## Coates' Canons Blog: How Much is Too Much for That Application Fee?

**By David Owens**

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In her regular budget update for the town council, Mayor Juanita Beasley advised the council that the budget cuts implemented for the 2010-11 fiscal year appeared to be adequate. She cautioned, however, that while the economy seemed to be stabilizing, the town's budget outlook for 2011-12 was still bleak. After some grim discussion about just how bleak it was, Council member Eddie Haskell suggested that the town revisit its fee schedule. "We have cut our expenses to the bone, but we still have a big gap looming. I don't think we can realistically consider a tax increase," he said. "I think we have to consider some fee increases to make up the gap we're facing. How about significantly bumping up our zoning fees? They haven't changed in the ten years I've been on council. With the economy turning around next year, why can't we get all these out-of-town developers to pay a little more? Seems to me they ought to be able to afford a $1,000 fee for a rezoning application instead of the $50 we now charge. Better them than our suffering town folk."

How far can the town go in this direction suggested by Haskell? What limits are there on using development fees to make up for the town's budget shortfall?

At the outset, it is important for the town to distinguish two types of development fees.

One type of fee requires those developing property to contribute to the costs of addressing the public service needs generated by their development. For example, developers are often required to pay for the utility and transportation improvements necessary to serve the proposed development through provision of land, construction of facilities, or payment of a share of the costs. Governmental charges for these costs, referred to as development exactions, are legal as long as there is statutory authority for the exaction, the cost is reasonably related to the impacts of the development, and the amount charged is no more than a fair proportional share based on the projected impacts of that development. These fees can be controversial, but we'll address that in a later post.

It is a second type of fee that Councilmember Haskell is suggesting — an administrative fee. Cities and counties routinely charge application fees. In the development area, a fee is usually required to request a rezoning, to apply for a special or conditional use permit, a driveway permit, a sign permit, to file a variance petition, to request approval of a subdivision plat, and so forth. In many communities these fees are often set in the $100 to $200 range. They are sometimes substantially higher. The question for today is what are the limits on these administrative fees? How high can they go?

A quick look at the state statutes does not provide an answer. For the most part, the statutes are silent on the topic of administrative fees in the development area. What about the argument that cities and counties cannot charge these fees at all since they are not specifically authorized by state law? The North Carolina court considered that argument in *Homebuilders Association of Charlotte v. City of Charlotte*, 336 N.C. 37, 442 S.E.2d 45 (1994). The court concluded that reasonable fees can be required to offset the costs of administration of the ordinance, upholding the imposition of fees for a variety of city services, including rezonings, special use permits, plat reviews, and building inspections. Grants of authority to cities and counties must be interpreted to include supplementary powers that are expedient to execution of powers that are expressly granted. G.S. 153A-4, 160A-4. The court applied this rule to hold that when a local government is granted regulatory power that grant includes implied authority to charge fees to carry out those regulatory powers.

There is a significant limiting factor on these fees, however. The court noted that such fees must be reasonable, generally not to exceed the cost of the regulatory program. The costs of the regulatory program can be substantial. When a applications are filed, the city or county often must hold a public hearing on the proposal with advertisements placed in the newspaper. Mailings to adjacent owners may be required. The staff typically must prepare a report analyzing the proposal. The planning board or other technical review committees may need to meet and prepare a recommendation. But while an administrative fee can recoup these costs, the government cannot charge an application fee that is more than the typical

administrative cost for action involved. If a typical ten lot subdivision plat generates $1,000 in costs to the town for review, the town cannot charge a $10,000 application fee. It can choose to charge $100 or $500 or even $1,000, but it cannot charge more than the actual typical administrative cost. The amount of the fee is limited to cost recovery, not revenue generation. Once a fee moves beyond cost recovery, it is a tax, not an administrative fee.

Therefore, in setting the amount of these application fees, it is important that some staff analysis of actual costs be made. Some local governments set the fee amount to recover all direct expenses, such as payments for the newspaper advertisement of a hearing and required mailings. Others also recover the costs of staff time for review and analysis and reasonable overhead expenses. As the amount of the fee moves beyond direct expenses, it is prudent to have staff analysis to document the typical costs. Care should also be exercised if a sliding fee scale is used, such as basing the fee on the number of lots or acreage involved in an application. The city or county needs to be sure the higher fees with large projects does not exceed the actual administrative costs of review. The fact that a large project may have a greater “ability to pay” does not justify charging an administrative fee that exceeds actual costs.

The local government can also pass some costs directly on to the applicant without making it part of the application fee. For example, the ordinance may require that a traffic impact analysis or engineering verification of stormwater controls be submitted for certain types of applications. As long as the information and analysis being required is needed for review of the application, it is permissible to require that it be paid for by the applicant.

It is also reasonable for the local government to consider the policy implications of who pays these administrative costs. It is a good public policy question to ask what portion of the actual costs should be borne by the applicant who is benefited by a potential approval and what portion by the taxpayers who are benefited by review. A local government can set administrative fees to secure 100% cost recovery, 50% cost recovery, or some other proportion. That is a policy choice for the governing board. The legal limit to that discussion, however, is that the applicant’s share cannot be more than a reasonable estimate of actual costs.