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O.C. 2-1 AUTHORITY AND APPLICABILITY

Section 1.1 Authority

Chapter 16, Article II of the Code of Ordinances adopted by the Board of Commissioners of the City of Owensboro Government, requires that every person engaged in any occupation, trade, profession or other activity in the City of Owensboro shall pay to the City Government for the purpose of the general fund, an annual license fee for the privilege of engaging in such activities.

Under the authority of Section 16-29, the Director of Finance of the City of Owensboro is charged with the enforcement of the provisions of the Chapter 16, Article II of the Code of Ordinances (hereafter referred to as the "ordinance"), as amended and is empowered to prescribe, adopt, promulgate and enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of the ordinance. This edition of the License Fee Regulations (hereinafter referred to as the "regulations") is issued pursuant to the authority prescribed in Section 16-29. The regulations are intended to document the policies and procedures for the administration and enforcement of Chapter 16, Article II.

Section 1.2 Amendments and supplements

These regulations, together with all amendments and supplements thereto and all changes therein shall be on file with the Director of Finance and shall be open to public inspection. Copies thereof will be available upon request to all licensees and their representatives.

Section 1.3 Effective Date

These Regulations are effective for returns due on and after July 1, 2017 except as otherwise expressly provided.

O.C. 2-2 DEFINITIONS.

Section 1.1 Definitions

In addition to the words and terms defined in the Ordinance, as amended, and elsewhere herein, the following words and terms, when used in these Regulations, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the terms in this section shall have the meanings hereinafter given. Throughout these Regulations, unless the context shall clearly indicate otherwise, the singular shall include the plural, and the masculine shall include the feminine and the neuter.

(1) **"AGENT"** shall mean a person who acts for or in place of another by authority for him or her. This relationship may exist between businesses, individuals, corporations, partnerships, employers, or any combination thereof

(2) **"BUSINESS ALLOCATION OR APPORTIONMENT PERCENTAGE"** shall mean the portion of net profits subject to the City as having been made in the

City, under the two-factor formula of sales revenue and payroll provided for in the Ordinance and Regulations.

(3) **"BUSINESS INTEREST AND DIVIDENDS"** from "business activity" shall mean any interest and dividends that are payable to a corporation, S corporation, partnership, or other entity not classified as a sole proprietorship, that are a result of any specific and intentional action initiated by the business entity or it's agent to realize the payment of the resultant interest and dividends. For sole proprietors, business interest and dividends shall be interest and dividends payable to a sole proprietor that are a result of any specific and intentional action initiated by the sole proprietor, or his or her agent, to realize the payment of the resultant interest and dividends; however, if the resulting interest and dividends paid are not required to be reported for Federal Tax purposes on the federal schedule(s) recognized for reporting the sole proprietors other subject sales revenue subject to the occupational license fee, such interest and dividends shall be classified as personal investment income and not subject to the license fee.

(4) **"BUSINESS, PROFESSION OR OCCUPATION"** shall mean an enterprise, activity, trade, profession, occupation or undertaking of any nature conducted for gain or profit, whether conducted by a natural person, partnership, limited liability company, registered limited liability partnership, association, corporation, fiduciary or any other entity. However, this term shall not include the usual activities of boards of trade; chambers of commerce; trade associations or unions, or other associations performing the services usually performed by trade associations or union; community chest funds or foundations; corporations or associations organized and operated exclusively for religious, charitable, scientific, literary, educational, or civic purposes, or for the prevention of cruelty to children or animals; or clubs or fraternal organizations for social, literary, educational , or fraternal purposes where no part of the earnings, income, or receipts of such units, groups, or associations inures to the benefit of any private shareholder or individual. (Note: See O.C. 2.3, Section 3.13(8))

(5) **"CAPITAL ASSETS"** shall mean property which is held by the licensee but not offered for sale to customers in the regular course of business.

(6) **"CAPITAL GAIN OR LOSS"** shall mean the gain or loss which is realized from the sale or exchange of a capital asset.

(7) **"CITY"** shall mean the City of Owensboro, Kentucky.

(8) **"COMMON CARRIER"** shall mean a carrier that expressly and publicly offers to undertake, for all persons indifferently, and for a fee or reward, the transportation of goods in intrastate or interstate commerce. The definition of common carrier shall not include a "private carrier" that does not expressly and publicly offer and provide transportation services.

(9) **"CONSTRUCTIVE RECEIPT"** shall mean the recognition of the legal right to property, even though actual, physical transfer may be delayed, deferred, or transferred by other means.

(10) **" DESIGNEE"** shall mean any person that is duly authorized to act on behalf of the Director of Finance.

(11) **"DIRECTOR OF FINANCE"** shall mean the Director of Finance for the City of Owensboro.

(12) **"GOVERNMENTAL AGENCY"** shall mean any administration, agency, arm, authority, board, body, branch, bureau, department, division, section, unit of any government (federal, state or local) or political subdivision thereof, or any corporation created and owned or controlled by any government or political subdivision thereof.

(13) **"INDEPENDENT CONTRACTOR"** shall mean a person who provides services who is not subject to the control and direction of another except as to the final result of his or her work, and not as to means, and who is therefore not an employee as defined in the Ordinance.

(14) **"INDIVIDUAL"** shall mean a natural person.

(15) **"LICENSEE"** shall mean any person required to file a return with or to pay an occupational license fee to the city.

(16) **"NEXUS"** as defined in applicable case law, shall mean a minimum connection between a person/business entity and the City brought about when the person/business entity purposefully avails itself of the privileges and protection of the City while doing business or practicing a trade, occupation or profession.

(17) **"OCCUPATIONAL LICENSE" or "LICENSE TAX OR LICENSE FEE"** shall mean the employee license fee on compensation and/or the net profits license fee as the context shall indicate.

(18) **"OFFICER"** shall mean a person who holds a position of trust or authority, appointed or elected, for a business, corporation, partnership or employer organization.

(19) **"OTHER ACTIVITY"** shall mean any undertaking not otherwise specifically defined herein which is normally entered into for profit.

(20) **"PARTNERSHIP"** shall mean any unincorporated enterprise of two or more persons engaged in any business, profession or occupation recognized as a partnership for federal income tax purposes.

(21) **"PRIVATE CARRIER"** shall mean a carrier, or independent contractor that only provides transportation services to an individual business or individual class of businesses and may or may not do so on a regular basis. The private carrier does not publicly offer its transportation services indifferently to all persons.

(22) **"SOLE PROPRIETOR"** shall mean a natural person engaged in any business, profession or occupation, but not as an employee.

(23) **"TRADE OR BUSINESS ASSET"** shall mean the tangible property used in a trade or business which is subject to the allowance for depreciation as provided in the Internal Revenue Code.

(24) **"WAGES"** shall include all salaries, wages, commissions, and other compensation earned by an employee as more precisely defined in the Ordinance and these Regulations.

O.C. 2-3 WHO MUST OBTAIN; BASIS OF COMPUTATION

Section 1.1 License fee on wages and net profits distinguished

The occupational license fee is measured by 1.78% of all wages, salaries, commissions and other compensation earned for work done or services performed or rendered in the city by a resident or nonresident employee (as defined in section 16-23 of the Occupational License Fee Ordinance). The occupational license fee is measured by an annual license fee being the greater of seventy-five dollars ($75.00) or one and seventy-eight hundredths (1.78) percent of the net profits of such business, profession or other enterprise (as defined in section 16-24 of the Occupational License Fee Ordinance).

Although the wage/net profits license fee is authorized by KRS 92.280 and KRS 92.281 as a single fee, there are important distinctions between the license fee on wages and the license fee on net profits. A clear understanding of these distinctions is important to every licensee and every accountant or attorney who has dealings with the City. The reader who bears in mind the following points will be greatly aided in understanding these Regulations.

(1) The license fee on wages is imposed on employees only. All others pay the license fee on net profits.

(2) There is no license fee on wages which are not attributable to activities within the City.

(3) The burden of obtaining the City occupational business license and corresponding account number is on all persons engaged in a business, trade, occupation, profession, enterprise or other activity in any capacity other than that of an employee(whether or not such persons actually have net profits). Employers are required to file with the City on behalf of their employees. The employee is not required to file a return or other document with the City unless (1) the employer fails to properly withhold the license fee from the employee's wages or (2) the employee has occupational income other than wages.

(4) No person shall be exempt from the application of the occupational license fee except if

(a) Specifically excluded or exempted by state or federal law, or
(b) Specifically excluded by the Ordinance or by these Regulations.

Section 2.1 Occupational license fee on wages

Pursuant to the authority vested in it by Section 181 of the Kentucky Constitution, KRS 92.280 and KRS 92.281, the City has imposed an occupational license fee measured by 1.78% of all wages of a resident or nonresident employee from businesses, trades, occupations, professions and other activities in the City.

Section 2.2 Compensation subject to the occupational license fee – General

As set forth in KRS 67.750 (2) the license fee required to be withheld on an employee's wages by the employer and remitted to the City includes a license fee on, "wages, salaries, commissions, or any form of remuneration paid or payable by an employer for services performed by an employee, which are required to be reported for federal income tax purposes" and adjusted as follows to include:

(1) Any amounts contributed by an employee to any retirement, profit sharing, deferred compensation plan, which are deferred for federal income tax purposes under a salary reduction agreement or similar arrangement, including but not limited to salary reduction arrangements under Section 401(a), 401(k), 402(e), 403(a), 403(b), 408, 414(h), or 457 of the Internal Revenue Code; and

(2) Any amounts contributed by an employee to any welfare benefit, fringe benefit, or other benefit plan made by salary reduction or other payment method which permits employees to elect to reduce federal taxable compensation under the Internal Revenue Code, including but not limited to Sections 125 and 132 of the Internal Revenue Code.

(3) **Employer contributions to a Qualified Plan Arising from Employee Elections-** Amounts contributed by an employer to a qualified plan or a section 403(b) plan which would be received as wages taxable in the year earned by the employee except for the employee's election to have the employer contribute the amount to said plan.

(4) **"Picked Up" Employee Contributions -** Employee contributions to Section 401(a) or Section 403(a) plans which are "picked up" by an employer pursuant to Section 414(h) of the Internal Revenue Code.

(5) **Contributions to Non-Qualified Plans -** Employer contributions and/or assignments to any plan other than a plan described by Section 401(a), Section 401(k), Section 403(b), and Section 414 (h) or Section 457 of the Internal Revenue Code. Each employer who employs one or more persons within the city who participate in any non-qualified deferred compensation plan (any plan under which the employer is not permitted for federal income tax purposes to deduct its expenses arising from its contributions or assignments into such plan during the year in which such contributions or assignments are made) shall withhold the license fee from employee's wages and pay to the city the license fee on the amounts contributed or assigned to any such plan on behalf of any said employee. Such employers may, however, apply (and upon request of the employee, shall apply) for a refund of all such license fees withheld and paid on behalf of any employee whose employment is terminated before he becomes eligible to receive benefits under such a non-qualified plan and who in fact does not receive such

benefits and loses all right to future benefits arising from the non-qualified plan upon termination from employment.

(6) **Separation Payments -** Including (a) payments made by an employer to an employee at the time of retirement to the extent that said payments represent accrued vacation pay unused sick pay, severance pay and, if such benefits would be subject to the license fee if they were paid to an active employee, other benefits accrued pursuant to any employment contract between the employee and the employer; and (b) payments which are made in lieu of any payment which the employer is obligated to make to or on behalf of the employee arising from the employment to the extent that such payments would be subject to the license fee if they were made to an active employee.

(7) **Expense Accounts -** Sums allowed and paid by employers to employees for expenses, which sums are required to be recognized as wages for federal income tax purposes.

(8) **Payments for Services Rendered to Students -** Stipends, honorariums, grants and other payments made to students to the extent that such payments are made for services rendered by the student and an employer/employee relationship exists between the payer and the student.

(9) **Property and Services Received as Compensation -** The fair market value of property or services received as compensation by an employee and paid by the employer including board and lodging and similar items where such board and lodging is considered part of the compensation paid and is not afforded for the convenience of the employer.

(10) **Other Income-** All other income paid by an employer and received by an employee for the performance of any activity subject to the license fee, not otherwise exempt, unless such income is to be reported and a net profit license fee paid thereon.

(11) **Non-Cash Fringe Benefits -**Each employer who employs one or more persons within the city shall also deduct from each employee who receives non-cash fringe benefits taxable for federal income tax purposes, at the time at which the receipt of such non-cash fringe benefits by the employee is required to be reported by the employer for federal income tax purposes, the occupational license fee arising from the employees receipt of such compensation; and the employer shall remit to the Director of Finance with the deposit made for the period in which such non-cash benefits are so reported the occupational license fee due on such non-cash fringe benefits. All fringe benefits except those which pursuant to Section 132 of the Internal Revenue Code qualify as: (1) no additional cost services; (2) qualified employee discounts; (3) working condition fringes; and (4) de minimus fringes; are subject to the license fee.

(12) **Vacation, Holiday, Bonus Benefits -** Compensation paid to employees by an employer as vacation, holiday and/or bonus benefits are subject to the occupational license fee at the time such compensations are paid to the employee.

(13) **Life Insurance Premiums -** For coverage in excess of $50,000, where premiums are paid by the employer are subject to the occupational license fee and the employee withholding requirements.

(14) **Transportation Fringe Benefits-**Cash option amounts received as a transportation fringe benefit, as described in Section 132 (f) of the Internal Revenue Code, are subject to the Occupational License Fee.

(15) **Stock Option -**If an employer grants an option to purchase stock of the employer or other property to an employee for any reason connected with the employment of such employee in the city, and if (i) the option is not a stock option as defined by Section 421(a) of the Internal Revenue Code or (ii) the option was a stock option as defined by said Section 421(a) at the time it was granted but was subsequently exercised or otherwise disposed of in a way that disqualifies the option pursuant to Section 421(b) of the Internal Revenue Code from treatment under Section 421(a), then the fair market value of the option so granted shall be subject to occupational license fees on the wages of said employee. The fair market value of the option so granted shall be includable in the employee's wages at the time it is granted if the option had a readily ascertainable fair market value at the time it was granted. The fair market value of the option shall be deemed readily ascertainable at the time it was granted if it was actively traded on an established market, in which case its value shall be determined by the Director of Finance in the same manner as is prescribed in Section 20.2031-2 of the Internal Revenue Code Regulations. If the option does not have a readily ascertainable fair market value at the time it was granted the employee shall include in his or her wages the value of the option at the time the employee disposes of the option for value or at the time that (i) the employee exercises the option and (ii) the employee acquires an additional right to receive the property subject to the option. The value of the option thus included in the employee's wages shall be the difference between the fair market value of the property at the time and the amount payable for the property pursuant to the option. The employee has an unconditional right to receive the property subject to the option when his or her right to receive such property is not subject to any conditions, other than conditions which may be performed by him or her.

For determining the extent, if any, to which compensation paid to an employee in the form of an option has been paid for work done or services performed within the City, the full amount of the said compensation shall be multiplied by the percentage determined pursuant to Section 2.6 of these regulations applicable for the year in which the option was granted.

(16) **Sick Leave -** Amounts paid to employees as sick leave under an employer provided sick leave plan. By definition "sick leave" shall mean any amount which:

(a) is paid to an employee pursuant to a plan to which the employer is a party and does not adequately shift the insurance risk to an unaffiliated third party, as determined by IRS Regulation Section 31.3401(a)-1(b) and

(b) constitutes remuneration or a payment in lieu of remuneration for any period during which an employee is temporarily absent from work on account of sickness or personal injuries.

Section 2.3 Compensation not subject to the occupational license fee

As set forth in KRS 67.750 (2) the license fee required to be withheld on an employee's wages by the employer and remitted to the City includes a license fee on, "wages, salaries, commissions, or any form of remuneration paid or payable by an employer for services performed by an employee, which are required to be reported for federal income tax purposes" and adjusted as follows to exclude:

(1) **Allowances and Reimbursement for Expenses -** Sums allowed and paid by employers to employees for expenses necessarily and actually incurred by the employee in the direct performance of his or her services, including meals and lodging allowances, if the employee is not required to include such receipts as income on his or her federal income tax return.

(2) **Strike Benefits -** Strike pay benefits paid from a fund which is established and/or replenished, in whole or in part, from the employee's wages.

(3) **Kentucky National Guard -** Compensation paid members of the Kentucky National Guard for active duty training, unit training assemblies and annual field training. (See KRS 92.300)

(4) **Fringe Benefits Not Taxable for Federal Income Tax Purposes -** Non-cash fringe benefits which pursuant to Section 132 of the Internal Revenue Code qualify as (a) no additional cost services, (b) qualified employee discounts, (c) working condition fringes, and (d) de minimus fringes and are therefore not taxable for Federal income tax purposes.

(5) **Employer Contributions to Qualified Plans Not Arising from Employee Election -** Employer contributions to qualified plans, other than contributions made pursuant to an employee election to defer compensation into a plan, under Section 401(a), Section 401(k), Section 403(b), or Section 457 of the Internal Revenue Code.

(6) **Disability Payments –** Payments made to an employee under a disability insurance plan which meet one of the following criteria:

(a) The payments are made by a third-party payor, which bears an insurance risk as determined by IRS Regulation Section 31.3401(a)-1(b).

(b) The payments are for "permanent and total disability" as defined by IRC Section 22(e) (3).

(c) The payments are for the loss of limb or disfigurement of an employee as set forth in IRC Section 105(c)(1) and the payments are made without regard to the amount of time an employee is absent from work.

(7) **Amounts paid from Qualified and Non-Qualified Plans -** Amounts paid from retirement plans, profit sharing plans, stock bonus plans or employee stock

ownership plans whether or not such plans are "qualified" plans pursuant to the Internal Revenue Code.

(8) **Student Grants -** Stipends, honorariums, grants and other payments made to students to the extent that such payments are conditioned only upon the recipient's pursuit of studies and/or participation in athletic or other intercollegiate competition, and scholarships and other non-cash benefits received by duly registered students from the school, college or university in which they are enrolled.

(9) **Exemptions afforded by Treaty -** Any wages, salaries, or other compensation paid to a foreign national to the extent that such payments are exempt from state and local taxation by a treaty of the United States.

(10) **Payments to Non-Resident Military Personnel -** Payments to non-resident military personnel exempt from state and local taxation under the Soldiers and Sailors Relief Act (50USCA 574).

(11) **Unemployment Compensation and Severance pay-** Unemployment compensation payments made by the state or any other government agency are not subject to the occupational license fee. However, payments made to employees by an employer at the time of a voluntary or involuntary separation (dismissal) of the employee from the service of the employer, are to be regarded as subject to the license fee. This shall always be the case regardless of the name assigned to the fund from which separation payments are made. Severance pay paid after termination of employment, which payments to the ex-employee, by the employer, are not based on past, current or future time spent working for the employer, is exempt.

(12) **Employee Under Age 16 -** Compensation paid employees who have not attained age 16 on or before the day such income is earned. Earnings of an employee shall be subject on the day that age 16 is reached.

(13) **Occasional Entry** – Wages paid an employee who performs the duties for which he is employed entirely outside the City, but who spends eight (8) hours or less per month within the City for purposes of reporting, delivering, receiving instructions, etc., incidental to his or her duties outside the City.

(14) **Precinct Workers** – Compensation paid to employees for election training or work at election booths in state, county, and local primary, regular, or special elections within the City.

(15) **Employer Payments for Employee Benefits** – Employer's payments for employee's life insurance premiums not treated as wages for federal income tax purposes, employer's payments for employee's health insurance benefits.

(16) **Third Party Sick Pay** – Payments made to an employer are considered to be third party sick pay if the third party making such payment assumes a direct insurance risk. If a third party is paid an insurance premium and not reimbursed on a cost plus fee basis, the third party is not an agent of the employer, but the third party is a payor of third party sick pay. If a third party is reimbursed on a cost plus fee basis, the third party is an agent of the employer and any such payments from

the third party are not considered "third party sick pay" and are subject to the calculation of the occupational license fee.

(17) **Health Savings Account** – An **employer's** contribution to an employee's Health Savings Account is not treated as wages for federal income tax purposes and is exempt from occupational tax unless, such contribution later becomes income to the employee and is judged to be subject to federal income tax.

Section 2.4 Tip Income and Directors Fees

Compensation which is not "wages" for purposes of the imposition by ordinance or hereunder of a duty on the employer to withhold and remit a license fee thereon, but which nevertheless is subject to the license fee which must be paid by the employee if not withheld and remitted by the employer includes, but is not limited to, the following:

(1) **Tip Income** - Waiters, Waitresses, bellhops and others receiving tip income shall be deemed to be employees with respect to any base wage and any tip income on which the employer withholds and remits a license fee, and in addition shall be deemed independent contractors for purposes of any tip income or other compensation received for which the employer has not withheld and remitted a license fee. An individual who receives tip income not reported by his or her employer is deemed to be engaged in an activity which requires such person to file a Net Profit return and remit the license fee due as shown on said return.

(2) **Directors Fees** - Corporations are permitted but not required to withhold and remit fees paid to directors, provided that such corporations submit information indicating that such payments are directors' fees, and state the amount of the license fee withheld.

Section 2.5 Classes of Employees Exempt

(1) **Domestic Servants** - Because of the undue burden of administration, no license fee shall be required of domestic servants employed in private homes. For purposes of this section a domestic servant is defined as an individual employed to drive his or her employer as a chauffeur or employed on the grounds or in the home of his or her employer, to cook, clean, wash, garden, transport or otherwise care for or wait upon the employer, the employer's family and guests or to care for the person, home, grounds, and/or vehicles of the employer, the employer's family and guests, including but not limited to maids, butlers, nurses, nursemaids, gardeners, cooks, launderers and chauffeurs engaged to serve the employer, the employer's family and guests, but not including such individuals who are employed by a cleaning service, personal nursing service, chauffeuring service or other entity which offers the service of its employees to the public.

(2) **Minister of Religion** - No occupational license fee shall be required of a minister of religion who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church religious sect or religious organization, to teach and preach its religious doctrines or to administer its rights in public worship, in the performance of one or more of those duties. Provided, however, that it is not intended to exempt such ordained minister of religion from the necessity of paying a license fee for work done or services performed in the city for business activity

not connected with his or her regular duties as a minister of religion. Thus, compensation earned by ordained persons employed as chaplains, teachers, administrators, musicians or counselors whose employment is connected with the regular functions of a religious organization is exempt. Compensation earned by persons who are not ordained is not exempt regardless of the religious nature of such individuals work.

Section 2.6 Apportionment of wages for activities both inside and outside the City

(1) Wages are deemed to be allocable to the City when the activities to which they are attributable were performed or rendered in the City regardless of where the payment was made or received.

(2) Wages attributable to activities both inside and outside the City shall be subject to the occupational license fee on wages in the same proportion that the activities within the City bear to total employment time.

(3) The duties imposed on employers pursuant to Section 16-23(d) of the Ordinance shall apply with respect to wages paid employees who work both inside and outside the City. City wages shall be computed by multiplying the total wages paid each said employee by a fraction whose numerator is the time spent on the job in the City and whose denominator is the total time spent on the job by the employee inside and outside the City and shall treat the result as the wages subject to the occupational license fee imposed by the City. Time spent "on the job" includes any time an employee is actually performing activities on behalf of his or her employer. Time spent "on the job" shall not include time for which an employee is compensated for sick and accident leave pay, vacation leave pay, holiday leave pay, compensatory pay or other similar compensation.

(4) Every employer with one or more employees employed both inside and outside the City shall require each said employee to keep accurate records of time spent inside and outside the City. These records must be available for inspection by the Director of Finance or his or her designee.

(5) Pursuant to Section 16-23(d) of the Ordinance, every employer with one or more employees employed both inside and outside the City shall remit quarterly or, if applicable, monthly the amount of license fee withheld. For purposes of the required withholding of occupational license fee and of the required quarterly (or monthly) remittances of license fee withheld, employers are permitted to estimate the portion of an employee's time spent inside and outside the City on the basis of an employee's prior year experience. Provided, however, that if there is a substantial and continuing change in assignment respecting the place of an employee's job performance, the employer shall revise the estimate of the portion of the employee's time spent within the City to conform with the employee's current performance. Provided, further, that the employer shall annually reconcile the license fee actually due on each said employee's wages based upon the employee's actual time spent on the job inside and outside the City.

(6) **Apportionment of sick and accident leave pay, vacation leave pay, holiday leave pay, compensatory pay and other pay**

Compensation received by an employee for accrued unused vacation leave, unused holiday leave, unused sick and accident leave, compensatory time, bonus benefits or other payment made under an employer's wage or salary continuation plan during any period of absence from work shall be multiplied by the fraction determined pursuant to Paragraphs (1) through (3) of this Section applicable for the most recent twelve month period compensation was includable in wages subject to occupational license fee.

(7) **Apportionment of Separation pay**

Compensation received by an employee for separation pay shall be multiplied by the fraction determined pursuant to paragraphs (1) through (3) of this Section applicable for:

(a) the year the compensation is includable in wages subject to occupational license fee if the year in which payment is received is a full calendar year, or

(b) if the year in which the payment is received is less than a full calendar year, the portion of the year that the compensation is includable in wages plus the entire previous calendar year.

(8) **Exception to apportionment method**

If it is impossible to apportion the compensation as provided above because of the peculiar nature of the activities of an employee, or of the unusual basis of compensation, apportionment shall be made in accordance with the facts. Each employer or employee seeking an exception under this paragraph shall furnish the Director of Finance a detailed statement of facts prior to the due date of the return covering the first period for which an exception to the apportionment method is sought.

Section 2.7 Unrelated Business Losses – Employee's Earnings

Losses from the operation of a business or profession are not deductible from an employee's earnings unless the activities are required as a condition of employment. Income or loss generated from business unrelated to employment should be reported separately from compensation earned by the employee.

Expenses which are a condition of employment and are normally reported on Form 2106, Employee Business Expense, are deductible from employee earnings and reimbursements. Employees may file a request for refund in connection with such expenses, attaching a copy of the Federal Form 2106 for support.

Section 2.8 Independent Contractor

In determining whether an individual is an "employee" or an "independent contractor", the Director of Finance or his or her agent shall apply the definitions of these terms

found at Official Treasury Regulation 31.3401(c) -1 and shall consider the following factors:

(1) whether the person receiving the benefit or the service has the right to control the manner and method of performance;

(2) whether the person rendering the service has a substantial investment in his or her own tools or equipment;

(3) whether the person rendering the service undertook substantial costs to perform the services;

(4) whether the person performing the service has an opportunity for profit dependent on his or her managerial skill;

(5) whether the service rendered required special training and skill;

(6) the duration of the relationship between the parties;

(7) whether the service performed is an integral part of the recipients business rather than an ancillary portion;

(8) whether the person rendering the service had a risk of loss;

(9) the relationship which the parties believed they created;

(10) whether or not the person who performed the services offered such services publicly and independent trade;

(11) whether the person who received the benefit of the service had the right to discharge without cause the person who performed the services;

(12) whether the person who performed the services had the right to delegate his or her duty to others.

Section 2.9 Liability of Employer for Employee Withholding

Every employer is deemed to be a trustee of the City of Owensboro who by employing persons within the City undertakes an obligation to collect and hold the employee license fee, and the funds so collected are deemed to be trust funds. Every such employer required to deduct and withhold the employee license fee is liable directly for failure to file the Employer's Return of Occupational License Fees Withheld and for failure to make payment of such fees, whether actually withheld by such employer or not. If the funds are actually withheld by the employer and not remitted, the employer may be criminally prosecuted for theft by failure to make required disposition.

Any corporate officer or other individual required to withhold, or truthfully account for and remit any license fee required to be withheld from employee wages, who willfully fails to withhold such fee, or truthfully account for and remit such fee or willfully attempts in any manner to evade or defeat the payment of any such fee, in addition to the administrative and criminal penalties provided by City ordinance and by any other penalties provided by law, shall be civilly liable for the total amount of the fee evaded, or

not collected, or not accounted for and remitted, plus applicable penalties and interest. Neither the corporate dissolution or withdrawal of the corporation from the State of Kentucky nor the cessation of holding any such corporate office shall discharge the foregoing liability of any such person.

NET PROFIT LICENSE FEE

Section 3.0 Rate Increase – Net Profit License Fee

On July 1, 2017, the City of Owensboro's Occupational License Fee increased from one and thirty-nine hundredths (1.39) percent to one and seventy-eight hundredths (1.78) percent. On July 1, 2015, the City of Owensboro's Occupational License Fee increased from one and thirty-three hundredths (1.33) percent to one and thirty-nine hundredths (1.39) percent. On July 1, 2003, the City of Owensboro's Occupational License Fee increased from one (1.0) percent to one and thirty-three hundredths (1.33) percent. On July 1, 2002 the rate decreased from 1.33% to 1%.

Section 3.1 Occupational License Fee on Net Profits

Pursuant to the authority vested in it by Section 181 of the Kentucky Constitution, KRS 92.280 and KRS 92.281, the City has imposed an occupational license fee being the greater of seventy-five dollars ($75.00) or one and seventy-eight hundredths percent (1.78%) of the net profits of resident and non-resident corporations, partnerships, fiduciaries, sole proprietors (including natural persons performing activities as independent contractors) and other enterprises engaged in any business, trade, occupation, profession or other activity in the City.

Each person subject to the City occupational license fee on net profits shall, on or before the fifteenth day of the fourth month following the closing of their federal tax year, make and file a return, on a form furnished or obtainable from the City, setting forth the aggregate amount of salaries, wages, commissions and other compensation or net profits it had during the preceding year, with such other pertinent information as the Director of Finance may require. No return shall be required of any person classified as an employee under the provisions herein, if such employee compensation earned had all occupational license fee due the City withheld at the source.

Section 3.2 Sufficient Nexus Test

(1) A person practicing a business, profession, trade or occupation shall be deemed to be subject to the net profit license fee if the person has a nexus with the City sufficient to justify the imposition of the license fee in a manner consistent with the commerce clause and the due process clause of the Fourteenth Amendment to the Constitution of the United States and other applicable federal law. If the person has a sufficient nexus with the City, but also has a sufficient nexus with other taxing local, state and federal and international taxing jurisdictions, then the net profits derived from activities conducted within the City shall be determined by the apportionment formula set out in Section 16-24 of the Ordinance. It shall not be necessary that there be an independently established nexus between the City and each activity from which the licensee has derived income subject to apportionment.

(2) The term "nexus" shall be defined in the context of applicable case law. In general a "nexus" shall be defined as a minimum connection between a person/business entity and the taxing jurisdiction brought about when the person/business entity purposefully avails itself of the privileges and protections of the jurisdiction while doing business or practicing a trade, occupation or profession, enterprise or other activity. Without excluding by implication other activities which may create a nexus, the following connections between a person/business entity in the City shall normally establish a sufficient nexus:

(a) Location of a place of business in the City;

(b) Frequent and continuing entry into the City in the course of business by an owner, officer or employee of a business;

(c) Delivery of goods to residents in the City other than through the mails or by common carrier. Delivery by mail or common carrier beginning at a point within the city, to residents in the city, shall be considered a delivery of goods in the City;

(d) Contracting to sell goods in the City; or

(e) Conducting substantial business activity in the City leading to a contract to buy or sell goods or provide services.

(3) The absence of a branch, office, store, warehouse or other permanent place of business within the City shall not exempt or render non-licensable the net profits of any business, trade, profession, occupation, enterprise or other activity on which a license fee is imposed by the Ordinance.

(4) Any person engaged in the business of transporting people, stock, goods or documents both inside and outside the City will be deemed to be subject to the occupational license fee imposed on net profits if the person has a nexus with the City sufficient to justify the imposition of the license fee.

(5) Common carriers and others who have a sufficient nexus with the City are subject to the net profits license fee on a fairly apportioned share of their net profits even though engaged in interstate commerce.

Section 3.3 Unitary Business Considerations

(1) All corporations, partnerships, fiduciaries and associates with a nexus in the City pay the full 1.78% net profits license fee regardless of whether individual officers, directors, partners or associates have a nexus with the City. Consequently, the "net profit" of the corporation, fiduciary, partnership or other association shall be subject to apportionment and taxation based on unitary business principles. To the extent that the licensee submits satisfactory proof that any income is not from a unitary source, such income may be excluded.

(2) The net profits of a sole proprietorship, corporation, fiduciary, partnership or other association shall be subject to apportionment and license fee based on unitary

business principles. Those principles dictate that the income of a sole proprietorship, corporation, partnership or other association arising from the licensee's investments in another legal entity be included in the Net Profits License Fee Return unless the separate legal entity is not part of a "unitary business" with the licensee. Those principles also prohibit segregation of the net profits reported for federal income tax purposes into two or more "divisions" or "profit centers" in an attempt to pay a license fee only on the division and/or profit center with the City nexus.

(3) The Director of Finance or his or her designee may require such information as may be deemed necessary to ascertain whether or not net profits are properly allocated to the City pursuant to this Section. If the Director of Finance or his or her designee finds net profits are not properly allocated to the City, the Director of Finance may require the filing of either a consolidated or separate return or require adjustment of transactions so as to produce a fair and proper allocation of net profits to the City.

If a licensee believes the requirements of this Section do not result in a fair and proper allocation of the net profits due to the peculiar nature of the business involved, he shall submit a statement seeking an exception to this Section, furnishing a detailed statement of facts explaining the basis of the exception sought. In each case, allocation and apportionment shall be made in accordance with the facts. The Director of Finance or his or her designee may adjust the apportionment percentage of any licensee to fairly and accurately reflect business activity within the City. Once permission to use a different method in calculating the net profits license fee has been granted, a licensee must continue to use the alternate method until given permission to change by the Director of Finance or his or her designee.

Section 3.4 Common Carriers and Others Engaged in Interstate Commerce

Common Carriers are not excluded from the net profit license fee even though engaged in interstate commerce. Common carriers and others engaged in interstate commerce are subject to taxation on a fairly apportioned share of their net profit if they have a sufficient nexus with the City to support the imposition of the license fee. The provisions of this Section are subject to the limitations of Public Law 86-272 (15 U.S.C.S. 381) which prohibits states and political subdivisions thereof from attributing taxable nexus to persons who do not maintain an office within the jurisdiction and whose sole activity within the jurisdiction consists of solicitations of sales by employees or agents not empowered to enter binding contracts within the jurisdiction.

Section 3.5 Exemptions to License Fee on Net Profits

The following classes of business are exempt from payment of the net profit license fee:

(1) No net profits licensee fee is imposed upon or collected from and no filing is required of any bank, trust company, combined bank and trust company or combined trust, banking and title business in Kentucky or upon any state or federally chartered savings and loan association because these entities are expressly exempted from the license fee by KRS 92.300.

(2) No net profits license fee is imposed by the City on insurance companies. The license fee on insurance premiums is authorized by KRS 91A.080 and is imposed in lieu of, and not in addition to, the City net profits license fee.

(3) No net profit license fee is imposed on and no filing is required of the activities of boards of trade, chambers of commerce, trade associations or unions, community chest funds or foundations; corporations or associations organized and operated exclusively for religious, charitable, scientific, literary, educational, or civic purposes, or for the prevention of cruelty to children or animals: or clubs or fraternal organizations operated exclusively for social, literary, educational, or fraternal purposes where no part of the earnings, income, or receipts of such units, groups, or associations inures to the benefit of any private shareholder or individual and/or the organization does not earn "unrelated business income" as defined at Internal Revenue Code 511. To qualify for this exemption, the organization must submit satisfactory proof of their exempt status for federal income tax purposes.

(4) No net profit license fee is imposed and no filing is required of companies (doing business in the city) "that pay an ad valorem tax and a franchise tax". The exemption from the license fee for companies that "pay an ad valorem tax and a franchise tax" refer to companies and only to companies that are subject to the public service corporation tax as set forth at KRS 136.120. This tax is applied only to utility companies and to certain common carrier companies. To be entitled to this exemption, companies are required to show that they are actually assessed as public service companies by the Kentucky Revenue Cabinet and that they in fact pay an ad valorem tax based on this assessment. Licensees whose business is predominantly non-public service who are also engaged in public service activity are required to pay a license fee on their net profit derived from the non-public service activities apportioned to the City.

(5) No net profit license fee is imposed and no filing is required of any person who has not attained age 16 on or before the federal tax year end applicable to such person. Any person reaching age 16 during the year shall be required to file and report the license fee due on earnings made on or after attaining such age.

(6) No net profit license fee is imposed on any minister of religion who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect or religious organizations, to teach and preach its religious doctrines or to administer its rights in public worship, in the performance of one or more of those duties. Provided, however, that it is not intended to exempt such ordained ministers of religion from the necessity of paying a license fee for work done or services performed in the city in activities not connected with his or her regular duties as a minister of religion.

(7) No license under this ordinance shall be required of any person authorized by the Bar-B-Que Festival Committee or Dust Bowl Committee to sell or offer for sale any goods, wares or merchandise at the said annual events. This exemption is limited geographically to the "area" or "areas" from which each committee conducts the "core" activities surrounding the events.

(8) Venture capital funds are exempt from the terms of this ordinance and no license is required, provided, that for purposes of this exemption, a venture capital fund

is a limited liability company, limited liability partnership, or limited partnership, formed and operated for the exclusive purpose of buying, holding and/or selling securities, including debt securities, in non-publicly traded companies on its own behalf and not as a broker, and the capital of which fund is derived from investments by entities and/or individuals which are neither related to nor affiliated with the fund. For purposes of this subdivision (9), the following provisions shall apply:

(a) "Affiliated" means entities that are part of an affiliated group as defined in 26 U.S.C. 1504(a) and any applicable federal regulations thereto, as they may be amended from time to time;

(b) "Non-publicly traded companies" means any business entity that is not a "publicly traded company", as defined by subdivision (9) (b);

(c) "Publicly traded company" is any company that is traded on:

(1) A national securities exchange registered under Part 6 of the Securities Exchange Act of 1934 or exempted from registration under such act by 15 U.S.C. because of limited volume transactions;

(2) A foreign securities exchange operating under principles analogous to a national securities exchange;

(3) A regional or local exchange;

(4) An interdealer quotation system that regularly disseminates firm buy or sell quotations by identified brokers or dealers by electronic means or otherwise; or

(5) On a secondary market or the substantial equivalent thereof, if taking into account all of the facts and circumstances, the owners are readily able to buy, sell or exchange their ownership interest in a manner that is comparable, economically, to trading on an exchange; and

(d) "Related" means entities and/or individuals that are related as determined by 26 U.S.C. 267 (b) and (f) and any federal regulations applicable thereto as they may be amended from time to time.

(9) Any family-owned non-corporate entity where all of the activity of the entity is the production of passive investment income is exempted from the terms of this Ordinance and no license is required. For purposes of this section (10):

(a) "Family-owned" means that at least ninety-five percent (95%) of the ownership units of the entity are owned by members of the family, which means, with respect to an individual, only:

(1) An ancestor of such individual;

(2) The spouse or former spouse of such individual

(3) A lineal descendent of such individual, of such individual's spouse or former spouse, or of a parent of such individual;

(4) The spouse or former spouse of any lineal descendent described in subdivision (iii); or

(5) The estate or trust of a deceased individual who, while living, was as described in any of the above subdivisions.

For purposes of section (10), a legally adopted child of an individual shall be treated as the child of such individual by blood.

(b) "Passive investment income" for section (10) means gross receipts derived from dividends, interest, annuities, and sales or exchanges of stock or securities to the extent of any gains therefrom.

(10) No net profit license fee is imposed and no filing is required of any person who sells farm products, other than trees, shrubs, sod, or ornamental plants in the City, or any person who sells livestock in the City or who board their livestock in the City for breeding purposes. The exemption afforded these farm related transactions shall only apply to the sale of the products or services by the original producer or owner. Any entity engaged in the selling of the exempted products and services that cannot be classified as a farmer shall not be afforded the exemption. As an example, the sale of farm produce by a grocery store is not exempted from the net profit license fee. A farmer is defined as a person who manages land on which crops or animals are raised.

Section 3.6 Determination of net profits in general

(1) The provisions in the definitions of net profits discussed in this Section have general application to all types of licensees.

(a) **Net Profit** – As set forth in Section 16-21 of the Ordinance means gross income as defined in Section 61 of the Internal Revenue Code minus all the deductions from gross income allowed by Chapter 1 of the Internal Revenue Code except as specified in the Ordinance and Regulations and otherwise by law.

(b) **Expenses Associated with Income not Subject to License Fee are not deductible** – Any expenses attributable to income not subject to the occupational license fee shall not be allowed as deductions from the remaining net profits. In the absence of records showing the actual expenses attributable to income not subject to the license fee, the minimum shall be all expenses up to the amount of income not subject to the license fee.

(c) **Federal Tax Credit in Lieu of Deduction** – Business expenses for which a licensee has, for federal income tax purposes, elected a credit in lieu of a deduction may be deducted from net profits. Some current examples of federal credits are the investment tax credit, foreign tax credit, jobs credit, and rehabilitation expenses credit. The deduction for the expense is allowable in the year(s) the expenses would have been deductible for federal income tax purposes had the credit not been taken. Thus, for example, the credit for rehabilitation expenses is not excluded from net profit in the year the credit is allowed for federal tax purposes, but in the year the amount of the basis reduction would otherwise have been allowed as a depreciation expense had the credit not been taken. The foreign tax credit may only be excluded from net profit where the related foreign income is included in determining net profit.

(d) **State and Local Taxes Based on Income** – Corporations, partnerships and sole proprietors may not deduct state or local taxes or license fees based on income. State or local franchise, license or gross receipts taxes or other taxes not based on income, but are costs of doing business, are allowed as a deduction in determining net profits.

(e) **Net Operating Losses** – Net operating loss carrybacks and carryforwards allowed under IRC Section 172(a) are not deductible in determining net profits.

(f) **Capital Gain Income** – Except as provided in Section 3.13 (2)(e) of these Regulations, capital gain income related to business activity shall be subject to the license fee and be reported in the same manner as for federal income tax purposes. (Effective for transactions occurring after 06/30/05)

(g) **Capital Gains Arising from Sale of Business** – Except as provided in Section 3.13(2)(e) of these Regulations, gains realized from the sale of a business are subject to the license fee if the person receiving the gain has been engaged in the business within the City at any time; the license fee on the gain shall be included in the net profits of the person receiving the gain for the year in which the gain is recognized regardless of whether the person receiving the gain was otherwise engaged in that business within the City during that year and regardless of whether or not the business was active during the year the gain was recognized. (Effective for transactions occurring after 06/30/05)

(h) **Deductions for profits from Kentucky sale of Alcoholic beverages** - All gains (losses) derived from the business activity, other than the direct licensing and/or manufacturing and/or sale of alcoholic beverages as set out in Kentucky Revised Statute (KRS) 243.070, shall be included in Total Net Profit subject to the occupational license fee. The gross receipts from any sales that are not from the direct manufacturing and/or sale of alcoholic beverages that results in a gain (loss) shall not be included in the Total Sales denominator when determining the Alcoholic Beverage Sales Deduction nor shall the gains from such sales be included in Total Income when calculating the Alcoholic Beverage Sales Deduction. Gains from the

sale of equipment, real property or any other business related activity that is not otherwise exempted in KRS 243.070 are not considered to be included in the direct manufacturing and/or sale of alcoholic beverages.

(i) **Interest on U.S. Obligations –** Corporations and partnerships are allowed to exclude from net profit the amount of interest on U.S. obligations reduced by any expenses definitely related thereto. The word "definitely" contemplates an exclusive connection between the expenses and the interest earned. Thus, for example, fees charged by an investment advisor to manage an account consisting of only U.S. obligations would be "definitely" related to interest earned on the U.S. obligations. However, if the account consisted of other investments in addition to the U.S. obligations, there would be no definite relationship between the fee and the U.S. obligations. The word "definitely" does not contemplate any allocation of expenses among various types of income.

(j) **Deduction for non-business interest and dividend income** – Non-business interest and dividend income is allowed as a deduction in determining net profits. Whether income is classified as passive income by the IRS does not determine business or non-business income for occupational license fee purposes. Business interest and dividends are subject to the occupational license fee and are therefore not deductible in determining net profits. Examples of business income include, but are not limited to, income in the form of interest from accounts receivable, interest from leasing or financing arrangements or dividends from subsidiaries.

(k) **Deduction for Tobacco Settlement Funds** – Funds received from the state as a share of the tobacco settlement funds to be paid to farmers is exempt from inclusion in net profits for the purpose of calculating the net profits which are subject to this occupational license fee as follows:

(1) Any amount received by a producer of tobacco or a tobacco quota owner from the multistate settlement with the tobacco industry, known as the Master Settlement Agreement, signed on November 22, 1998;

(2) Any amount received from the secondary settlement fund, referred to as "Phase II", established by tobacco companies to compensate tobacco farmers and quota owners for anticipated financial losses caused by the national tobacco settlement; and

(3) Any amount received from the 2004 Tobacco Transition Payment Program, also called the "Tobacco Buyout, whether treated as a capital gain/loss or ordinary income.

(l) **Deduction of Certain Expenses -** In calculating net profits subject to occupational license fee all ordinary and necessary expenses of doing business, unless specified as not being deductible by Ordinance, Regulation or otherwise by law, including reasonable compensation of employees, shall be allowed, but no deductions may be claimed for salary

or withdrawal of a sole proprietor or of the partners, members or other owners of an unincorporated business or enterprise.

(1) If not claimed as a part of the cost of goods sold or elsewhere in the return filed, there may be claimed and allowed a reasonable deduction for depreciation, depletion, obsolescence, loss resulting from theft or casualty, not compensated for by insurance or otherwise, of property used in the trade or business, but the amount may not exceed that recognized for the purpose of federal income tax.

(2) Where depreciable property is voluntarily destroyed, only the cost of such demolition and the undepreciated balance thereof will be allowed as an expense in the year of such demolition to the extent allowable for federal income tax purposes.

(3) Bad debts in a reasonable amount may be allowed in the year ascertained worthless and charged off, or at the discretion of the Director of Finance. If the reserve method is used, a reasonable addition to the reserve may be claimed, but in no event shall the amount exceed the amount allowable for federal income tax purposes.

(4) Income from the sale or lease of mineral rights is not subject to the license fee, and expenses or losses in connection therewith are not deductible for license fee purposes, except in cases where the licensee conducts the activities by which the minerals are extracted from the land.

Section 3.7 Determination of Net Profits for Corporations other than S Corporations

(1) For corporations (other than S Corporations), "net profit" shall mean the licensee's "taxable income" for federal income tax purposes adjusted as follows:

(a) plus any sum deducted for federal income tax purposes as net operating loss carryforwards or carrybacks, including passive activity losses

(b) plus any deductions for federal income tax purposes for state or local taxes based on income,

(c) plus any expense attributable to income not subject to the occupational license fee,

(d) plus the total deduction for dividends paid and the Section 857(b) (2)(E) deduction used in the determination of real estate investment trust taxable income,

(e) less interest on U.S. obligations,

(f) less non-business interest and dividend income,

(g) less the amount of foreign dividend gross-up under Section 78 of the Internal Revenue code,

(h) less the amount of subpart F income included under Section 951 of the Internal Revenue Code but not actually received,

(i) less business expenses for which a licensee has for federal income tax purposes, elected a credit in lieu of expenses.

(2) Net profits are subject to such other adjustments as may be required by City Ordinance or otherwise by law.

(3) The corporation's annual Net Profit License Fee Return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or other authorized officer. The name and title of said officer must be printed legibly or typed underneath the signature.

(4) Copies of applicable federal schedules or their equivalent must be attached as evidence supporting a licensee's statement of income and expenses.

(5) Corporations with business activity in the City must file an annual net profits license fee return whether or not they have net profits from the business, trade, occupation, profession, enterprise or other activity in which they are engaged during the year.

Section 3.8 Determination of Net Profits for Partnerships and S Corporations

(1) For partnerships and S Corporations "net profit" shall mean a licensee's "ordinary income" for federal income tax purposes adjusted as follows:

(a) plus income passed through separately on the federal income tax return from a partnership to the partners or from an S corporation to the shareholders, including, but not limited to, guaranteed payments to partners, dividends qualifying for exclusion, net capital gains, gains from casualty or theft, IRC 1231 gains,(See Section 3.6(f),(g) of these regulations),

(b) plus any deductions for federal income tax purposes for state or local taxes or license fees based on income,

(c) plus any expense attributable to income not subject to the occupational license fee,

(d) less interest on U.S. obligations,

(e) less non-business interest and dividend income,

(f) less professional expenses not reimbursed by the partnership which for federal income tax purposes are claimed on the partners federal income tax return. In order to reduce gross receipts or sales revenues by these expenses, they must be of the type which would have been deductible by the partnership for federal income tax purposes had those expenses been paid by the partnership and they must actually have been deducted by the partner

on his or her federal income tax return. These expenses would, for example, include professional liability expenses and automobile expenses,

(g) less the amount of foreign dividend gross-up under IRC Section 78,

(h) less the amount of Subpart F income included under IRC Section 951 but not actually received,

(i) less business expenses for which a licensee has, for federal income tax purposes, elected a credit in lieu of expenses,

(j) less business expenses passed through separately on the federal tax return from a partnership to the partners or from an S corporation to the shareholders including, but not limited to charitable contributions, expense deduction from recovery property pursuant to IRC Section 179, and special allocations passed through separately by the partnership to the partners or by the S corporation to the shareholders,

(k) and for purposes of this ordinance the following items when passed through separately to the partner or shareholder, when paid on behalf of the partners, or when paid on behalf of the shareholders: health and life insurance premiums, amounts contributed to a Keogh (HR-10) retirement plan, amounts contributed to a SEP as defined in Section 408(k) of the Internal Revenue Code, amounts contributed to any other self-employment retirement plan, amounts paid for self-employment taxes of a partner, shall not be deductible for purposes of determining net profit for partnerships and S corporations,

(l) and for purposes of the Ordinance, the license fee is imposed on the partnership or S Corporation, not the partner or shareholder.

(2) Net profits are subject to such other adjustments as may be required by City Ordinance or otherwise by law.

(3) Partnerships and S corporations are considered separate entities for purposes of filing license fee returns. No licensee is required or permitted to include in its income subject to the license fee its share of any item of income or deduction from partnerships or S corporations with business activity in the City. Thus, for example, a corporation which owns an interest in a partnership which conducts business in the City must exclude the net profit or loss of the partnership from its net profit or loss since the partnership would have separately filed a return and paid a license fee on its net profits.

(4) Copies of applicable federal schedules or their equivalent must be attached as evidence supporting a licensee's statement of income and expenses.

(5) Partnerships and S corporations with business activity in the City must file an annual Net Profit License Fee Return whether or not they have net profits from the business, trade, occupation, profession, enterprise or other activity in which they are engaged during the year. Partnerships are required to file one annual Net Profit License Fee Return on behalf of all individual partners, and S corporations are required to file one annual Net Profit License Fee Return on behalf of all shareholders.

(6) A partnership's annual Net Profit Return must be signed by a general partner. An S corporation's annual Net Profit Return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or other authorized officer.

Section 3.9 Determination of Net Profits for Sole Proprietors

(1) For sole proprietors net profits shall mean a licensee's gross receipts or sales revenues from his or her business, trade, occupation, profession, enterprise or other activity including, but not limited to, royalties, rental income and nonemployee compensation, less ordinary and necessary expenses of the business trade, occupation, profession, enterprise or other activity such as defined as deductions for federal income tax purposes adjusted as follows:

(a) plus ordinary gains and capital gains from the sale of property used in a licensee's business, trade, occupation profession, enterprise or other activity including, but not limited to Section 1231, 1245 and 1250 of the Internal Revenue Code, (Effective for transactions occurring after 06/30/05)

(b) plus any sum deducted for federal income tax purposes as a net operating loss carryforward or carryback, including passive activity losses

(c) plus any deductions for federal income tax purposes for state or local taxes or license fees based on income,

(d) plus any expense attributable to income not subject to the occupational license fee,

(e) less ordinary losses and capital losses from the sale of property used in the licensee's business, trade, occupation, profession, enterprise or other activity,

(f) less business expenses for which a licensee has, for federal income tax purposes, elected a credit in lieu of expenses,

(g) and for purposes of this ordinance, contributions on behalf of the licensee to a Keogh (HR-10) retirement plan, amounts contributed to a SEP, as defined in Section 408(k) of the Internal Revenue Code, amounts contributed to any other self-employment retirement plan, amounts paid for self-employment taxes of an individual owner shall not be deductible for purposes of determining the sole proprietor's net profit. Contributions by the licensee to a Keogh retirement plan, Simplified Employee Pension Plan or other self-employment retirement plans are deductible from gross receipts or sales of a sole proprietor in computing net profits to the extent that they are on behalf of his or her common law employee.

(2) Net profits are subject to such other adjustments as may be required by City Ordinance or otherwise by law.

(3) **Single return for two or more businesses; exception** – Sole proprietors, including single owner LLC's filing as sole proprietors for federal income tax purposes, may combine on a single Net Profit License Fee Return the net profits

from two or more distinct businesses with activities within the City. However, if a sole proprietor engages in one or more activities, businesses, trades, professions or occupations as a sole proprietor in the City and in addition engages in one or more distinct and separate business activities, trades, professions or occupations as a sole proprietor wholly outside the City, only the net profits and/or losses from the business activities, trades, professions or occupations engaged in by the sole proprietor in the City are subject to the net profit license fee; no fee is due and no offset is permitted with respect to any profit or loss arising from the sole proprietor's activity outside the City.

(4) Copies of applicable federal schedules or their equivalent must be attached as evidence supporting a licensee's statement of income and expenses.

(5) A sole proprietor conducting a business, trade, occupation, profession, enterprise or other activity in the City must file an annual Net Profit License Fee Return whether or not they have net profits from the activity, business, trade, occupation or profession in which they are engaged during the year.

(6) A sole proprietor must personally sign the City Net Profit Return reporting said net profits.

Section 3.10 Determination of Net Profits for Fiduciaries, Trusts

The net profit of a fiduciary (estate or trust) which is engaged in a business activity is subject to the net profits license fee as is the net profits of any other business, trade, occupation, profession, enterprise or other activity. The rules of the occupational license fee ordinance and regulations applicable to individuals engaged in renting real property is also applicable to trusts and estates engaged in the management of real property and in the event the trust or estate is deemed thereby to be in the business of renting real property, the profit derived there from shall be subject to the license fee. Income distribution deductions arising from distributions to beneficiaries of a trust or estate shall not be included in the trust's or estate's costs and expenses deducted from its income in determining the taxable income of the trust or estate subject to the occupational license fee net profits.

Trusts that are part of qualified retirement plans and individual retirement accounts who pool their assets in a group trust and are engaged in an enterprise, activity or business which is productive of income, that income shall be considered subject to the license fee.

Section 3.11 Determination of Net Profits for Limited Liability Companies

A limited liability company shall have the same entity classification as that elected for IRS federal income tax filings.

Section 3.12 Net Profits Apportionment

(1) **Determination of Net Profits Apportionment Percentage**

This Section describes the method by which a licensee engaged in business both inside and outside the City is to apportion its net profits. As discussed in this

Section, the apportionment percentage is determined by a two-part formula using a "sales factor" and a "payroll factor".

(2) **Net Profits Apportionment – Introduction and Overview**

If the operations of a licensee are conducted both inside and outside the City, then the extent to which its total net profits from all sources shall be considered as having been derived from activities within the City (and hence being subject to the occupational license fee imposed by the City) shall be determined by application of the business apportionment percentage to be determined by averaging the percentage of sales revenue and percentage of compensation within the City.

(3) **Apportionment Factors**

(a) **Sales Factor** – The sales factor is the percentage computed by determining the licensee's sales revenue attributable to activities within the City and dividing by the licensee's total sales revenue.

(b) **Payroll Factor** – The payroll factor is the percentage computed by determining the licensee's compensation paid to employees attributable to activities within the City and dividing by the licensee's total compensation paid.

(4) **Determination of Sales Factor**

(a) **Definition of "Business Receipts"**
"Business receipts" are "sales revenues as defined in Section 16-21 of the Ordinance" and is inclusive of all cash payments, the fair market value of all property and services received and all receivables from transactions and activities of the licensee's trade or business operations. "Business receipts" shall be computed on the cash or accrual basis in accordance with the method of accounting used for federal income tax purposes. "Business receipts" shall not include any item of income which is excluded from the licensee's net profits.

(b) **Receipts from the Sale of Tangible Personal Property**

Receipts within the City shall include the sales of tangible personal property delivered to a purchaser within the City, regardless of F.O.B. point or other conditions of sale, unless otherwise specified by the Ordinance or these Regulations.

(1) **Property Ordered from outside the City of Owensboro**

Sales are attributable to activities within the City when property is delivered to a purchaser within the City even though the property is ordered from outside the City.

***Example**: B Corporation with inventory in Henderson, Kentucky, sold $100,000 of its products to a purchaser with branch stores in several locations, including the City. The purchase order was placed by the*

purchaser's central purchasing department located in Louisville, Kentucky. $25,000 of the purchase order was shipped directly to the purchaser's branch store in the City. The branch store in the City is the "purchaser within the City" with respect to $25,000 of B Corporation's sales. Therefore, B Corporation has $25,000 of business receipts within the City.

(2) **Shipment terminating in the City later transferred**

Sales are attributable to activities within the City when property is delivered or shipped to a purchaser in the City even though the property is later transferred by the purchaser to another location.

Example: *D Corporation makes a sale to a purchaser who maintains a central warehouse in the City where all merchandise purchases are received. The purchaser reships the goods to its branch stores in other localities for sale. All products shipped to the purchaser's warehouse in the City are property "delivered or shipped to a purchaser within the City". Therefore, these are business receipts within the City for D Corporation.*

(3) **When Property is Physically Delivered to a Purchaser outside the City**

Sales are not attributable to activities within the City when property is delivered or shipped to a purchaser outside the City.

Example: *A new car dealer located within the City sells used vehicles taken in trade to a wholesaler located in Henderson, KY. The new car dealer physically delivers these vehicles to the Henderson location using a commercial carrier service. These sales are not "in the City".*

(c) **Other City Business Receipts**

Business receipts from sales, other than sales of tangible personal property, are attributed to the City as follows:

(1) **Gross Business Receipts from the Sale, Lease, Rental or other use of Real Property**

Gross business receipts from the sale, lease, or rental or other use of real property are in the City if the real property is located in the City; except that commissions or other gross business receipts paid as a result of the fulfillment of a contract to sell, or provide other services related to the sale of the real property, shall be in the City based on the time spent in fulfilling such contract or providing said services.

(2) **Gross Business Receipts from Rental, Lease, Licensing or Other Use of Tangible Personal Property**

Gross business receipts from rental, lease, licensing or other use of tangible personal property shall be attributable to the City if the property is in the City during the entire period of rental, lease,

license or other use. If the property is within and without the City during such period, gross business receipts attributable to the City shall be based upon the ratio which the time in the City bears to the total time or use of the property everywhere during such period.

(3) **Gross Business Receipts for the Performance of Services**

Gross business receipts for the performance of services are attributable to the City based on the time spent in performing such services in the City. Time spent in performing services includes time spent in performing contracts or other obligations which gave rise to such gross business receipts.

(4) **Gross Business Receipts from the Sale of Intangible Personal Property**

For persons whose business includes the sale of intangible personal property, gross business receipts from the sale of such property shall be attributed to the City based on time spent in selling such intangible personal property in the City. Time spent in selling includes time spent in performing contracts or other obligations which gave rise to such sales.

(d) **Determination of Sales Factor – Particular classes of persons**

The following classes of persons have presented particular questions and/or difficulties with respect to determining their City business receipts. The provisions of this Subsection (d) are established to set forth clearly which business receipts are attributable to activities within the City for those particular classes of persons.

(1) **Persons engaged in Transportation of Goods or Documents**

Receipts from the service of transporting goods or documents are attributable to the City if 1) the party contracting with the licensee for the provision of such services is located within the City; and 2) such goods or documents are placed in the control of the licensee at such location or are delivered to such location. With respect to goods or documents transported "C.O.D.", the party contracting with the licensee shall be deemed to be the party who placed the goods or documents in the control of the licensee.

(2) **Persons Engaged in the Transportation of People**

The receipts of any licensee which arise from the service of transporting people shall be deemed to have arisen in the City if the fee for the provision of such service is received within the City.

(3) **Persons Furnishing Advertising**

The receipts of any licensee which arise from advertising services are attributable to the City as follows:

(a) printed media, radio and television broadcast advertising, 100 % of advertising revenue received from customers whose principal places of business are in the City and a percentage of advertising revenues received from customers whose principal place of business are outside the City equal to the proportion of the licensee's audience/circulation which is within the City.

(b) Billboard advertising, if the billboard is located within the City.

(4) **Loan Companies**

Business receipts of any licensee doing business as a loan company shall be receipts derived from loans negotiated through offices in the City.

(5) **Residual Payments**

Residual payments received by insurance agents, authors, performers, salespersons and others are subject to the license fee to the extent that such payments were earned in the City. Such payments shall be rebuttably presumed to have been earned in the entirety in the City, unless a claim is made that such income was earned, in part, outside the City; in which case the licensee must furnish undisputable evidence to support such a claim.

(5) **Determination of Payroll Factor**

(a) **Definition of "Payroll"**
Payroll shall include all wages paid to or payable to employees. Payroll shall be computed on the cash or accrual basis in accordance with the method of accounting used for federal taxable income.

(b) **What is included in City Payroll?**
Payroll within the City shall include all wages attributable to activities within the City as defined in the Ordinance and Regulations and otherwise by law.

(6) **Computation of Apportionment Percentage**

(a) **Apportionment Percentage Formula**
The apportionment percentage is determined by adding together the sales factor and the payroll factor then dividing the total by two (2). (However see Paragraph (b) below in the event one factor is absent.) This apportionment percentage is applied to the entire net

profits of the licensee, wherever derived, to arrive at subject net profits.

(b) If either the sales factor or the payroll factor is missing the remaining factor is the apportionment percentage. A factor is not deemed to be absent merely because none of the licensee's sales revenue arose inside the City or none of the compensations paid by the licensee were attributable to activities inside the City.

Section 3.13 Special Cases

(1) Introduction

The following special cases have presented particular questions and/or difficulties with respect to liability for and/or collection of the occupational and net profits license fee. The provisions of this Section are established to set forth clearly the liability in these special cases and to outline the procedures by which the City shall collect the license fees.

(2) Income from the Rental of Real Property

(a) The definition of real property, as the term is used in this Regulation, shall include commercial property, residential property, farm property, and any and all other types of real estate.

(b) Rental income received by a licensee is subject to license fee only if and to the extent that the rental, ownership, management or operation of the real estate from which such rental income is derived (whether so rented, managed or operated by the licensee individually or through agents or other representatives) constitutes a business activity of the licensee in whole or in part.

(c) Corporations, partnerships and other associations who have business activity in the City and receive income from the rental, ownership, management or operation of real property, wherever located, are presumed to be in the business of renting said property, regardless of the amount of gross annual rental income or the number of residential or other units held or offered for rent. The net profits from such rental, ownership, management or operation shall be included in the corporation, partnership or other association's Net Profits License Fee Return.

(d) Individuals as well as fiduciaries acting on behalf of individuals or deceased individuals who receive income from the rental, ownership, management or operation of real property located in the City are rebuttably presumed to be engaged in a "business activity" which requires a license fee to be paid and a return filed, unless the individual or fiduciary's gross rental receipts are $5,000 or less during the applicable calendar or fiscal year.

Single owner LLC's filing as sole proprietors for federal income tax purposes are considered to be individuals for purposes of the residential gross rental receipts test.

(e) Licensees shall include in net profits any capital gain arising from the sale of any real property included in the licensee's business of renting real property. An individual's or fiduciary's real property is presumed to be included in the licensee's business of renting property if the licensee met the "business activity" test of Section 3.13 (2)(d) of this Regulation in the current or previous tax year.

(3) **Waiters, Waitresses, Bellhops and Others Receiving Tip Income**

Waiters, waitresses, bellhops and others receiving tip income not reported by his or her employer is deemed to be engaged in a business activity. They are required to obtain their own Occupational Business License and file the annual Net Profit License Fee Return as required and to remit the license fee due, with respect to the unreported tip income.

(4) **Employees of Federal Agencies**

Certain federal agencies do not withhold and remit to the City the full amount of their employees' license fee. All federal agencies, whether or not they withhold license fees on behalf of their employees, shall submit either copies of federal form W-2 and W-3, transmittal of wage and tax statements, or a detailed employee listing with the required equivalent information, on behalf of each employee, by February 28 of each year, reflecting the previous year's wages. The City will collect any amounts not withheld by federal agencies on behalf of their employees directly from the employees. Such employees are required to pay by April 15th of the year following the calendar year in which the wages were paid.

(5) **Income Deriving from a Covenant not to Compete**

Payments deriving from a covenant not to compete are excluded from a licensee's net profits subject to the license fee to the extent that the recipient does not perform services in consideration for such payments. Licensees are required to report income deriving from a covenant not to compete and to show that such income is entitled to the exclusion hereunder by attaching a copy of the covenant from which the income is derived.

(6) **Commissions or Fees Received by Trustees, Executors and Administrators**

Monies received as commissions or fees by a person who holds in trust property or monies to which another has the beneficial title or interest or who receives and controls income for another person or persons are subject to the net profits license fee unless the person receiving such commission or fees is a bank, trust company, or combined bank and trust company exempted from payment of the net profits license fee by statute.

(7) If a licensee believes the requirements of this Section do not result in a fair and proper determination of net profits due to the peculiar or unusual nature of the

business involved, he shall submit a statement seeking an exception to this Section, furnishing a detailed statement of facts explaining the basis of the exception sought. In each case, a determination shall be made in accordance with the facts. The Director of Finance or his or her designee may adjust the calculation of any licensee to fairly and accurately reflect business activity within the City. Once permission to use a different method in calculating the net profits has been granted, a licensee must continue to use the alternate method until given permission to change by the Director of Finance or his or her designee.

(8) **Unrelated Business Income; Non-Profit Organization**

Any organization classified as a "Nonprofit Organization" as defined in the Ordinance shall be required each year to file a copy of Federal Form 990 as defined at Section 6033 of the Internal Revenue Code. The applicable Form 990 must be filed on or before the 15th day of the fifth month following the close of the organizations accounting period. If an organization earns "unrelated business income" as defined and administered in Section 511 of the Internal Revenue Code, a net profit return must be filed by the organization and the license fee paid on the "unrelated business income"

(9) **Receipt of Income from any Activity**

Unless exempted by Ordinance, Regulation, or otherwise by law, any earned income not having the occupational license fee paid through employee withholding, that is derived from any activity not heretofore mentioned as subject to the net profit license fee, is subject to the net profit license fee, if the earned income derives from an activity conducted, in whole or in part, in the City. Retainers or other payments received for being available to render or provide services are subject to the license fee.

O.C. 2-5 DEDUCTIONS FROM EMPLOYEE COMPENSATION, PAYMENT; RECORDS REQUIRED

Section 1.1 Liability of Employers Who Fail to Comply with City Requirements

(1) Every employer is deemed to be a trustee of the City who by employing persons within the City undertakes an obligation to collect and hold the employee occupational license fee, and the funds so collected are deemed to be trust funds. Every such employer required to deduct and withhold the employee license fee shall file and remit the amount of license fee withheld to the City using the Employer's Return of License Fee Withheld form.

(2) Every such employer required to deduct and withhold the employee license fee is liable jointly and severally with the employee directly to the City for failure to file the Employer's Return of License Fee Withheld and for failure to make payment of such fees, whether actually withheld by such employer or not. If the funds are actually withheld by the employer and not remitted to the City, the employer may be criminally prosecuted for theft by failure to make required disposition (KRS 514.070)

(3) No employee shall be liable to the City for any license fee actually withheld from the employee's wages by the employer.

O.C. 2-8 INITIAL FEE

Section 1.1 Initial Licensing

(1) Corporations, partnerships, and other associations, sole proprietorships, estates and trusts, independent contractors and individuals subject to the occupational net profits license fee and all employers must apply for an occupational license fee reporting number (account number) and in such process shall complete an Occupational Business License Application. The applicant shall remit the non-refundable seventy-five dollar ($75) minimum license fee with the application. If there is no activity, the first time filer may carry a credit of the fee over to the next year, but shall receive no refund.

(2) Each separate legal entity conducting business in the City requires a separate application and separate account number. When a corporation becomes a new legal entity, as when it dissolves and incorporates again, a new application must be completed and executed. However, an individual engaged in more than one business activity as a sole proprietor is permitted to use the same account number for the two or more activities in which the individual is engaged.

(3) Identifying account numbers are assigned and licenses are processed on the basis of the information supplied by the completed Occupational Business License Application. Licensees are required to notify the City of any change in address, of the cessation of business activity and of other significant changes which render inaccurate the information previously supplied in the completed questionnaire. Failure of the licensee to notify the City of such changes may result in the initiation of legal action by the City.

(4) Licensees must complete the Occupational Business License Application and obtain their identifying account number prior to engaging in any business, trade, occupation, profession, enterprise or other activity in the City.

(5) The failure of any employer or licensee to receive or procure forms or documents is not an excuse for failure to make any return or to pay the occupational license fee.

O.C. 2.9 WAIVER OF PENALTY AND/OR INTEREST

(1) The Director of Finance shall have the authority to resolve occupational license fee controversies to the extent of waiving penalty or interest, or both, in whole or in part where it is shown to the satisfaction of the Director of Finance that failure to file or pay timely is due to reasonable cause and not willful neglect. In exercising such authority, the Director of Finance will consider the fact and circumstances of each particular matter and the hazards and costs of litigation. The Director of Finance has no authority to waive any tax due.

(2) "Reasonable Cause" exists if the licensee establishes to the satisfaction of the Director of Finance that either (1) there was significant mitigating factors for the

failure or (2) the failure arose as a result of an event, happening or circumstance entirely beyond the knowledge or control of a licensee who has exercised due care and prudence in the filing of a return and in the payment of the license fee due.

(3) Events which will be generally considered beyond the licensee's knowledge or control include, but are not limited to, the following:

(a) **Unavoidable Absence -** The absence (e.g. due to death or serious illness) of the person with sole responsibility for filing the return in issue or for payment of the fee. The duration of the absence and its proximity to the due date of the return or payment will be taken into account in the Director of Finance determination.

(b) **Unavailability of relevant business records -** Necessary business records must have been unavailable under such conditions, in such manner and for such period as to prevent timely compliance.

(4) Events which will not generally be considered as establishing reasonable cause include, but are not limited to, the following:

(a) **Actions of agent or employee -** The filing of a license fee return and the payment of fee due are both personal, nondelegable duties of the licensee. Reasonable cause is not established by merely showing that the licensee relied upon an employee, accountant, attorney, payroll service or other person, who failed to file the return or pay the fee.

(b) **Ignorance of the Law -** Neither ignorance of the law, nor ignorance of the necessity of filing the return or paying the fee is sufficient in and of itself to relieve the licensee from liability for penalty or interest, except that a response from a licensee to a delinquency within 60 days of the due date of the return shall allow for any assessed penalty to be forgiven if:

1) If the return/payment that is late is the first time such return has been due or;

2) the licensee's account has not experienced any delinquencies within the previous three year period as it applies to the return being filed and the due date of such return.

(c) **No tax forms -** Failure to receive or obtain license fee forms.

(5) In addition to establishing that an event beyond the licensee's knowledge or control caused the failure to file or pay timely, the licensee must also establish that the licensee acted in a responsible manner both before and after the failure occurred. The licensee must demonstrate that the licensee undertook appropriate steps to avoid or mitigate the failure and that the licensee rectified the failure as promptly as possible once the impediment to compliance was removed or the failure discovered.

(6) In evaluating the hazards and cost of litigation, the Director of Finance will consider waiving penalties and interest, in whole or in part based on doubt as to collectibility. To establish such doubt, a licensee must demonstrate lack of both present and future income and assets (inability to pay must be permanent or long term and the licensee's lack of present ability to pay is not sufficient). That the licensee will suffer hardship by reason of payment of penalty or interest is not in and of itself a sufficient basis to waive penalty or interest.

(7) Circumstances which will generally be considered in evaluating collectibility include, but are not limited to, the following:

(a) The licensee is in receivership or is the subject of any proceeding under the Bankruptcy Act, taking into account the priority of the City of Owensboro's claim.

(b) The licensee has made or is making an assignment for the benefit of creditors or other arrangement or composition with the licensee's creditors.

(c) The licensee is involved in any other insolvency or liquidation proceedings.

(d) The licensee is seriously ill, disabled or deceased.

(e) Any lien rights and other security the City of Owensboro may possess.

(f) Any court proceedings involving the licensee, pending substantial claims against the licensee outside of the ordinary course of business, and other unusual circumstances impacting the licensee's financial condition.

(8) In considering requests for waiver of interest and penalties, the Director of Finance will take into account the history, if any, of the licensee in complying with its obligations to the City of Owensboro in the past. Other evidence demonstrating a lack of willful neglect on the part of the licensee with respect to the licensee's failure to comply will also be considered.

(9) Since interest represents merely a charge for the benefit realized by the taxpayer from retaining money beyond the date it should have been paid to the City of Owensboro and the loss incurred by the City of Owensboro from not having use of the money for the same period of time, the Director of Finance will generally be more disposed to granting waivers of penalties as opposed to waivers of interest.

(10) In order to obtain a waiver of penalty or interest, a licensee must submit to the Director of Finance a written request for the waiver no later than forty-five (45) days after notice of assessment of the penalty or interest. In such request, the licensee shall set forth all of the facts and circumstances believed by the licensee to constitute reasonable cause for the non-compliance on the part of the licensee giving rise to the penalty or interest. The licensee should submit to the Director of Finance with the request all documentation, affidavits, and other material the licensee deems necessary or relevant in support of the licensee's position. The Director of Finance will not generally consider a request for waiver of interest or penalty unless the licensee has paid the entire fee to which the interest or penalty relates before or at the same time as the taxpayer submits the request.