Managing Town Finances: Recovering Application Review Fees

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Municipalities are not insulated from this uncertain economic climate, and many are seeking ways to minimize costs and meet their budgets, all while providing the same level of services. One method many towns have considered is fully offsetting costs expended on behalf of third parties, particularly for reviewing zoning and land use applications as well as building permits and similar fees. Such costs can include expert review fees of engineers, surveyors and lawyers; publishing expenses, mailing charges and others. But a local government may not utilize application fees as a general revenue-raising measure. Only rational assessments of the underlying costs, with proper limits on the charges, will be upheld, making drafting permissible fee recoupment provisions a difficult assignment, particularly with the paucity of concrete guidance from the Legislature.

Towns are not left bereft of direction, however. First, they have implied power under Municipal Home Rule Law § 10 to impose reasonable fees necessarily related to the review. In addition to this rather general authority, the State Environmental Quality Review Act (SEQRA) and its implementing regulations allow a lead agency — often one of a town's boards, if not the town board itself — to recover expenses related to reviewing Draft and Final Environmental Impact Statements. And in the rare case where the lead agency prepares the DEIS/FEIS for an applicant, it can recoup the cost of that preparation. Keep in mind, however, that not all of your team's work in the environmental process is recoverable. For instance, no fee can be charged for preparing an Environmental Assessment Form or for determining significance. Finally, there are specific provisions under SEQRA that limit the amount that can be assessed as a review fee, depending on the type of project involved. Thus, the town should not rely on SEQRA alone, but adopt fee recovery enabling legislation to the fullest extent possible.

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In addition to this relatively sparse statutory authority, courts throughout New York have provided rules for charging fees, albeit not always consistently. New York's Court of Appeals has specifically recognized that towns have the implied power to charge fees associated with regulating activities. See *Jewish Reconstructionist Synagogue of N. Shore, Inc. v. Incorporated Vil. of Roslyn Harbor*, 40 N.Y.2d 158 (1976). But this authority is not unfettered.

First, the charge has to be reasonably necessary for accomplishing the task. Communities may only charge the fees required to process and administer an application and police the resulting approval. In addition, the charges must have a rational basis. The costs cannot be open-ended; they must be fixed in some manner. You cannot merely require the applicant to "pay all fees generated by the town engineer's review," for example.

Second, it cannot be a revenue-raising measure in the guise of a regulation. A town's regulatory authority is largely derived from its police power to legislate for public protection, while its ability to raise revenue is a product of its taxing authority. While a party may attack a fee based on either or both of these grounds, most litigation today centers around the amount of the fee.

A few other notes bear mentioning on this issue. Costs do not have to be precisely charged to every applicant, but New York courts have ruled that there must be a study or other estimate made of the likely expenses related to reviewing the application. However, if your town conducts a study, and later ignores it, do not expect the enactment or decision to withstand judicial scrutiny.

Review of area charges can help establish a basis for fees, if the surrounding communities' rates are reasonable. In general, fees charged should represent the average cost for application review. Further, if a municipality demonstrates that a

type or class of project encompasses greater review costs, it may impose different expense levels. Thus, a fee charging 4 percent of the amount of the performance bond to recover engineering review fees for a subdivision has been upheld. See *Kencar Assocs., LLC v. Town of Kent*, 27 A.D.3d 423, 812 N.Y.S.2d 587, 587 (2d Dep't 2006). Likewise, a town's fees in lieu of parkland dedication and engineering, planning, legal and clerical costs incurred in reviewing a residential development were upheld as reasonable. See *Twin Lakes Dev. Corp. v. Town of Monroe*, 1 N.Y.3d 98, 769 N.Y.S.2d 445, 450-51 (2003). Moreover, a quarterly charge for fire services provided to private fire hydrants located on the petitioners' properties was deemed rational, too. See *Howitt Enters. Sweden, Inc. v. Town of Monroe*, 52 A.D.3d 1233, 859 N.Y.S.2d 825, 826 (4th Dep't 2008).

Finally, a cautionary reminder on conditional approvals: You cannot grant a permit on the condition that the applicant agrees to reimburse the town for its legal fees and other expenses if the applicant challenges the determination. An applicant's liability for expenses ends with the review process.