



THE CITY OF NEW YORK
INDEPENDENT BUDGET OFFICE

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October 20, 2000

The Honorable Archie Spigner
Council of the City of New York
113-43 Farmers Boulevard
St Albans, New York 11412

Dear Chairman Spigner:

This letter responds to your request to the Independent Budget Office to consider the issue of whether fee revenues collected by the Department of Buildings (DoB) may exceed expenses.

Attached for your information is a memo written by IBO's General Counsel regarding the legal issues of revenues from fees exceeding the cost of the service provided. He concludes that a fee need not exactly reflect the cost of providing a service, so long as it is reasonably related to the provision of the service and is not a subterfuge for raising general revenue.

The second attachment provides information concerning DoB's actual expenses and revenues, headcount, and workload for the past several years. In recent years DoB's fee revenues have grown faster than expenses, exceeding them by \$31.0 million in fiscal year 2000. This growth reflects both an increase in the number of permit filings and also an increase in the average fee charged per application. Since the amount of the fee for construction permits is determined by building size (for new construction) or cost (for alterations) and the fee schedule has not changed since 1990, the increase in the average fee most likely reflects an increase in construction costs, and possibly (although less likely) an increase in the average size of new buildings.

Is the increase in DoB construction fee revenues likely to be permanent? The recent increase in construction activity reflects a cyclical upswing that is unlikely to be indefinitely sustained. Hence, permit applications may well decrease again within the next few years. In contrast, construction costs are unlikely to actually decrease (although their rate of growth may slow as demand tapers off). By IBO's estimate, roughly 60 percent of the increase in construction permit revenues from fiscal year 1992 to fiscal year 2000 can be attributed to the growth in construction activity, and 40 percent to rising costs. Hence, in fiscal year 2000, fees from construction permits would have been \$31.2 million if the average fee had stayed at its 1992 level—\$15.0 million, or 33 percent, less than actual revenues of \$46.2 million.

At the same time, the Department's expense budget has risen at a much slower rate, and headcount is actually below its 1992 level (although it has risen steadily since a low point in 1996). The Department initiated a self-certification program for construction permit applications in 1995. Approximately 30 percent of applications are self-certified, that is, do not undergo review by DoB plan examiners (although approximately 15 percent of self-certified filings are eventually audited). Plans submitted through the self-certification procedure must, however, pay the full fee as determined by the fee schedule. By our estimate, if plans submitted through the professional certification program had paid only the \$100 minimum fee, DoB construction fee revenues would have totaled roughly \$37.0 million in fiscal year 2000. If, in addition, average fees for all other building alteration permits were at their 1992 levels, we estimate total construction permit revenues would have been \$24.4 million—47 percent below actual 2000 revenues.

Please feel free to call me directly at (212) 442-0225 or Preston Niblack, Deputy Director, at (212) 442-0220, concerning this or any other matter.

Sincerely,

Ronnie Lowenstein
Director

Attachments

C. Preston Niblack

Memorandum

To: Ronnie Lowenstein
From: Michael Rogovin
CC: Preston Niblack
Date: September 20, 2000
Re: Fees and Taxes (Request from Councilmember Spigner)

Question Presented

Can a fee for a permit or other government service be imposed such that the revenue produced by the fee exceeds the cost of providing the service?

Conclusion

Yes, but the fee must be reasonably related to the service and not be a subterfuge for raising general revenue for the government.

Discussion

The key distinction is between a tax and a fee. Local governments are granted limited powers to raise general revenues in the form of taxation. Taxes are imposed in order to support general government operations that benefit the citizens of that government. Local governments are also delegated certain police powers from the state. Police powers are the powers of government to regulate property, businesses and behavior in order to protect the health, safety and welfare of the citizenry. Included in this power is the power to provide services that benefit particular persons and which are provided only at the request of such person or business. In such a case, the government can charge a fee for the service so long as the fee is reasonably related to the provision of the service. It may be less than or equal to the actual cost of the service. It may also exceed the actual cost, but not so much so that its primary purpose is to raise revenue by creating a tax on a particular type of business or class of persons. If the fee creates a burden on interstate commerce, it may also run afoul of the U.S. Constitution.

There are no New York statutes or cases that provide clear authority for this principle. However, several cases refer to the requirement for the reasonableness of the fee, although what constitutes a reasonable link is not clearly delineated.

Application

In order to determine if the fees imposed by the Department of Buildings exceed the costs of providing the services, it is not enough to simply compare the expenses and revenues. One must examine the purpose and authority of the regulations and the fees, who is the beneficiary of the service provided, the use of the revenues generated (are they set aside to offset budget cuts or to enhance the department's budget) and examine the relationship between the fee amount and the service. So long as a reasonable relationship can be established between the fee and the service, even if the fee exceeds the cost of the service, it is considered a fee and not a tax and is valid.

Attachment 2: Department of Buildings Revenues, Expenses, and Workload

Revenues and Workload

In recent years, DoB fees—including licenses, permits, and charges for services (we exclude fines and penalties from this analysis)—have grown to exceed the department’s total expense budget by substantial amounts. In fiscal year 1992, fee revenues exceeded expenses by \$5.7 million, or 17.4 percent. In 2000 (unaudited figures), revenues exceeded expenses by \$31.0 million, or 73.6 percent (see Table 1). Even adjusting for fringe benefits and pension contributions (expenses not reflected in DoB’s budget), revenues still outstripped expenses by \$23.8 million in fiscal year 2000.

Table 1. Department of Buildings Expenses and Fee Revenues, fiscal years 1992 – 2000

(Dollars in Thousands)

<i>Fiscal Year</i>	1992	1993	1994	1995	1996	1997	1998	1999	2000
Total Fee Revenues	38,726	39,581	41,290	44,172	45,979	46,188	55,538	65,810	73,028
Construction permits	21,200	21,624	23,437	26,174	28,360	29,477	35,919	40,773	46,214
Other permits	2,796	2,286	2,868	2,979	2,748	3,671	4,757	6,391	6,713
Inspections	14,026	14,988	14,288	14,297	14,162	12,351	14,103	17,879	19,242
Licenses	705	683	697	721	709	689	760	767	859
<i>Note: Total DoB Revenues</i>	<i>40,929</i>	<i>42,412</i>	<i>44,514</i>	<i>47,808</i>	<i>49,544</i>	<i>49,506</i>	<i>60,145</i>	<i>71,403</i>	<i>79,632</i>
Total Expenses	32,993	32,474	31,355	29,005	28,416	29,618	34,900	39,567	42,063
PS expenses	26,294	25,928	24,747	22,030	21,435	21,585	25,986	29,216	32,141
Total headcount	N/a	774	654	596	528	607	665	678	690
Excess of Fees over Expenses	5,733	7,107	9,935	15,168	17,563	16,570	20,638	26,243	30,966
Percentage	17.4%	21.9%	31.7%	52.3%	61.8%	55.9%	59.1%	66.3%	73.6%

SOURCE: IBO, based on Comptroller’s *Comprehensive Annual Financial Report* and FMS data.

NOTE: “Inspections” includes building, boiler, elevator, and electrical inspections and microfilm fees. “Other permits” includes other building, illuminated sign, and place of assembly permits. Fiscal year 2000 financial data is preliminary and unaudited; headcount is as of September 9, 2000.

Revenues from construction permit fees are by far the largest component of DoB revenues, and have more than doubled from \$21.2 million in 1992 to \$46.2 million in 2000—a 118 percent increase.

This increase in part reflects a sharp rise in building activity in the city, especially since 1997. According to data from the Mayor’s Management Reports (MMR), new construction plan applications have increased by 62.4 percent since 1992 (see Table 2).¹

The revenues from licenses, permits, and other charges are based on a schedule laid out in the city’s administrative code. Fees for work permits for new construction, building alterations, demolition, plumbing, signs and service equipment are prescribed in sec. 26-212, and have been

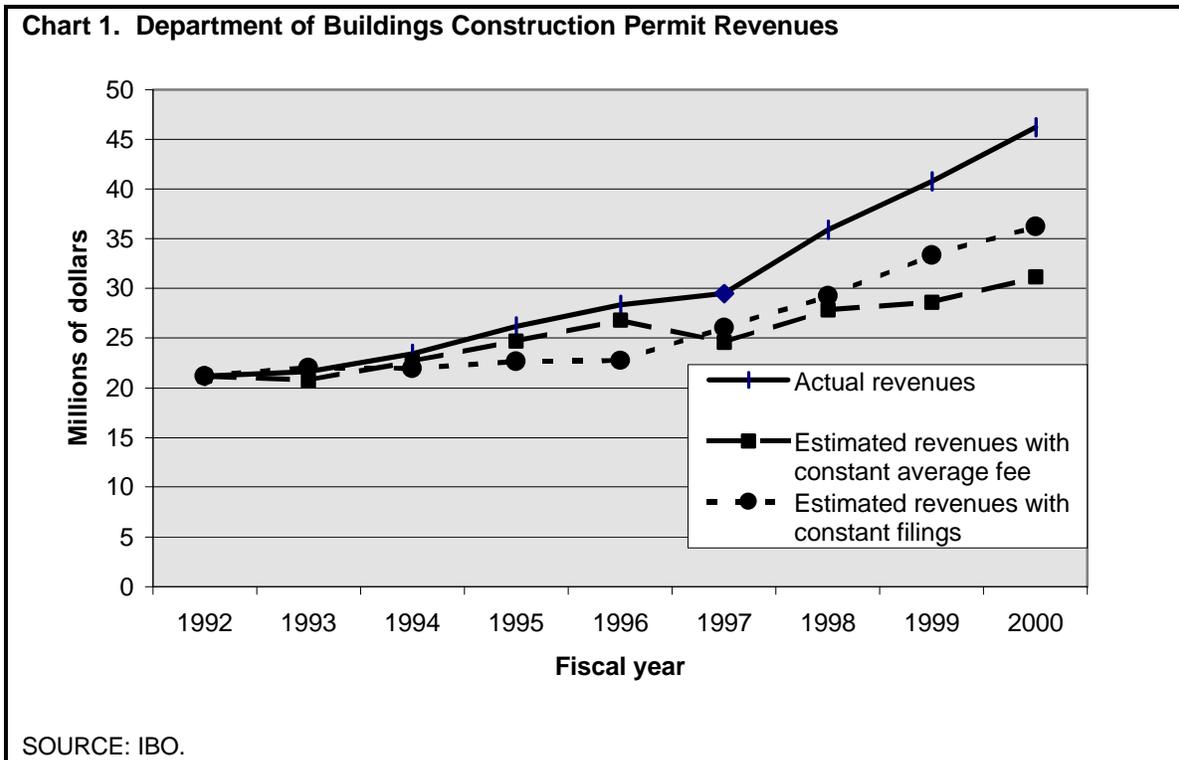
¹ Note that fee collections may lag initial permit applications, because final payment is not due until work is complete. Therefore revenues in a fiscal year do not exactly track the workload data.

	1992	1993	1994	1995	1996	1997	1998	1999	2000
New Buildings	2,541	3,142	2,830	2,173	2,643	2,978	3,255	3,879	4,624
Alteration 1	4,412	4,415	4,159	4,286	4,491	5,025	5,021	5,654	5,847
<u>Alteration 2 & 3</u>	<u>27,100</u>	<u>27,837</u>	<u>28,224</u>	<u>29,683</u>	<u>29,001</u>	<u>33,142</u>	<u>37,325</u>	<u>42,257</u>	<u>44,824</u>
Total New Applications	34,053	35,394	35,213	36,142	36,135	41,445	45,601	51,790	55,295

SOURCE: Mayor's Management Report, various years.

in effect since 1990 (see the attached summary of the fee schedule). Fees for new construction permits are based on square footage, while those for alterations permits are based on cost. Thus, the increase in revenues is partially attributable to an increase in filings, and not to a change in the fees charged to builders and other contractors. However, since construction permit fees have increased faster than new permit filings, the average fee per permit must also have increased. Rising construction costs is the most likely explanation for increasing average fees. It is conceivable that some of the increase in average fee could be attributed to an increase in the average size of new buildings. This seems unlikely, however, because applications for alterations make up 90 percent of permit applications and DoB construction revenues.

We performed a rough estimate of what DoB construction permit revenues would have been if (a) the average fee had remained at its 1992 level, and (b) if filings had remained at their 1992 level. The results are shown in Chart 1. In fiscal year 2000, with actual average fees but construction permit filings at their 1992 level, construction permit revenues would have been \$36.2 million, or 22 percent below their actual level. If, in contrast, the number of filings followed its actual



pattern but the average fee had stayed constant at its 1992 level, revenues would have been \$31.2 million, or 33 percent below actual revenues. In sum, the increase in revenues between 1992 and 2000 is composed of two effects: an increase in filings, which accounts for about 40 percent of the difference, and an increase in the average fee per filing, which accounts for about 60 percent of the difference, and most likely reflects rising construction costs.

Expenses and Self-Certification

Direct personal services (PS) expenses of the Department of Buildings rose by 22.2 percent from 1992 to 2000, and represent roughly three-quarters of the DoB budget (see Table 1). To our knowledge, the City incurs no other expenses in any other part of the budget for activities of the Department of Buildings except for pension contributions and fringe benefits for DoB employees. Citywide, this has contributed an average additional 26 percent to employee compensation costs. During the same period total DoB headcount actually declined from 774 to 690 (fiscal year 2000 numbers are preliminary). Headcount hit a low of 528 in fiscal year 1996, and has been rising each year since then. The number of plan examiners has risen in recent years, and currently stands at 32, according to FMS data.

Beginning in 1995, builders were allowed to submit plans through the professional certification process. The department has not published data on how many plans were submitted through professional certification since 1997, when 29 percent of applications for permits for new construction and major alterations were self-certified. With the number of plan examiners rising, and assuming that about 29 percent of plan submissions continue to be self-certified, the average workload for plan examiners, while rising, should not be substantially higher than it was prior to the institution of professional self-certification.

Returning to the legal question of the relationship of a fee to the service provided: In the case of professional self-certification, only a minimal service is provided (registration of the plans, but no review). It could be argued that in this instance, the fee is not reasonably related to the service provided.

If we assume that 30 percent of new construction and major alteration (Alteration I) permits are self-certified, and that these plans are only assessed the minimum charge of \$100, then estimated revenues in fiscal year 2000 would have been \$37.0 million.

If, in addition, average fees for building alterations were at their 1992 levels, we estimate total construction permit revenues would have been \$24.4 million—47 percent below actual 2000 revenues. Table 3 summarizes these results.

Table 3. Actual and Estimated Fee Revenues		
<i>(Dollars in Thousands)</i>		
	FY 2000	Excess, Fee Revenues over Expenses
Actual Expenses	\$42,063	
Actual Fee Revenues	73,028	30,966
Estimated Fee Revenues with Minimum Charge for Self-Certification (\$100)	63,837	21,783
Estimated Fee Revenues with Minimum Charge for Self-Certification and 1992 Average Alteration Fee	51,205	9,142
SOURCE: IBO.		
NOTE: Revenue numbers include all other Department of Buildings fee revenues at actual levels.		

Schedule of Department of Building Fees
 Source: Title 26, New York City Administrative Code

A. Plans, Permits, and Certificates of Occupancy

<i>Type of Permit</i>	<i>Rate</i>	<i>Notes</i>
New Building Construction		
New Buildings	25.53 cents per square foot of total floor area, except 1-3 family dwellings	\$100 minimum
New one, two, or three family dwelling	11.63 cents per square foot	\$100 for garage
Other ^a	\$100 up to cost of \$2,000; \$20 per \$1,000 up to \$5,000 cost; \$10.30 for each \$1,000 cost above \$5,000	
Elevator submitted separately	\$70	
Alterations		
One, two, or three family dwelling ^b	\$100 for 1 st \$5,000 of cost of alteration; \$5.15 per \$1,000 above \$5,000	
All Other ^b	\$100 for 1 st \$3,000 of cost of alteration; \$20 per \$1,000 up to \$5,000; \$10.30 per \$1,000 above \$5,000	
Foundation, Open Spaces, etc.		
	\$10 per 2,000 sq. ft. or portion (except golf driving ranges: \$7.53 per 20,000 sq. ft.)	
Demolition and Removal		
	\$2.60 × frontage in feet × stories	\$260 minimum
Plumbing and Fire Suppression Systems		
Existing buildings		
Existing 1/2/3 family home	\$100 for first \$5,000 cost, \$5.15 per \$1,000 above \$5,000	
Existing other	\$100 for first \$3,000 cost; \$20 per \$1,000 up to \$5,000; \$5.15 per \$1,000 above \$5,000	
New building	??	
Signs		
	As for building alterations, plus additional fee depending on size and type.	Illuminated signs pay annual fee
Service Equipment		
Oil-burning equipment	\$100 - \$175 for large or multiple-dwelling burners; otherwise \$45	Fee depends on capacity of tank
All other	As for building alterations.	
Equipment Use Fee		
Boilers	\$65 for DoB inspection; \$30 for authorized private inspection	
Elevators	\$65 for DoB inspection; \$30 for authorized private inspection	

NOTES: ^a Radio aerial towers and masts, tank structures, fire escapes, etc.
^b Excluding installation or alteration of plumbing or fire suppression piping.

B. Professional Licenses
(amount in dollars)

<i>Profession</i>	<i>Original</i>	<i>Annual Renewal</i>	<i>Late renewal penalty</i>
Master plumber or fire suppression piping contractor	\$225 ^a	\$200	\$50
Welder	10	5	
High-pressure boiler operating engineer	25	15	\$10
Hoisting machine operator	10/25/50 ^b	10	
Master rigger	150	100	20
Special rigger	30	25	20
Master sign hanger	100	55	30
Special sign hanger	75	40	30
Oil-burning equipment installer	75	50	30
Concrete testing lab	100	50	30
Private elevator inspection	\$100 for agency; \$15 per inspector	\$50 for agency; \$10 per inspector	

NOTES: ^a Includes \$100 for certificate of competence, \$75 for plate, and \$50 for seal.
^b For Class A, B, or C respectively.