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The Hidden Costs of Impact And Administrative Review Fees

By Anthony S. Guardino
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Most communities across New York, whether they're in the shadow of the Manhattan skyline or a stone's throw from a Finger Lake, encourage the development and redevelopment of underperforming land. New developments like small office buildings with ground-floor retail or large apartment buildings, can attract residents, business owners, and shoppers—all of whom bring the promise of increased sales tax, income tax, and property tax revenues.

But new developments also bring with them costs and additional strain on local resources like emergency services, utilities, and roads. Even before any shovels break ground, there are initial costs municipalities and counties incur in permitting, planning, and reviewing new projects to ensure that the proposed work complies with all applicable laws, ordinances, and regulations. While they could use tax revenues to offset these costs (and some do), municipalities and counties often turn to two other revenue sources, impact and administrative review fees, to recoup them.

But those impact and administrative review fees have hidden costs that could, ironically, stunt growth in the areas municipalities are trying to revitalize.

ANTHONY S. GUARDINO *is a partner with Farrell Fritz, P.C., practicing in the areas of land use, zoning and environmental law. He can be reached at aguardino@farrellfritz.com.*

Anthony S. Guardino

A Primer on the Fees

Impact fees are one-time payments required by local governments in connection with new developments for the purpose of defraying some of the cost of constructing or improving the public infrastructure needed to serve them. To be valid, there must be a "rational nexus" between the impact fee imposed and the infrastructure needs created by the new development.

While many states have enacted legislation authorizing the imposition of impact fees, New York is not among them. In fact, a number of decisions by New York courts cast serious doubt on whether municipalities can enact local impact fee legislation pursuant to home rule powers, or otherwise impose such fees on developers.

Unlike impact fees, New York allows municipalities to charge administrative review fees, which are intended to cover the costs to municipalities of permitting, planning, and reviewing new land projects. These fees are typically charged during the approval process and must be paid by a developer. Developers will work with a municipality to determine exactly how much they owe and when they must pay the fee.

The administrative review fees charged to developers vary by municipality. For example, Long Island's Nassau County charges a flat $1,500 fee for projects with construction costs of over $25,000. Once the expected construction cost of a project rises above $250,000, Nassau County will charge a fee of 0.75 percent of the total construction cost, plus the initial $1,500 fee.

Municipalities do not, however, have free rein to charge whatever they want for these fees. In the past, developers have challenged these fees, arguing that the administrative review fees charged were excessive or disproportionate to the administrative overhead the municipalities incur when reviewing projects.

As a result, New York courts have established guidelines for the amounts of administrative review fees municipalities can charge. Administrative review fees must be limited to that which is "reasonably necessary" to undertake the regulatory review involved.

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There does not have to be an exact dollar-for-dollar parity between the administrative review fees a municipality charges and the work its employees do. But courts will hold municipalities accountable if their fees are disproportionate to the work done.

Importantly, municipalities cannot use administrative review fees to defray general operating costs, nor can they use them as a backdoor tax. They must be able to show that their administrative review fees are directly related to the actual costs incurred by the municipality in working with a developer in furtherance of their project.

While municipalities understandably want to defray the costs of making infrastructure improvements to accommodate new developments and recoup the costs they incur in connection with the approval of these developments, impact fees and administrative review fees can have hidden costs when they are too high. Instead of leading to desired growth, the fees may have the opposite result by driving away developers and potential residents, workers, and shoppers.

Fees Can Dissuade Developers From Building. In a state as populated and diverse as New York, developers have many attractive options within it (and outside of it). Developers are, of course, looking to make a profit on their projects while also leaving their mark on a community. Impact and administrative review fees are additional costs that can decrease, sometimes significantly, the return on investment a developer expects for a project.

When these fees make the math of a new development unworkable for a developer, other cheaper areas become more attractive targets for them. When choosing between multiple sites for a specific project, or choosing between multiple projects in different jurisdictions, developers look at all the various inputs affecting revenue, profit, and loss. They will then greenlight the project that makes the most financial sense.

An additional quarter of a percent in fees may seem trivial, but this expense could be the difference between a municipality being the most profitable choice for a project or the runner-up for it. The municipality could miss out on hundreds of thousands, or perhaps millions, of dollars of economic benefits because of that additional quarter of a percent.

Just because a developer has identified a certain community as an ideal location for a new project does not mean they are not actively scouting other locations. Local governments that impose substantial impact fees or charge excessive review fees will dissuade developers from building projects within their borders.

Fees Can Increase the Cost of Living and Doing Business. When a developer is not dissuaded by an impact fee or administrative review fee for a project and decides to move forward with it, there's a good chance the developer will pass these fees onto residential or commercial tenants occupying the new development. This artificially raises the rents tenants will pay for the privilege of living or doing business at the new development.

When the rents are disproportionately higher than surrounding areas because of a developer's attempt to recoup the fees, fewer individuals, families, and businesses will decide to move to the new development.

If a new development was viewed as a golden opportunity to revitalize an area, but the cost of living or running a business at the development is too high, government officials could be looking at a lost opportunity that, for the reasons described below, could have lasting repercussions.

Fees Can Increase a Municipality's Struggle in Attracting Residents and Businesses. The two hidden costs above, on their own or together, could lead to municipalities that charge excessive impact or administrative review fees struggling to attract and retain residents and businesses.

Municipalities should avoid imposing illegal or irrational impact fees on developers, and ensure that administrative review fees are commensurate with the work their employees perform when permitting, planning, and reviewing new projects.

This struggle will continue the "brain drain" facing areas already having a difficult time providing housing and well-paying jobs for its recent college graduates, and otherwise attracting young families with discretionary income to spend on housing and at local businesses and cultural institutions. Every resident that does not move to an area is another resident not dining out at local restaurants, attending shows at the local theater, or shopping at the local clothing boutique.

This "brain drain" will trickle down to the businesses and institutions that can no longer stay in business because there aren't enough customers, clients, and members to keep them viable. When they inevitably shut down, there will be even fewer businesses and institutions to attract and retain residents and businesses, perpetuating this downward spiral.

Fees Can Negatively Affect Local Governments' Budgets. The last hidden cost domino to fall is the most ironic of them all. Excessive impact and administrative review fees will hit municipalities in the pocketbook in the form of lost tax revenue. Sales tax, income tax, and property tax revenues may go down—or never increase as hoped—when excessive fees dissuade developers from building, discourage new residents and businesses from moving or setting up shop, and prevent certain areas from experiencing a revitalization.

I need not list the parade of horribles caused by a diminishing local tax base, as they are self-evident. But suffice to say that fees that at first seem like a reasonable way to offset costs associated with new developments could turn into a major drag on a municipality's budget as second-order consequences emerge. That drag could lead to damaging budget cuts that reduce public services, thus further driving away potential residents, businesses, and workers.

Spurring Growth by Eliminating the Hidden Costs of Impact and Administrative Review Fees. Though these hidden costs are significant, there is a relatively easy way to avoid them. Municipalities should avoid imposing illegal or irrational impact fees on developers, and ensure that administrative review fees are commensurate with the work their employees perform when permitting, planning, and reviewing new projects.

Naturally, municipalities will be tempted to charge large impact and administrative review fees, hoping to make a quick, sizable deposit to their coffers soon after developers announce plans for new projects. But the municipalities that impose more modest fees may find that in the long term, their increased tax revenues from new developments will be exponentially higher than the larger one-time fees they chose not to levy.