

Lesson 13.

PERMITS AND LICENSES

This lesson continues our consideration of the various legal tools available to environmental health practitioners to help ensure that the public health is protected. Like any tool, in any trade, the utility of the tool often depends as much on the dexterity of the person using the tool as on the tool's design. In other words, you have to know the intended function of the tool and the particular characteristics of the tool which will affect its use. you have to know how and when to use it.

This lesson will explore the nature and use of permits and licenses in environmental health. Professor Grad notes that the "terms permit and license are used interchangeably. Both terms denote special permission by the government to perform an otherwise prohibited activity." Usually they also contain certain conditions and performance standards designed to limit the activity to qualified individuals and to insure safe and healthful conditions.

The most common uses of permits and licenses in environmental health are found in the food protection program, the swimming pool program, schools and institutions, plumbing, rooming houses, day care centers, on-lot sewage disposal systems, water supply systems, etc. Not every department with a program in these areas, uses a permit system for all of them, but in light of increasingly tight budgets more and more agencies are turning to permits and licenses as one way to be able to continue to provide essential services by making the individual programs self supporting. Thus it is essential that you have a good understanding of the function and use of permit and licenses in environmental health.

LESSON OBJECTIVES

The objective for this lesson is to provide you with an understanding of the basic legal nature and use of permits and licenses in environmental health, and to enable you to discuss some of the benefits and constraints of their use in particular situations.

KEY POINTS

A. Definitions

1. **Registration:** The term registration was originally restricted to the recording of a list of individuals involved in a particular activity, i.e., merely data gathering. However, registration, particularly professional registration, has taken on the additional connotation of assuring certain minimum standards of education, training and/or experience for practitioners of the profession, making it synonymous with the term certification. Thus, the terms

Registered Sanitarian and Certified Industrial Hygienist both connote a professional worker who has passed some kind of an examination designed to test for a minimum competency in their respective fields.

2. **Permits and Licenses:** The terms license and permit have come to be used interchangeably. Both are special permission by the government to perform an otherwise unlawful activity. That is, the government first bans or prohibits anyone from performing a particular activity and then establishes authorized exceptions to the ban through the issuance of a license or permit. Usually these also contain certain conditions and performance standards designed to limit the activity to qualified individuals and to insure safe and healthful operations.

B. Authority

Since the U. S. Constitution speaks in terms of "property", for the purpose of meeting "due process" requirements, this concept should be used instead of the ambiguous terms of "right" and "privilege". An intangible property right is said to exist when there is a mutual expectation between the parties. For a permit, the mutual expectation is that upon meeting the standards of the permit, a person will be allowed to continue operating. The agency's expectation is that the person will meet and continue to abide by the standards in order to lawfully maintain his/her operation.

A person's right to a permit devolves from two sources. One is the licensing statute itself. The other is constitutional guarantees. Constitutional guarantees are bare minimums that apply across the board. Licensing statutes may merely incorporate the constitutional protections requirements or they may expand them to provide greater protection. As long as the minimal constitutional protections are provided the licensing statute controls the agency's actions and discretions.

C. Process

In the licensing process there are three critical points with different legal implications. The first point is the application. The second is during the term of the permit. And, the third is at the time of time of renewal.

1. **Initial Application:** When a person applies to an agency for a license, there is a mutual expectation that he will receive it, if he meets all of the standards. However, in the absence of statutory provisions, there is no right to a hearing before the agency if the license is denied. If the agency is sued over the denial of a permit application, the court will only look to see if the decision of the agency was arbitrary. The applicant has the full burden of proving that he has met all of the agency's standards and that the agency's action was arbitrary.

2. **During the Term of the Permit:** Once a license or permit has been issued, the power and the burden shift. A mutual expectation exists between the licensee and the agency that the licensee will be allowed to continue operating during the term of the permit. This,

provided that the licensee fulfills the terms and conditions of the permit. The mutual expectation creates "due process" rights and shifts to the agency the burden of proving any violations and acting on them. If the agency wishes to break the mutual expectation and take away the licensee's property, i.e., the permit, it must follow "due process" to achieve suspension or revocation of the license or permit. At a trial, the agency may have to prove by substantial evidence or by a preponderance of the evidence that there is sufficient reason to act upon the person's license.

3. **Renewal of the Permit or License:** A license renewal could be treated in the same manner as the initial application, or as a mere extension of the license's terms, or as some hybrid in between. The treatment depends upon the licensing statute and the agency's operations. If either the statute or the operation fosters or creates a mutual expectation of continued licensure, then the agency must deal with the licensee in virtually the same manner as it would during the term of the license or permit. Therefore, any nonrenewal would require notice, a hearing and substantial evidence. An agency's operation would create a mutual expectation, if previous license renewals were automatically given upon payment of the fee and if there existed significant violations about which the agency said or did nothing.

D. The Effect of Licensing

In the previous lesson we examined the issue of entry and indicated that the requirement for a business to have and maintain a license or permit might constitute an exception to the general requirement for obtaining a warrant when an inspector is refused entry. The case *In Re: State Department of Environmental Protection* [Reading #21] discusses the application of this exception to the warrant requirement. Since many environmental health programs involve the licensing or permitting of an establishment or business the court's consideration of the issues in this case are particularly important.

The court distinguished between two types of cases. The first involves "general regulatory schemes" which apply to all residences, or all structures, or all employees within a particular jurisdiction. The second type of case involves regulatory legislation governing specific licensed industries.

STUDY QUESTIONS:

1. Compare the licensing and renewal provisions of the FDA Model Food Code found in Reading #20 with either those of the King County Food Code [Appendix B.10] or the APHA-CDC Recommended Housing Maintenance and Occupancy Ordinance . Explain the advantages and disadvantages of each with regard to the initial application for a permit or license, the manner in which the license is viewed during its term of operation, and the implication which each code has for the renewal of the license or permit.

2. Suppose a person has submitted an application to your department for a food service license. The proposed establishment of a restaurant by this individual in the community has stirred up considerable controversy.
 - a. Could your department deny the application? How and for what reasons?
 - b. On the other hand, could your department just "sit on" the application and make no decision at all? How long could it do this?

3. In a number of environmental health programs, as a condition of the license, there is a requirement for routine, periodic inspections. If the licensee refused to permit an inspection of his/her establishment:
 - a. What actions could the agency take against the licensee?
 - b. Would those action be as effective and efficient as obtaining a license would be in forcing compliance?