

UNDER
CONSTRUCTION

Building Permit Fees on Public Construction Projects

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Governmental entities such as school districts are often required to compensate local municipalities for the cost of inspections to ascertain compliance with building codes and to cover administrative expense. In many instances, municipal formulas for assessing these costs and expenses are developed with small projects in mind. Many public projects (e.g., new prisons, new administrative buildings, new and renovated schools) are, however, much larger than the projects for which the formulas have been developed. This in turn has led to the imposition of fees greatly in excess of the actual costs of inspection and administration.

The Fees Assessed by a Municipality May Constitute a Disguised Tax

The Pennsylvania Supreme Court has explained that a “license fee,” as distinguished from a tax is “a sum assessed for the granting of a privilege. . . . [H]owever, this fee must be commensurate with the expense incurred by the [municipality] in connection with the issuance and supervision of the license or privilege.” *Mastrangelo v. Buckley*, 250 A.2d 447, 464 (Pa. 1969) (emphasis added). See also *Talley v. Com.*, 553 A.2d 518, 521 (Pa. Cmwlth. 1989). But where a license fee is grossly disproportionate to the municipality’s cost of administering the regulation, the license fee is struck down. *Altman v. Borough of Wilmerding David J. Miller*, 459 C.D. 2014, 2015 WL 5122619, at *10 (Pa. Cmwlth. Jan. 8, 2015). A municipal entity cannot collect licensing fees in order to raise revenue for other purposes. *Nernberg v. Borough of Sharpsburg*, 14-931, 2016 WL 3521970, at *4 (W.D. Pa. June 28, 2016) (annual revenue of \$53,600, while expenses were merely \$29,610). See also *Skepton v. Borough of Wilson*, 755 A.2d, 1267, 1269 (Pa. 2000) (\$88,838 for permit grossly disproportionate to costs of \$1,234).

A municipality’s costs in delivering the services incident to a school district’s building permit (plan reviews, building inspections, administration, etc.) must approximate the fees levied or those fees constitute an illegal tax.

Challenging the Fees

There are several options available to a public entity in challenging the imposition of building permit and administration fees that exceed cost. First and foremost, we recommend that the school district approach the municipality early in the design process and negotiate a fair amount. Without early discussion, the municipality may develop expectations about receiving a windfall. The fees are intended to make the municipality whole, not to provide the municipality with disguised and impermissible tax revenue for the general fund. Settlement of the claim can take the form of having the school district pay directly reasonable amounts based on invoices from in-house or third-party inspectors.

Failing a reasonable and mutually acceptable resolution, the school district may opt to seek a refund. Rarely will the school district have the luxury of postponing the project to pursue the refund. Instead, the school district will ordinarily pay the fees imposed under protest and prosecute a claim using the applicable refund procedure.

The school district that is challenging the building permit fees bears the burden of proving that the fees are unreasonable. *Talley*, 553 A.2d at 520. To prevail, the school district challenging the fees must prove that the fees are revenue-generating, rather than compensation for the cost in administering the municipality’s ordinance. *Com. v. Tobin*, 828 A.2d 415, 425 (Pa.Cmwlth. 2003).

The mechanism by which the school district must pursue its refund is set forth in the Local Tax Collection Law, 72 P.S. § 5566b(a). The demand for a refund should be made first to the municipality. *Skepton*, 755 A.2d at 1270-71. To avoid uncertainty as to entitlement to a refund, see generally *Wilson*, 895 A.2d 1250, the school district's construction contract documents should provide that the school district pay the municipal fees.

Negotiations between the school district and the municipality should be initiated early in the process and before the municipality develops an expectation of fees in excess of its costs. Assuming that negotiations are unsuccessful and the fees are paid in order to keep the project moving, the school district should formally demand a refund. If the municipality has not provided the detail backing up the amounts assessed, discovery in the course of litigation would provide the detail as to the municipality's actual costs.

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NOTE: The International Code Council publishes a formula periodically that purports to allocate inspection and administrative costs on a proportional basis, allocating municipal costs to administer and inspect on the basis of project cost divided by total construction value. Unfortunately, a formula is still a formula, and this guide, while presumably well intentioned, still misses this issue of actual costs in administering and inspection for a specific project.



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Critical Communications

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A communication plan is critical to the implementation of a strategic plan. The success or failure of the strategic plan depends on the effectiveness of the communication plan. A good communication plan can ensure that all members of the organization are aware of the plan, the importance of the plan and how they may be impacted by the implementation. After all, for the strategic plan to be successful, it relies on the activities of many people within the organization, not just those responsible for creating the plan.

To start the process, you will need to define the message, keep it simple—a short phrase or sentence. Help staff to connect and support the organization's vision and mission statement. Introduce the proposed changes along with any challenges that may present.

Analyze the target audience; the message will need to be shaped to each audience to communicate clearly and effectively. Audiences can be both internal and external. In a typical school district, the internal audience could be made up of administrators, teachers, support staff and students, and the external audience could include the parents, the community and taxpayers.

Explore communication outlets. What medium will your target audience connect with most? Whether it be social media, online video, face to face, email, mail, posters or any combination of these, the budget may play a factor in this decision. Also consider using multiple outlets, which will help your audience remember the message.

Create a timeline, share the plan information and how long the process or steps will take. Identify ways to get feedback and measure results so that the plan stays on track, and work towards the planned goal. Keep an open mind; a strategic plan is a living document and is meant to be followed but also to be adjusted or modified as the process may dictate.

The focus today was on implementing a strategic plan, but a good communication plan can go a long way in proposing change of any kind. People are creatures of habit, and although change may be a challenge, communication early and often throughout the process can prove to be very beneficial in the end.

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