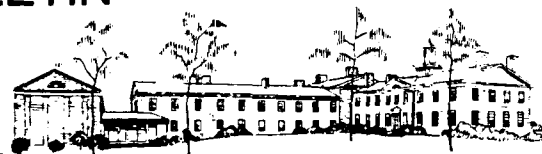


# LOCAL GOVERNMENT LAW BULLETIN

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## PRIVILEGE LICENSE ORDINANCE MODEL ADMINISTRATIVE PROVISION

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This model for the administrative provisions of a local privilege license tax ordinance was prepared by James Stoddard Hayes, while a third-year student at the University of North Carolina Law School, and David Lawrence and William Campbell, members of the Institute of Government faculty. The model has undergone a careful review within the Institute and by a committee of city attorneys who graciously gave of their time. With the revisions suggested by these reviews, the model ordinance is now being published. The introduction that follows highlights a few provisions of the model ordinance. (Throughout, the ordinance is cast as if adopted by a city. It is, however, equally suitable for adoption by a county.)

The model makes no effort to suggest the classes of business to be taxed or the rates or bases of taxation, leaving these decisions to each unit. It does, however, specify the nexus with the city or county that must exist before a business is taxable. If a business location is maintained within the unit, or if a person either solicits business within the unit or picks up or delivers goods or services within the unit, there is sufficient nexus to tax that business or person under the ordinance. In a few instances a business that is located within the city or that conducts business within the city under the terms of the ordinance may in fact be conducting an exclusively interstate business and thus be immune from local privilege license taxation under the Commerce Clause of the United States Constitution. The case law on this subject is extensive and complex, and therefore this model makes no effort to define the situations in which there may be such a constitutional immunity. Rather, such situations are more properly a matter of administration of the ordinance, in which the facts of each situation will determine the outcome.

In some cities and counties, privilege license ordinances serve two purposes: (1) raising revenue, and (2) regulating some or all of the businesses taxed. Thus, some ordinances condition approval of the license for certain businesses upon the applicant's showing himself to be of good moral character. In others, one reason for refusing the

license is that the applicant had not been bonded, as required by another city ordinance. The model does not mix purposes in this way; it is concerned solely with raising revenue. Two reasons account for this single concern. First, there is some reason to question the constitutionality of the standards that applicants must conform to as set out in some local ordinances. Arguably some of these are unconstitutionally vague. Second, both city and county laws now provide several enforcement devices for local ordinances, so that there is really no need to make the tax collector an enforcer of police measures. Therefore, section 2 of the ordinance specifies that the ordinance is enacted for revenue purposes only and makes clear that paying the license tax and receiving the license does not give the licensee any vested right in his business such that the business might not otherwise be regulated.

Under G.S. 105-33 (c) , local privilege license taxes authorized or restricted by Schedule B may come due either June 1 or July 1. Most units have chosen the July 1 due date. The model also uses this date, though June 1 could just as well be used. G.S. 105-33 provides that if a business begins operations in the last five months of the tax year, only half the tax is due. The model follows that provision also, to provide uniformity between Schedule B taxes and other privilege license taxes.

Perhaps the most significant element of the model is the use of the "conference" between the tax collector and the taxpayer. The ordinance makes it unlawful to conduct a taxed business within the unit without having paid the tax. This provision makes acquisition of a license so important that the drafters of the model thought it advisable to afford due process rights of notice and hearing to any taxpayer faced with the loss or refusal of a license. Three situations can lead to a conference between taxpayer and tax collector: initial refusal to issue a license, proposed revocation of an issued license, and disagreement over the amount of tax due. In each case, the taxpayer may request a conference with the tax collector, at which the reasons for the collector's actions will be discussed. Such a conference may be quite informal, so long as the taxpayer knows the reasons for the collector's actions and has an opportunity to challenge those reasons.

Finally, the ordinance provides several means of enforcement. Criminal prosecution and the injunction are available to stop businesses from operating without a license, while levy and sale and attachment and garnishment are available to collect taxes that have not been paid.

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## ARTICLE I. GENERAL

§1. Definitions. When used in this ordinance (unless the context requires a different meaning):

(a) "Person" includes any individual, trustee, executor, other fiduciary, corporation, unincorporated association, partnership, sole proprietorship, company, firm, or other legal entity.

(b) "Business" includes each trade, occupation, profession, business, and franchise taxed under this ordinance.

(c) A business is "seasonal" in nature when it is conducted for profit six months out of the year or less.

§2. Construction of This Ordinance. This ordinance is enacted for revenue purposes only. Therefore, it should be construed to require payment of the maximum tax permitted under its terms. In addition, issuance of a license pursuant to this ordinance does not excuse a licensee from compliance with any other applicable ordinance or statute. This ordinance does not prevent the city from imposing license taxes on additional businesses, from increasing or decreasing the amount of any license tax, or from regulating any business taxed.

## ARTICLE II. LEVY

§3. Levy of Tax. An annual privilege license tax is hereby levied on each business conducted within this city listed in sections \_\_\_\_ through \_\_\_\_ of this ordinance, in the amounts set forth in those sections.

§4. Who Must Pay Tax. Each person who conducts a business within this city is subject to this ordinance. A person "conducts business" when he engages in one act of any business taxed under this ordinance. He conducts the business "within the city" if he maintains a business location in the city; or if, either personally or through agents, he (1) solicits business within the city limits, or (2) picks up or delivers goods or delivers services within the city limits.

§5. Period of License; Due Date. (a) Annual licenses. Unless the section of this ordinance levying the privilege license tax applicable to a particular business provides otherwise, a license issued pursuant to this ordinance is good for the twelve-month period beginning July 1 and ending June 30. The tax is due July 1 of each year. However, if a person begins a business after July 1 of a year, the tax for that year is due before the business is begun.

(b) Licenses for periods shorter than one year. If the section of this ordinance levying the privilege license tax applicable to a particular business so provides, a license may be issued for a period of one day, one week, or some comparable period of less than a full license year. A person may not commence a business conducted within the city and taxed under such a provision until the privilege license tax due is paid, and may not continue such a business beyond the period for which the license is issued.

§6. Proration of Tax. If a business is begun after January 31 and before July 1, the amount of tax due is half the amount otherwise due. If a business is seasonal in nature, and if the amount of tax is not based on gross receipts, the amount of tax due is half the amount otherwise due.

§7. Refunds. If for any reason a licensee discontinues his business during the license year, he is not entitled to a refund.

§8. Separate Businesses. A separate license is required and a separate privilege license tax must be paid for each place of business unless two or more places of business under common ownership, each conducting a business subject to the same tax under this ordinance, are contiguous to each other, communicate directly with and open into each other, and are operated as a unit. In addition, a separate privilege license tax

must be paid for each business taxable under this ordinance conducted by the taxpayer at any one location; however, the tax collector may issue a single license for all taxable businesses conducted at one location by a single taxpayer.

§9. Computation of Tax Based on Gross Receipts. (a) Whenever this ordinance levies a privilege license tax computed on the basis of gross receipts, "gross receipts" means the amount reported as gross receipts on a business's state income tax return, or on the federal income tax return filed with the state income tax return if the state return does not separately state gross receipts, for the most recently completed tax year.

(b) If a business has not been in operation long enough for the information required in subsection (a) of this section to be available, the tax collector shall estimate gross receipts for the business, based on gross receipts of comparable businesses or any other information that the tax collector considers useful.

On or before the July 31 immediately after each license year, each licensee for whom the tax paid in the license year just concluded was based on estimated gross receipts shall submit to the tax collector a sworn final report showing the amount of gross receipts for the license year. If the amount shown is more than estimated gross receipts, the licensee shall pay the amount of additional tax that would have been due had the estimate been accurate. If the amount shown is less than estimated gross receipts, the city shall refund to the licensee the difference between the actual tax paid and the amount of tax that would have been due had the estimate been accurate.

§10. Exemptions. (a) Generally. Except as otherwise provided in this section or by state law, no person is exempt from the payment of a privilege license tax levied by this ordinance.

(b) Charitable organizations. A person who operates a business for a religious, educational, civic, patriotic, charitable, or fraternal purpose, when the entire gross income of the business is used for such a purpose, is exempt from paying any privilege license tax levied by this ordinance.

(c) Blind persons and members of the armed forces and merchant marine. Blind persons and persons who serve in the United States armed forces or the merchant marine are exempt from paying any privilege license tax levied by this ordinance to the extent provided by G.S. 105-249 and G.S. 105-249.1.

(d) Must obtain license. A person exempt from paying a privilege license tax levied by this ordinance shall nevertheless obtain a license from the tax collector. The license shall state that the licensee is exempt from paying the privilege license tax.

### ARTICLE III. LICENSES

§11. Application. A person shall apply to the tax collector for each license required by this ordinance no less than 30 days before the date the tax is due. The application, which shall be submitted on forms provided by the tax collector, shall contain:

(a) The name of the applicant and whether he or it is an individual, a partnership, a corporation, or some other entity.

(b) The nature of the business.

(c) Where the business is conducted.

(d) An address to which may be mailed notices and statements required by this ordinance.

(e) Whether the business is one regulated by a state occupational licensing board subject to G.S. Chapter 93B, and if so, the serial number of the state license the applicant currently holds.

(f) Any other information the tax collector determines to be necessary to compute the amount of tax due.

§12. Reasons for Refusal or Revocation of a License. The tax collector shall refuse to issue a license or shall revoke a license for either of the following reasons:

(a) The applicant misrepresents a fact relevant to the amount of tax due or his qualifications for a license.

(b) The applicant refuses to provide information necessary to compute the amount of tax due.

§13. Unqualified Applicants; Right to a Conference. After receipt of the completed application, if the tax collector believes that a reason exists for refusing a license under section 12 of this ordinance, he shall refuse to accept payment of the tax and shall not issue the license. At the applicant's request, the tax collector shall, pursuant to §22 of this ordinance, give him a written statement of the reason for refusing the license. The applicant may, within ten days after the day he receives this statement, request a conference to discuss the refusal. In his request he shall specify why his application for a license should not be refused. The tax collector shall arrange the conference within a reasonable time.

If the tax collector refuses to issue a license, the applicant may reapply for a license at any time thereafter. If the reason for which the application was refused no longer exists, and if no other reason exists for refusing to issue a license, the tax collector shall issue the license pursuant to §14 of this ordinance.

§14. Tax Collector to Issue License; Payment of Tax a Prerequisite. After receipt of the completed application, if the tax collector believes that no reason exists for refusal of a license under section 12 of this ordinance, he shall determine the amount of tax due and notify the applicant of that amount. The tax collector shall not issue a license until the tax is paid.

§15. Amount of Tax Disputed. If the applicant disputes the amount the tax collector determines to be due, he may either refuse to pay and request a conference with the tax collector to discuss the determination, or pay the amount and request a conference to discuss his right for a refund. If a conference is requested, the tax collector shall arrange it in a reasonable time.

§16. Revocation. The tax collector shall revoke a license if a reason exists to revoke it as set forth in section 12 of this ordinance. Before the tax collector may revoke a license, he shall give the licensee written notice of the grounds for revocation, pursuant to section 22 of this ordinance. The licensee may within ten days after the day on which notice is served request in writing a conference with the tax collector. The request shall specify the reasons why the license should not be revoked. The tax collector shall arrange the conference within a reasonable time.

If the licensee fails to request a conference within ten days after the day on which notice is served, the tax collector shall revoke the license. If the licensee requests a conference, the tax collector may not revoke the license until after the conference.

If the tax collector revokes a license, the former licensee may apply for a new license at any time thereafter. If the reason for which the license was revoked no longer exists, and if no other reason exists for refusing to issue a license, the tax collector shall issue the license pursuant to §14 of this ordinance.

§17. Form and Contents of License. A license shall show the name of the person licensed, the place where the business is conducted (if it is to be conducted at one place), the nature of business licensed, the period for which the license is issued, and the amount of tax paid. In addition, if a machine is licensed, the license shall show the serial number of the machine. The tax collector shall keep a copy of each license issued.

§18. Assignments. A license may be assigned if (1) a business licensed under this ordinance and carried on at a fixed place is sold as a unit to any person, and (2) the purchaser is to carry on the same business at the same place. Such a change shall be reported to the tax collector pursuant to section 19 of this ordinance. Otherwise, each license issued under this ordinance is a personal privilege and is not assignable.

§19. Changes in the Business Conducted by Licensee During the Tax Year. A licensee or his assignee shall report a change in the information contained in the license application to the tax collector within ten days after the change occurs. If information shown on the license itself is affected thereby, the licensee or his assignee shall surrender the license to the tax collector when reporting the change.

(a) Changes affecting the amount of tax due. If there are no reasons for revoking the license under section 12 of this ordinance and the change results in the imposition of a separate or additional tax, the tax collector shall reissue a license reflecting the change upon payment of the separate or additional tax.

(b) Changes not affecting the amount of tax due. If there are no reasons for revoking the license under Section 12 of this ordinance and the change does not result in an imposition of a separate or additional tax, the tax collector shall reissue a license reflecting the change upon payment of a fee of \_\_\_\_\_.

(c) Change Requiring Refusal of a License. If there is reason for revoking the license under section 12 of this ordinance, the tax collector shall refuse to reissue a license and shall instead begin proceedings to revoke the license pursuant to section 16 of this ordinance.

§20. Tax Collector to Furnish Duplicates. Upon satisfactory proof that a license has been lost or destroyed, the tax collector shall furnish a duplicate for a fee of \_\_\_\_.

§21. Record of Conferences. The tax collector shall maintain for three years a record of each conference held pursuant to this Article. The record shall contain the applicant's or licensee's name, the date of the conference, and a brief statement of the issues discussed and the result reached. After three years, the tax collector shall dispose of the record pursuant to G.S. 121-5.

§22. Providing Notice to an Applicant or Licensee. Whenever this ordinance requires the tax collector to give a written statement or notice to an applicant or a licensee, he may do so in any one of three ways:

1. By personally delivering the statement or notice to the applicant or licensee.
2. By mailing the statement or notice by registered or certified mail, return receipt requested, to the address specified for that purpose in the license application.
3. By causing the statement or notice to be served on the applicant or licensee in accordance with the procedures for service of process under Rule 4, North Carolina Rules of Civil Procedure.

#### ARTICLE IV. ENFORCEMENT AND COLLECTION

§23. Duty to Determine Whether Tax Due. Each person has the duty to determine whether the business he conducts is taxed under this ordinance, and if so, whether that tax has been paid for the current tax year.

§24. Tax Collector to Investigate. If the tax collector has reason to believe that a person is conducting a business in the city in violation of this ordinance, he shall conduct an investigation to determine the person's tax liability.

§25. Duty to Keep Books. Each person who conducts a business taxed under this ordinance shall keep all records and books necessary to compute his tax liability. If a person fails to keep books and records as required, the tax collector shall make his own determination of that person's tax liability from the information available to him.

§26. Duty to Permit Inspection. Each person who conducts business in the city shall permit the tax collector to inspect his business premises during normal business hours to determine the nature of the business conducted there, and to examine his books and records to determine the nature and amount of business transacted.

§27. Duty to Post License. A licensee shall post his license or licenses conspicuously in the place of business licensed. If he has no regular place of business, the license must be kept where it may be inspected at all times by the proper city officials. If a machine is licensed, the license shall be affixed to the machine.

§28. Notice of Deficiency. If the tax collector determines that a person has not paid the full amount of tax due under this ordinance, either for the current license year or for a prior license year, he shall give the person written notice of the deficiency,

pursuant to §22 of this ordinance. The notice of deficiency shall specify: the total amount of tax due; the section of this ordinance upon which the tax is based; the amount of tax paid; any interest due; the balance owed; the manner and time period in which the person may respond to the notice of the deficiency; and the consequences to the person if he fails to respond as specified.

§29. Request for a Conference. The person may, within ten days after the day on which notice is served, request in writing a conference. The request shall specify the person's objections to the notice of deficiency. By way of illustration, but not limitation, a person who receives notice of a deficiency may object on the following grounds:

(a) That the tax due has already been paid;

(b) That the tax collector miscalculated the amount of tax due;

(c) That the tax collector based his calculation on incorrect or insufficient information concerning either the nature or amount of business conducted.

(d) That the tax collector based his determination on an erroneous interpretation of a section of this ordinance that establishes a category of business subject to a particular tax.

§30. Deficiency to Become Final. If the taxpayer fails to request a conference under section 29 of this ordinance, the deficiency becomes final and the tax collector shall proceed to collect the deficiency.

§31. Conference Held. If the taxpayer requests a conference, the tax collector shall not proceed to collect the deficiency until he hears the taxpayer's objections and determines that the deficiency should become final. The tax collector shall maintain for three years a record of each conference held pursuant to section 29 of this ordinance. The record shall contain the name of the taxpayer, the date of the conference, and a brief statement of the issues discussed and the results of the discussion. After three years, the tax collector shall dispose of the record pursuant to G.S. 121-5.

§32. Collection of Deficiency. (a) The tax collector may use any of the following methods to collect a deficiency:

(1) Criminal prosecution in accordance with section 33 (a) of this ordinance.

(2) Equitable relief in accordance with section 33 (b) of this ordinance.

(3) The remedies of levy and sale and attachment and garnishment, in accordance with G.S. 160A-207.

(4) The remedies of levy and sale of real and personal property of the taxpayer within the city in accordance with the provisions of G.S. 105-109.

(b) Any person who commences or continues to conduct a business taxed under this ordinance without payment of the tax is liable for the additional tax of 5 per cent each thirty days, imposed by G.S. 105-109.



§33. Enforcement of Ordinance.

(a) Criminal Remedies. Conducting business within this city without having paid the license privilege tax imposed by this ordinance, or without a valid license issued pursuant to this ordinance, or without posting a license pursuant to §27 of this ordinance, is a misdemeanor, punishable as provided in G.S. §14-4. Each day that a person conducts business in violation of this ordinance is a separate offense. Payment of a fine imposed in criminal proceedings pursuant to this section does not relieve a person of his liability for taxes imposed under this ordinance.

(b) Equitable Remedies. In addition to the criminal remedies set forth in subsection (a) of this section, and pursuant to G.S. 160A-175(d), the city may seek an injunction against any person conducting a business in violation of this ordinance.