## Permits and Fees

### General

A board of health can require a permit, set a fee, or set out substantive performance standards as part of a regulation. Boards may regulate by describing in a regulation all possible conditions under which an activity can be conducted without substantial injury to the public health without having to include a requirement for a permit. In some instances, it would be difficult, if not impossible, to specify in a regulation conditions under which a person could conduct an activity without board of health review. The board may instead require a permit, whereby the board makes a decision based upon evidence presented on a case by case basis. Butler v. Town of E. Bridgewater, 330 Mass. 33, 37 (1953).

Permits and fees may be authorized by a state statute or regulation, such as a construction works permit and fee authorized by Title 5 of the State Environmental Code under 310 C.M.R. §§ 15.02(7) and 15.02(9) (1978), or a permit for the transportation of garbage or refuse required by G.L. c.111,§ 31B. Boards of health may also require permits and set fees where there is no direct statutory authorization for a specific type of permit, such as the above, but is a necessary part of their general regulatory power. For instance, boards of health could adopt regulations, pursuant to their general regulatory powers under G.L. c.111,§ 31, to require every person who owns or operates a genetic engineering facility to register and receive a permit prior to operation. Boards may also require an entity that sells tobacco to receive a tobacco sales permit in order to sell.

Boards of health may also be authorized to require permits and set fees pursuant to a town by-law or city ordinance. If the amount of the fee is not determined by statute, boards may set the fee. All money received by a municipal officer or department must be turned over, upon receipt, to the municipal treasury for the general fund. Any money paid into the treasury shall not be later used by the officer or department who received it without an appropriation by town meeting. G.L. c..44, § 53, Mayor of Haverhill v. Water Comm'r of Haverhill, 329 Mass. 63, 67-70 (1946). An exception is made for provisions of special acts, for money received under G.L. c.71B (relating to education), and for fees provided for by statute.

## Fees and Charges

Fees imposed by the municipality tend to fall into one of two categories: user fees, based on the rights of the municipality as proprietor of the instrumentalities used, or regulatory fees (including licensing and inspection fees), founded on the police power to regulate particular businesses or activities. *Emerson College v. Boston*, 391 Mass. 415, 424 (1984).

Such fees are distinguishable from taxes in that: 1) they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner "not

shared by other members of society"; 2) they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service; and 3) the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. Id. at 424-425.

Recently, the Supreme Judicial Court upheld the authority of boards of health to require burial permit fees as valid regulatory fees. Paul F. Silva v. City of Attleboro & others, 454 Mass. 165 (2009).

The case law is clear that municipal boards and officials do not need statutory authority to adopt licensing and permit fees. Any statutory authorization to a municipality or to a board to regulate includes authorization to require licenses and licensing fees "'to cover reasonable expenses incident to the enforcement of the rules'". Commonwealth v. Plaisted, 148 Mass. 375, 382 (1889), *quoted in* Southview Co-operative Hous. Corp. v. Rent Control Bd of Cambridge, 396 Mass. 395, 400 (1985).

Further, if the authority to regulate includes the authority to require licenses and licensing fees, the authority to regulate also includes the authority to exact fees to defray the cost of conducting hearings and performing other services. Southview Co-operative Hous. Corp., at 400. As the court observed in Boston v. Schaffer, 26 Mass. (9 Pick.) 415, 419 (1830), "[t]owns are put to expense in preserving order and it is proper that they should be indemnified for inconveniences or injuries occasioned by employments of this nature". G.L. c.40,§ 22F.

Even though boards have inherent authority to adopt licensing and user fees, the legislature provided statutory authorization for the imposition of such fees and charges. G.L. c. 40, § 22F authorizes municipal boards or officials empowered to issue a license, permit or perform a service or work to fix reasonable fees after the municipality has accepted the provisions of § 22F by a vote of town meeting or the city council. G.L. c. 44, § 53G provides that certain municipal board regulations, including the board of health's regulations adopted under G.L. c. 31, § 111, can provide for the imposition of reasonable fees for the employment of outside consultants.

Municipalities may set fees and charges and if those fees and charges are currently established by statute, may increase them beyond the statutory level. General Law c. 40,§ 22F, authorizes municipal boards or officers who issue licenses, permits or certificates to fix reasonable fees for such licenses and permits "issued pursuant to statutes or regulations wherein the entire proceeds of the fee remain with such issuing municipality."

Additionally, § 22F permits an increase of fees and charges beyond the statutory limit, except the board may not supersede fees and charges already set under G.L. c.6A,§§ 31-37 (health care services approved by the Rate Setting Commission); G.L. c. 80 (betterment assessments); and G.L. c. 83 (sewer assessments).

Boards must be careful which fees and charges it chooses to raise. The fee must be for a license or service authorized by a state statute or regulation, not by a town by-law or city ordinance. Additionally, the entire proceeds of the fee must be retained by the municipality.

More importantly, § 22 authorizes the municipality to fix reasonable charges to be paid for any services rendered or work performed by the municipality or any department, for any person or class of persons.

The municipality must accept the provisions of G.L.c. 40,§ 22F by a town meeting vote, by a vote of the city council with the approval of the mayor in cities, or by a vote of the town council in towns with no town meeting.

**G.L. c. 44, § 53G, Employment of Outside Consultants**

G.L. c .44,§ 53G was amended in 1990, clarifying already existing authority which enabled different municipal boards to establish a special account for consultant fees and to set out a uniform procedure by which the fees may be imposed and collected. The amendment also sets out an administrative appeal process, but the grounds for appeal are limited to claims that the consultant selected has a conflict of interest.

§ 53G authorizes boards of health to amend regulations adopted pursuant to G.L.c. 111,§ 31 to establish a fee system which shall be used only for the purpose of employing an outside consultant. Note that the term "consultant" does not include legal counsel. **See section below, "Use of Outside Counsel**."

According to the language in § 53G, both the fee schedule and the procedure must be set out within the regulation. The collected fees are held in a segregated account by the city or town treasurer and any unexpended balance, with interest, shall be returned to the applicant. A model board of health regulation is included in Appendix A.

During recent years there has been considerable confusion whether the Uniform Procurement Act applies to boards of health and its employment of outside consultant. G.L. c. 30, et. seq. Because the administrative cost of complying with the Procurement Act often exceeded the actual cost of hiring the consultant, the Massachusetts Department of Public Health requested that the state legislature amend the statute to exclude boards of health. Accordingly, the state legislature amended the Procurement Act to exclude “municipal department[s] of health.” G.L. c. 30 § 27.

Although most municipalities call their volunteer boards of health "municipal department[s] of health," no such entity exists in Massachusetts law. To date, no court has reviewed this section of the Procurement Act. The Massachusetts Department of Health and most town counsels have, however, interpreted that language as including any entity which may legally perform the function of the board of health including: (1) boards of selectmen; (2) boards of health; (3) health departments; and (4) any entity created by a special act of the legislature.

The Office of the Inspector General has rejected that interpretation and concluded that "municipal department[s] of health" include only *health departments* created pursuant to G.L. c. 111, § 26A. Only a small handful of communities have actually abolished their boards of health and created *health departments.* Boards of health should consult with legal counsel for an opinion about whether the Uniform Procurement Act applies to the employment of outside consultants.