them exempt—would be reasonable. If a city does choose to tax Redboxes, I think the appropriate tax would be $25 per Redbox for video rental under the repealed-but-still-effective G.S. 105-102.5(b)(1).

**Property Managers & Landlords**

If a property manager or a landlord maintains an office outside of your city but owns and manages properties in your city, I

think that property manager or landlord could be subject to PLTs in your city. The presence of real property in your city should be enough to satisfy the physical location requirement.

For more on taxing property managers and landlords, see this post.

**Trash Removal Companies**

Here's one example that I think fails to satisfy the physical location requirement. If a business has its office elsewhere but leases dumpsters to property owners in your town and routinely enters your town to empty those dumpsters, I don't think your town may levy PLTs on that business.

You might argue that the presence of the business's personal property (dumpsters) in your town satisfies the physical location requirement. But I think this type of business is much more similar to plumbers and other service providers who conduct their customer transactions outside of town and enter the town only to provide a service. I don't think a town should be taxing these service providers unless they maintain offices in that town.

Similarly, I don't think a town should be taxing billboard rental companies, water bottle suppliers, restaurant suppliers, or other businesses that service clients in the town but have their offices elsewhere.

***I realize my city may no longer levy privilege license taxes as of 2015, but we still want to know who is doing business in our jurisdiction. Could we continue to require all businesses to register with the city?***

Probably.

Several cities have raised this question because they view the privilege licenses as a regulatory system as well as a revenue source. S.L. 2014-3 eliminates PLTs as a revenue source. But cities might be able to rely on another statutory provision to continue licensing businesses for regulatory purposes.

G.S. 160A-194 authorizes cities 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."

This statute might authorize a business registration system and a minimal registration fee that could help a local government keep track of businesses operating in its jurisdiction. I say "might" because state courts have not opined on the matter. But my colleague Trey Allen and I think that a court would likely approve of a city registration system that included a minimal fee.

That said, if a city were to adopt a registration system it would be wise to exempt from that requirement the businesses described in 160A-194(b) and (c): occupations that are licensed by the state (attorneys, doctors, etc.) and mobile ride dispatchers (Uber, Lyft). While we could craft an argument supporting the decision to include these businesses in a registration requirement, we think a conservative approach is best.

Assuming that an annual fee could be charged for this type of regulatory system, that fee should not be viewed as a replacement for lost PLT revenue. Regulatory fees must be tied to the cost of the related regulatory system. I assume that a business registration system that does not involve inspections or background checks would be relatively inexpensive. If so, fees above $10 or $20 per business would run the risk of being viewed as unreasonable by a court.

If you have questions about creating such a regulatory system, I recommend contacting my colleague Trey Allen at tallen@sog.unc.edu.

If a business failed to register and obtain a license before operating in the city, the city could enforce that requirement just as it can enforce other ordinances. G.S. 160A-175 authorizes fines, civil penalties, criminal prosecution, and injunctive relief for violations of city ordinances.

My colleague Trey Allen, our resident expert on local government's police power, suggests that if a city were to proceed down this path it should specifically identify the public purposes motivating the business registration ordinance. Those purposes could include protecting the public from scam artists and con men, ensuring compliance with zoning regulations,

helping the fire department be aware of buildings being used for commercial purposes, identifying businesses that should be listing property for taxation, or any other regulatory purpose for which the city previously used the PLT system. Trey also reminds me that due to First Amendment concerns any business regulation ordinances should not be applied to people who go door-to-door advocating on religious or political issues.

***How does S.L. 2014-3 affect local occupancy taxes?***

It makes local occupancy taxes apply to all rentals of private residences that are listed with real estate brokers or agents regardless of the length of those rentals.

Previously any private residence that was rented for fewer than 15 days per year was not subject to sales tax or local occupancy tax. That is no longer true.

Section 8.1 of S.L. 2014-3 amended the sales tax provisions to mandate the taxation of private residence rentals that are listed with a broker or agent. Local occupancy taxes (analyzed in detail here and here) base their exemptions on the sales tax exemptions. See G.S. 153A-155 (counties) and G.S. 160A-215 (cities). This means that private residences that are listed for rental with real estate brokers or agents are now subject to both sales taxes and local occupancy taxes even if they are rented for fewer than 15 days in a year.

Apparently this provision was the reason S.L. 2014-3 moved so quic-kly through the General Assembly. Moore County wanted to be able to levy occupancy taxes on houses being rented for big money during the men's and women's U.S. Opens at Pinehurst this week and next. (If you hurry might still be able to rent this house for a mere $150,000 during the two-week golf extravaganza.)

What if a residence is listed with a rental agency but rented privately by the property owner without help from an agent or broker? Most rental agency contracts would prohibit private rentals to ensure that the agency is paid a fee for promoting the property, but if one occurred I think sales and occupancy taxes would still apply. The statute doesn't say that the residence needs to be *rented* through a broker or agent for taxes to apply; it simply says that the residence needs to be *listed* with a broker or agency. Once a residence is listed with a broker or agent any subsequent rental should be subject to sales and occupancy taxes even if a broker or agent is not actually involved with the rental.

## 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=5146
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-194
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