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ZONING AND LAND USE PLANNING

When Can Land Use Applicants Challenge Pass-Through Fees?

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When a property owner or developer seeks an approval or other form of relief under a municipality's land use or zoning laws, fees typically must be paid. Over the years, New York courts have issued a number of decisions exploring whether, and the extent to which, these fees may be charged.

The Standard

The leading decision, by the New York Court of Appeals, came down more than four decades ago.

Jewish Reconstructionist Synagogue of the North Shore v. Incorporated Village of Roslyn Harbor, 40 N.Y.2d 158 (1976), arose when the Jewish Reconstructionist Synagogue of the North Shore sought a variance and a special use permit from the Incorporated Village of Roslyn Harbor for property it had purchased in the village to use primarily as a house of worship and religious school.

The board of appeals hired a hall for the hearings, retained its own legal counsel, and ordered that the proceedings be stenographically recorded rather than following its more usual and less expensive practice of taping them. It also required that the minutes be transcribed and a copy provided for each of the five board members.

Except for the stenographer's attendance and recording fee, which the applicant paid directly, the other items were charged against a fund that the applicant had to deposit in advance with the village. The costs charged were $2,561.50, of which $2,322.20 represented legal fees incurred by the board prior to its decision on the applicant's requests. The direct payment to the stenographer amounted to an additional $1,000. Therefore, together with $110 in fees for filing the variance and use permit applications, the total cost to the applicant was $3,671.50.

The applicant was granted the relief it sought. It then brought a declaratory judgment action to challenge a village ordinance that required that it pay the actual costs incurred by the board of zoning appeals in passing on the matter. The ordinance specifically referred to costs for advertising, stenographic minutes of meetings, engineering costs, inspection costs, legal fees, and recording fees, but it did not set out any precise amounts for these items or cap these costs. The applicant contended that the village could not impose such open-ended costs on it.

The trial court found that the charges for publication of notice, for stenographic attendance and recording, and for engineering and inspection fees had been properly levied and were valid. It disallowed the charges for the board's legal fees, for the rental of the meeting hall, and for transcribing and providing copies of the minutes.

The Appellate Division, Second Department, affirmed, and the case reached the Court of Appeals.

In its decision, the court stated that the "open-ended, indeed unlimited, nature of the fees" authorized by the village ordinance made it "vulnerable to attack." Such fees, it said, "must be reasonably necessary" to the accomplishment of a municipality's goals.

Moreover, the court added, the fees also "should be assessed or estimated on the basis of reliable factual studies or statistics." Put another way, it

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continued, the yardstick by which to evaluate the reasonableness of charges made to an applicant in an individual case was "the experience of the local government in cases of the same type." The court reasoned that, without the safeguard of a requirement that fees have a relation to average costs, "a board would be free to incur, in the individual case, not only necessary costs but also any which it, in its untrammeled discretion, might think desirable or convenient, no matter how oppressive or discouraging they might in fact be for applicants."

The court ruled that fees could differ among different kinds of applicants, describable by objective criteria such as whether they were involved in residential as distinguished from nonresidential uses, and that categories could revolve around factors such as the size or value of the property at issue. Where classifications were "rational," it said, fees for each class could "be based on its average." Therefore, according to the court, if a municipality demonstrated that a class of applicants generally required a board to incur costs greater than those usually attendant upon applications for those in another classification, it could establish such a class and could establish its fee schedule accordingly.

This past October, the Appellate Division, Second Department, issued an important decision in Matter of Landstein v. Town of LaGrange, applying the standard set forth by the Court of Appeals in Jewish Reconstructionist Synagogue for charging fees.

Applying that test, the court ruled that the charges for the cost of publishing the notice required by statute and for the cost of the necessary technical, information-supplying engineering and inspection reports were not in excess of what was necessary to carry out the board's review of the applications, even if the ordinance did not set out guidelines as to the fees for those items. In the court's view, the wide range of other cases in which such services were commonly employed made these charges "fairly uniform and predictable," providing assurance that the board's power to assess them on a case-by-case basis was not unlimited.

On the other hand, the court found that the charges for legal fees, for transcribing the record of the proceedings and supplying copies of it to each board member, and for the rental of the auditorium did not represent "necessary expenditures" but rather represented "conveniences to the board for fulfillment of what in the end was its own decision-making responsibility."

The court concluded that because the ordinance permitted the charges for the actual cost of these items to the applicant without so much as a point of reference grounded in data from similar cases, it could not assess whether any or all of the charges were necessary to accomplish the board's decision-making function or merely convenient to it. Accordingly, it affirmed the Second Department's decision.

The Standard Applied

In the years since that decision, a number of New York courts have relied on it when considering whether certain fees should be permitted. *See, e.g., Matter of Harriman Estates at Aquebogue v. Town of Riverhead*, 151 A.D.3d 854 (2d Dept. 2017); *Matter of Valentino v. County of Tompkins*, 45 A.D.3d 1235 (3d Dept. 2007); *ATM One LLC v. Incorporated Village of Freeport*, 276 A.D.2d 573 (2d Dept. 2000); *Cimato Bros., Inc. v. Town of Pendleton*, 270 A.D.2d 879 (4th Dept. 2000).

This past October, the Appellate Division, Second Department, issued an important decision applying the standard set forth by the Court of Appeals in *Jewish Reconstructionist Synagogue*.

The Second Department's decision, *Matter of Landstein v. Town of LaGrange*, 166 A.D.3d 100 (2d Dept. 2018), arose when an amateur radio hobbyist applied for a special use permit and an area variance that would allow him to construct a radio antenna structure on his property in the upstate town of LaGrange. An application form stated that all review costs were "the sole responsibility of the applicant and full payment must be received by the [t]own prior to receiving final approval. The [p]lanning [b]oard may also, at their discretion, require an escrow account to be funded at the sole expense of the applicant."

The town incurred more than $17,000 in legal consulting fees in connection with the applications, and informed the applicant that he had to reimburse the town for these fees before any determination would be made with respect to his applications. The applicant's attorney argued that the fees charged were excessive in light of the fact that the cost of the installation of the tower was expected to be substantially less than $1,000.

The town subsequently, as "an accommodation," reduced the amount that it was demanding for its previously incurred legal consulting fees to $5,874, but also required that the applicant maintain a minimum advance continuing escrow balance of at least $1,000 to cover the town's future consulting costs in connection with his applications. The applicant went to court to challenge the town's decision.

The Supreme Court, Dutchess County, rejected the applicant's petition, and he appealed to the Second Department.

The appellate court held that, because the town did not limit the fees charged to the applicant to those "necessary" to the decision-making function of the town's planning board and zoning board of appeals, the town could not require payment of the fees.

In its decision, the appellate court explained that, unlike the ordinance at issue in *Jewish Reconstructionist*, the LaGrange town code appropriately provided that "only reasonable and necessary consulting costs" could be passed on to applicants, and provided for audit procedures to review whether the expenses incurred were reasonable and necessarily incurred.

The court added, however, that although the LaGrange town code appropriately defined "reasonable" as bearing a reasonable relationship to the customary fee charged by consultants within the region in connection with comparable applications for land use or development, it defined "necessary" "much more broadly than the meaning ascribed by the Court of Appeals in *Jewish Reconstructionist*."

The Second Department pointed out that the definition of consulting expenses "necessarily incurred" in the LaGrange town code included, among other expenses, expenses charged by an attorney for services rendered "to assist in the protection or promotion of the health, safety or welfare of the [t]own or its residents…or to promote such other interests that the [t]own may specify as relevant." The court reasoned that the "plain meaning of this definition," and especially the "to assist" language and the "open-ended invitation to use the assistance of counsel to advance any interest deemed to be relevant," included expenses that were merely "convenient" to the town, as opposed to "necessary."

As a general rule, fees that bear a reasonable relationship to the amounts customarily charged in connection with comparable applications, and those that are reasonable and necessary to a board's decision-making function, will be upheld.

The Second Department ruled that because the town had not limited the legal consulting fees charged to the applicant to those "reasonable and necessary to the decision-making function" of the planning board and the zoning board of appeals, "as determined by reference to data or experience derived by this or comparable municipalities in similar cases," it could not require the applicant to pay them.

The appellate court concluded that the town also had acted improperly by directing the applicant to maintain a minimum advance continuing escrow balance of at least $1,000 to cover the town's future consulting costs in connection with the applications because this would require the applicant to continually make payments into the escrow account to replenish it as the town used the funds for consulting expenses, "without any review as to whether the expenses [were] necessary by reference to data or experience from similar cases."

Conclusion

Local governments should keep the decisions discussed and cited in this column firmly in mind when imposing fees upon applicants for reviewing and processing land use applications. As a general rule, fees that bear a reasonable relationship to the amounts customarily charged in connection with comparable applications, and those that are reasonable and necessary to a board's decision-making function, will be upheld. By contrast, fees that are not so circumscribed are vulnerable to challenge.