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'But We Need the Money!'

Can towns boost application fees in a time of financial distress?

By TIMOTHY S. HOLLISTER

Anyone paying the slightest attention these days to municipal governments knows that they are straining with reduced property tax revenues, reduced state aid, and escalating costs. As a result, they are looking under every figurative rock for new or enhanced revenue sources.

One of these potential sources is application fees for land use and construction permits. This reality brings to the forefront the authority of and limits on local governments to charge application fees, and particularly whether such fees provide a means to help balance local budgets or at least reduce deficits.

As a legal matter, this issue has been highlighted recently by a case decided by the Connecticut Supreme Court. A group of builders who work in Madison have brought a class action claiming that the town, over several years, collected illegal, excessive fees for building permits. The plaintiffs' claims include a state law count under the Unfair Trade Practices Act. The Supreme Court, in *Neighborhood Builders v. Town of Madison*, 294 Conn. 651 (Feb. 2, 2010), held that the plaintiffs met the requirements for class certification, and remanded for further proceedings. Another, similar case of some notoriety occurred several years ago. A three-town regional school district applied for a building permit for an expansion of its high school. The host town's building permit fee schedule was typical, charging a set fee per $1,000 of total construction cost, for a total of about $75,000. The building inspector, however, imposed a fee in excess of $300,000. A local newspaper reported his justification for this fee as, "We need the money."

What are the rules? In general, the principle, well established in Connecticut case law (which is consistent with judicial decisions nationally), is that application fees are intended and authorized to cover the municipality's reasonable cost of administering or processing the application. Thus, a town may charge an applicant its costs to publish and mail legal notices, to provide an appropriate location and security for a public meeting or hearing, and to hire a stenographer to transcribe a proceeding.

The power to set fees is limited by the principles that municipalities may only exercise those powers expressly delegated by the legislature or necessarily implicit in those powers, and therefore any financial charge by a municipality that is not authorized by statute – or is imposed not to cover administrative costs but to raise revenue for the town's general fund and unspecified use – is an unauthorized tax.

In Connecticut, the application of these principles dates to 1872, when in *Welch v. Hotchkiss*, 39 Conn. 140, the Supreme Court upheld as reasonable a license fee of 50 cents to erect, enlarge, or add to any building. More recent cases in Connecticut, such as *Karen v. Town of East Haddam*, 146 Conn. 720, 725-26 (1959), and other jurisdictions apply the same principles.

What Is Reasonable?

Connecticut's major land use statutes reflect this limitation. Connecticut General Statutes § 8-1c allows a town or its zoning commission to set a reasonable application fee, and § 8-26(b) (planning) and § 22a-42a(e) (wetlands) contain similar authorizations.


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Cases interpreting what is reasonable are few. But from the cases, as well as the everyday practice of land use, the following practices, untethered from costs of administration, are suspect if not plainly unauthorized:

- Charging an applicant for a staff review that will be done by a salaried municipal employee within the scope of his or her job.
- Setting fees that are based on a formula that has little or nothing to do with the scope of processing the application or determining regulatory compliance, such as wetlands application fees based on the number of proposed residential units, regardless of the acreage of wetlands on the property or the proposed wetlands impacts.
- Setting subdivision fees based on the total acreage of the site without regard to the simplicity or complexity of the development plan.
- Charging full application fees for re-applications, when a great deal of the processing work has already been done.

A particularly thorny and sometimes contentious aspect of application fees aris-

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es when a municipality determines that it should hire an outside consultant to review an application, and to charge the applicant the full cost of that retention.

Town officials have argued that they cannot have their planned municipal budgets upset simply because an applicant decides to submit an application that is beyond the time available or perhaps the professional expertise of existing town staff, and the public is entitled to a competent professional review. Fair enough. However, retention of experts is obviously open to abuses, including practices such as refusing the applicant's input into the qualifications and cost of the third party reviewer; requiring the applicant to post 100 percent or even 150 percent of the expected cost before the review; not putting funds into an interest-bearing account; not providing the applicant with a copy of the consultant's bills; and not refunding unexpended funds promptly.

One recently enacted statute has addressed these problems. General Statutes § 8-13t(b), the HOMEConnecticut Incentive Housing Zone statute, specifically requires separate accounts, prohibits charges for the work of salaried employees, and sets a timetable for return of funds.

From the rules stated in case law that fees must reflect processing costs and cannot be a tax imposed to balance the budget, and in light of the fact that each of the statutes limits fees to a "reasonable" amount, applicants should be on the lookout for fees that either depart from these rules, appear excessive, or are not justified upon request to town staff.

Meanwhile, municipal officials should bear in mind these substantive limitations, and not view application fees as low-hanging fruit or an unopened cookie jar. ■