STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

IN THE MATTER OF THE APPLICATION OF KEN TILLIM PURSUANT TO CPLR ARTICLE 78 AND FOR A DECLARATORY JUDGMENT

KEN TILLIM,

Petitioner-Plaintiff,

-againt-

VILLAGE OF HUNTER,

Respondent-Defendant.

DECISION and ORDER
INDEX NO. 09-1340
RJI NO. 19-09-4476

Supreme Court Greene County All Purpose Term, September 30, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Ken Tillim (hereinafter "Tillim") commenced this hybrid CPLR Article 78 proceeding and declaratory judgment action challenging the Village of Hunter's (hereinafter "Hunter") fee schedule for connecting to its municipal sewer system. Issue was joined by Hunter, which filed a record of proceedings, answered the petition/complaint, set forth unsubstantiated objections in point of law and submitted no answering affidavit pursuant to CPLR §7804(e). No discovery

was sought in the Article 78 proceeding and does not appear to have commenced in the declaratory judgment action. Because Tillim demonstrated his entitlement to relief under CPLR Article 78, that portion of this action/proceeding is granted.

The undisputed facts in this action/proceeding are as follows. In June 2005, Hunter completed construction of a new municipal sewer system. The system was designed to receive the anticipated sewage from all properties within its service area. The service area included property Tillim intended to improve with a condominium development in the future. In August 2005, Tillim's predecessor in title, Inn at Hunter, Inc., applied for a sewer connection permit for its existing hotel/bar/restaurant and its proposed condominium development. While the hotel/bar/restaurant was allowed to connect to the sewer system, the proposed condominium development's access was denied. Such denial was upheld in an Article 78 proceeding (Lalor, J., Decision and Judgment, dated March 27, 2006), which was affirmed on appeal. (Inn at Hunter, Inc. v. Village of Hunter, 35 AD3d 1072 [3d Dept. 2006]). In December 2007, Tillim again applied for a sewer connection permit for the proposed condominium project.

According to the record of proceedings and the allegations set forth in the Petition, there is no factual dispute about the following. Hunter considered Tillim's December 2007 sewer service application for his condominium project, which by that time had been approved, at their "Regular Meeting" held on December 10, 2007. At such meeting, Hunter did not grant Tillim's application. Rather, the Mayor of Hunter (hereinafter "the Mayor") stated that Tillim was required to pay a $3,500 "impact fee" for each unit associated with his 30 unit condominium project. The Mayor also indicated that he wanted to get counsel's opinion on the issue. Over the course of approximately the next year and a half, at Hunter's "Regular Meetings" this fee issue

was debated, an opinion of counsel was obtained, a second opinion of counsel was sought but never disclosed and no determinative decision was made. Consistently, throughout the course of the "Regular Meetings", Hunter's Board members referred to the fee as necessary to pay for future expansion of the sewer system. At Hunter's "Regular Meeting" held on May 11, 2009, the Mayor stated that the Board and "second special counsel" had no scheduled meeting, he declined Tillim's request that the Board vote on his application, and stated that Tillim could "easily get [his] building permit as soon as [he gives] a $3,500 per unit ($3,500 X 30 units = $105,000) check to the Village... Tillim's application is incomplete because it does not have the appropriate check.... [and if] Tillim's application had the required check [his application] would be approved. "

Although no vote was taken at the May 11, 2009 "Regular Meeting", the minutes demonstrate that Hunter's position was "final and binding". (*See generally*, Walton v. NYS Dept. of Correctional Services, 8 NY3d 186 [2007]).

Hunter's determination was based upon its interpretation of its own "Village of Hunter Sewer Use Law" (hereinafter "Sewer Use Law"). (Village of Hunter Local Law #3 of 2004, adopted August 9, 2004). Sewer Use Law §1205, as applicable herein, provides:

> An application shall be submitted to the Village prior to constructing a new private sewer system or connection to the POTW [Publically Owned Treatment Works] . Each Application must be accompanied with fee payment according to the permit fee schedule:
>
> | **Type of Permit** | **Fee** |
> | --- | --- |
> | Private Sewer Application (Residential/ Commercial/ Industrial) | $100 application fee for each private sewer to be constructed |
> | Residential Public Sewer Use | $100 application fee per single family unit to |

Application in a New Sewer Service Area	be constructed, up to a three family unit (Max. Fee $300). The fee for applications with more than three single family units will be determined on a case by case basis by the Village Board.
Residential Public Sewer Use Application in an Existing Sewer Service Area	$3,500 application/hook up fee per single family unit. This includes the cost of digging up the street, tapping the sewer main, and running up to 100' of lateral to the property line....

A Residential Public Sewer Use Application in a New Sewer Service Area must be submitted within one (1) year of official notification by the Village. After that time, it will automatically be treated as a Residential Public Sewer Use Application in an Existing Sewer Service Area requiring a $3,500 hook up fee.

Moreover, Sewer Use Law §1213 states: "Revenues derived from user charges... shall be credited to separate special funds.... [Permit fees are credited to the Capital Reserve account, which] may be used for: (a) Payment of interest on and the amortization of or payment of indebtedness which has been or shall be incurred for the construction or extension of the Village POTW, and (b) The extension, enlargement, replacement of, and/or additions to the Village POTW, including any necessary appurtenances."

It has long been held that a Village has no "power to impose a tax under the guise of a license or permit." (Bon Air Estates, Inc. v. Village of Suffern, 32 AD2d 921, 922 [2d Dept. 1969]). "[T]he law does not permit a municipality to charge 'newcomers' an impact fee to cover expansion costs of an existing water facility absent a demonstration that such a fee is necessitated by the particular project (as opposed to future growth and development in that municipality generally) or a demonstration that such newcomer would be primarily or proportionately benefitted by the expansion." (Phillips v. Town Of Clifton Park Water Authority, 286 AD2d

834, 835 [3d Dept. 2001]; Coconato v. Town of Espous, 152 AD2d 39 [3d Dept. 1989]; Torsoe Bros. Const. Corp. v. Board of Trustees of Inc. Village of Monroe, New York, 49 AD2d 461 [2d Dept. 1975]). Nor may a Village charge a hook up fee to defray "past costs expended." (Phillips, supra at 836). "[W]here a fee is properly imposed, the amount thereof must be based on reliable factual studies and statistics and must bear a reasonable correlation to the average, associated cost of the service provided." (Valentino v. County of Tompkins, 45 AD3d 1235 [3d Dept. 2007] quoting Phillips, supra at 835).

On this record, Tillim submits the affidavit of Darrin Elsom (hereinafter "Elsom") the Professional Engineer whose company drafted his condominium development's site plan. Elsom alleges, and Tillim corroborates, that his proposed condominium development will tap into the municipal sewer system once. Moreover, all of the work for the single tap (i.e. excavation, tapping, running the lateral, street repair, etc.) will be done by Tillim's contractors. Elsom estimates, based upon his professional experience, that Hunter's cost to review and inspect the single sewer tap to be approximately $100. Hunter failed to rebut or deny any of these allegations.

Rather, Hunter has refused to process Tillim's application until he pays $105,000. Such exorbitant fee is unrelated to any factual study or statistic. Nor is there any "correlation [of the fee] to the average, associated cost of the service provided." (Valentino, supra). Additionally, as this fee is specifically designated for future use, via Sewer Use Law §1213's Capital Reserve account, and Hunter failed to "demonstrat[e] that such a fee is necessitated by the particular project", it is an invalid tax as applied to Tillim's December 2007 sewer connection application.

Accordingly, Tillim's Article 78 petition is granted. Hunter's refusal to process Tillim's

December 2007 sewer connection application is reversed and this matter is remanded to Hunter to process Tillim's December 2007 sewer connection application, assessing an application fee that bears a reasonable correlation to the cost of the services it will be required to undertake to process Tillim's December 2007 sewer connection application.

This Decision and Order is being returned to the attorneys for the Petitioner/Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 20, 2009
Albany, New York

Joseph C. Teresi
JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition and Complaint, dated August 25, 2009; Summons , dated August 24, 2009, Petition and Complaint, dated August 25, 2009, Affidavit of Ken Tillim , dated August 29, 2009, Affidavit of Darrin Elsom, dated August 25, 2009, with attached Exhibits A-I.
2. Verified Answer, dated September 25, 2009; Village of Hunter record of Proceedings, certified by William Maley on September 24, 2009.