ROBERT KAPPE, individually and t/a
ROBERT KAPPE ASSOCIATES

and
CIVIL ACTION

GRANT E. NELSON, III, HENRY
HIDDLESON and GEORGE A. ROOS t/a HNR ASSOCIATES
and

JOHN P. CONNELL t/a CONNELL
ENTERPRISES
V
WEST CHESTER BOROUGH

IN THE COURT OF COMMON PLEAS

CHESTER COUNTY, PENNSYLVANIA

NO.00-07407

Lee A. Stivale, Esquire, and Ronald M. Agulnick, Esquire, Attorneys for Plaintiffs
Stephen P. McGuire, Esquire, and Glenn E. Davis, Esquire, Attorneys for Defendant

OPINION

By: Sanchez, J. March 17th, *2003*

Plaintiffs, residential rental-property owners, seek declaratory relief with respect to the annual rental permit fee ("Permit Fee") imposed by the Borough of West Chester ("Borough"). Plaintiffs assert the Permit Fees are not reasonably commensurate with the cost of issuing a permit and making an annual inspection. Plaintiffs ask this Court to declare the Permit Fees an unlawful special tax and order the Borough to refund Plaintiffs' Permit Fees paid since 1996.

The Borough argues the Permit Fee is a reasonable license fee, and Plaintiffs have not shown the Permit Fee to be grossly disproportionate to the Rental Permits Program's costs for administration and enforcement- We disagree.

STATEMENT OF FACTS

Plaintiffs own residential rental-property in the Borough. Defendant Borough is a Commonwealth of Pennsylvania municipal corporation and political sub-division with all the powers granted to the Commonwealth Boroughs.1 Plaintiffs are subject to the Borough's Code (the "Code").2 Chapter 66 of the Code ("Chapter 66"), the Borough's Housing and Property Maintenance Code, adopts the stated purpose of the BOCA National Property Maintenance Code ("BOCA Code") to ". ..ensure public health, safety, and welfare insofar as they are affected by the continued occupancy and maintenance of structures and premises."3

The Borough

The Borough is approximately 1.8 square miles.4 Nearly sixty-three percent of the properties in the Borough are residential rental-propeliies.5 The Borough has between 4,000 and 4,200 rental dwelling and rooming house units. A majority of the rental housing is rented to students and is located in the Borough's Southeastern section.6

Ernie McNeely is the Borough Manager. Mr. McNeely supervises the Borough's department heads and is responsible for their budgets and finances. He testified that rental housing is a constant source of complaints for his office.7 Mr. McNeely explained that the unusually high number of student renters has resulted in many complaints on the deterioration of the residential neighborhood due to the appearance of the rental propel-ties.8

1. 53 P.S. § 46201 et seq.(Exhibit P-9.)
2. (Exhibit P-9.);
3. Code, Chapter 66 *(citing* BOCA National Property Maintenance Code, Fifth Edition, 1996).
4. (N.T. 6.17.02 at 112.); (N.T. 5.24.02 at 139.)
5. (N.T. 10.21.02 at 86.)
6. (N.T. 10.21.02 at 86.); (N.T. 5.24.02 at 139.)
7. (N.T. 10.21.02 at 87.)
8. (N.T. 10.21.02 at 87.)

Rental Permits Program

The Borough's Code requires all rental dwelling units and rooming house units be licensed under Chapter 66.9 On October 28, 1987, the Borough enacted Chapter 66, Article 10 of the Code, by Ordinance No.11-1987 ("Rental Permits Program" or "Rental Housing Program").]O Chapter 66, Article 10, states, in pertinent part:

PM-I000.I Rental permits.

No person shall operate a rooming house unless he or she holds a valid rooming house permit issued by the Code Official in the name of the owner or operator and for the specific dwelling or dwelling unit. No person shall operate a rental dwelling containing one (I) or more dwelling units unless he or she holds a valid dwelling unit permit issued by the Code Official in the name of the owner or operator for such dwelling unit.

PM-I000.2 Permit fees.

Every person applying for a permit shall supply information as the Code Official requires and shall pay a yearly fee in accordance with the fee schedule approved and adopted by the Borough Council, which schedule shall be available for public inspection at the Department of Building and Housing. There shall be no proration of yearly fees for any reason whatsoever.

PM-IOOO.5 Issuance of residential occupancy permits.

Upon receipt of the fully completed registration form and the payment of the appropriate license fee, plus any penalties, the Code Official shall, within five (5) business days, issue a residential occupancy permit to the owner or responsible 1ocal agent. In the event that the Code Official finds the premises to be in violation of this Chapter or any other Ordinance or code of the Borough of West Chester, then said Code official shall issue the necessary notice and order as provided by this code to abate the illegal or unsafe conditions and to ensure compliance with this code. The Code Official after [re-inspection] to ensure compliance with this code and the other codes and ordinances of the Borough of West Chester, shall then issue pen11it to the owner(s) or responsible local agent. This pen11it shall, at all times, be maintained on the premises and be available for inspection by Borough officials.11

9 (Exhibit P-9.); Code, Chapter 66.
10 (Exhibit P-9.)
11 (ExhibitP-9.)

The Rental Permits Program provides that upon submission of a completed registration form and paY111ent of the Permit Fee, a Code Official wiIl issue a residential occupancy permit within five days.12 In the event, however, the Code Official finds the rental-property to be in violation of the Code, then the "Code [O]fficial shall issue the necessary notice and order as provided by this code to abate the illegal or unsafe conditions and to ensure compliance with this [C]ode."13

The Rental Permits Program is a special service provided by the Borough. The Rental Permits Program allows property owners to rent their property and ensures the rental units are in basic compliance with the Code, Chapter 66, and the BOCA Code.14 The BO1-ough requires rental-property owners to apply for a yearly pen11it and pay an annual Permit Fee for each rental dwelling unit and rooming house unit.15 In exchange, the Borough provides a permit and

certifies the rental dwelling unit or rooming house unit has passed inspection by meeting the standards set forth in the Code. The Borough may lawfully assess a fee to recover the administrative and enforcement costs of its special services. These costs include all necessary

12 (Exhibit P-9.)
13 (ExhibitP-9.);Code,Chapter66,art.10,PM-1000.5. 14 (Exhibit P-9.) Code, Chapter 66, art. 10.

expenses associated with the clerical, technical, administrative, registration, resource, and support functions of the Rental Permits Program. The Department of Building, Housing and Codes Enforcement (t11e "BHC Department") runs the Rental Permits Program.

The Department of Building, Housing and Codes Enforcement

The BHC Department handles building plan approvals, inspections, and permits. The BHC Department Director and inspectors enforce the Code through inspections and citations for Code violations, including nuisance violations involving trash, grass, graffiti, sidewalk, and abandoned cal-s. The BHC Department administers and enforces the Renta1 Permits Program.

Michae1 A. Perrone has been the Director of the BHC Department and Fire Marsha11 since May 1986.[16] In addition, he is liaison to the Borough Zoning Hearing Board and Planning Commission, and supervisor for the Parking Enforcement Depal-tment.[17] Director Perrone manages the entire BHC Department, trains personnel, reviews plans, supervises the issuance of permits, monitors outside contract inspectors, reports to the Borough manager, prepares the annual budget, and is responsible for complaint resolution.[18] Director Perrone' s multiple responsibilities, related to his various positions, also include supervising the paperwork for the Zoning Hearing Board meetings and decisions, control1ing the Parking Authority's application process for permits and street closings, and attending meetings for the Planning Commission.[19] Director Perrone oversees all BHC Department employees, including the employees directly involved in the Rental Pern1its Program. The BHC Department staff currently includes

15 (Exhibit P-9 .) Code, Chapter 66, art. 10.
16 (N.T. 6.17.02 at 5.)
17 (N.T. 5.24.02 at 151,152.)
18 (N.T. 6.17.02 at 7,8.)
19 (N.T. 5.24.02 at 152,153.)

Director Perrone, five full-time inspectors, and two part-time contracted employees.20 The Current members of the BHC Department staff involved in the Rental Permits Program are Director Perrone, a Codes Enforcement Officer, two full-time routine Building Inspectors, and an administrative assistant.21 The second Building Inspector was added to the staff in 1999.22 Director Perrone testified that 35% of his time is spent in the Rental Permit Program's administration and enforcement. This 35% figure is part of the Rental Permits Program's budget. This allocation of time, however, is inconsistent with Director Pen-one's responsibilities and duties in a role that is primarily as a supervisor. The 35% figure is over one-third of Director Perrone's time. If Director Perrone dedicates 35% of his time to the Rental Permits Program that would leave only 65% of his time for his other duties as BHC Department Director, Fire Marshall, liaison to t11e Zoning Board and Planning Commission, and super\lisor for the Parking Enforcement Department. Thus, we do not find Director Perrone's estimation accurate.

Jolm Malion and Harry Burd opined to the responsibilities of BHC Department Director and his staff in running a rental housing program, such as the Rental Permits Program. John Malion was the BHC Department Director for Bensalem Township in Lower Bucks County, Pennsylvania from 1990 until 1994. He was the BHC Department Director for Bristol Township 1986 unti11989.23 When John Malion was Director in 1993, Bensalem Township had approximately 12,000 rental units.24 John Malion further opined that the BHC Department Director should spend approximately 5% -10% of his time administering a program under

20 (N.T. 6.1702 at 17, 18)
21 (N.T. 6.17.02 at 111.)
22 (N.T. 5.24.02 at 128.)
23 (N.T.2.25.02 at 178, 179.)
24 (N.T. 2.25.02 at 181.)

Chapter 66.25 John Mallon further testified that one full-time inspector and one fuJl-time secretary are sufficient to administer the Rental Permits Program.26 Mr. Mallon stated the salary for housing inspectors is typically based on their experience, training, and education, but the range is between $20,000 to $25,000 for 52 weeks at 40 hours a week.27 Harry Burd is a consultant and owner of HJB Code Consultant, Inc.28 He has worked exclusively for municipal organizations for the last 37 years, but never for the Borough.29 Mr. Burd worked for the Centre Region Council for 22 years, as a housing inspector, Chief Inspector, Deputy Director, and then Director for the last 10 years.30 Centre Region has approximately 18,000 rental units and is four times the size of West Chester.31 Mr. Burd's department handled five townships covering 154 square miles as compared to the Borough's 1.8 miles.32 Mr. Burd's position was quite different from Director Perrone's position. Mr. BUl-d was not a zoning officer, liaison to the Zoning Hearing Board, or a fire marshall.33 In addition, Mr. Burd's position included occasionally reviewing building permits and performing inspections, unlike Director

Perrone.34 Centre Region is not only different from the Borough in size but in operation. Centre Region does not have a licensing program for electrical permits like the Borough. 35 Mr. Burd opined that one inspector can perform 1,500 rental housing inspections a year, including re-

25 (N. T. 2.25.02 at 220.)
26 (N.T. 2.25.02 at 221.)
27 (N.T. 2.25.02 at 158.)
28 (N.T.6.25002at93)
29 (N.T. 6.25.02 at 102,103,105.)
30 (N.T. 6025.02 at 96.)
31 (N.T. 6.25.02 at 97,98.)
32-(N.T. 6.25.02 at 141.)
33 (N.T. 6.25.02 at 142- 144.)
34(N.T. 6.25.02 at 142- 144.)
35 (N.T. 6.25.02 at 143.)

inspection and the related administrative cluties?6 Mr. Burd 's estimation is based on different criterion t])an present here. Further, we do not find Mr. Burd's testimony 011 how many inspections can be performed within a year credible based on the record as a whole.

I

Inspections

The Rental Pen11its Program requires a Borough Code Official perform a rental housing or habitability inspection for minimum health, safety, and welfare purposes ("Rel1ta1 Housing Inspection").37 The Rental Housing Inspection is to inspect and certify the renta1-propeliy for basic compl1ance with the Code, Chapter 66, and the BOCA Code, a11d is separate from the other Code related inspections,38 From 1996 through 2001, Rental Housing Inspections have ,varied in frequency from 14 to 30 months.39 In 1996, the frequency was 30 months.4O The frequency increased to a 14-month schedule il12000 -2001. In a Memorandum to Ernie McNeely dated August 7, 2000, Director .Perrone states that he is "confident that during the next 12-month cycle we will be able to inspect every dwelling unit."41 Director Perrone credits the improvement from a 30-month cycle to a J4-month cycle to the Rental Permits Program's addition of another inspector in 1999.42 Plail1ti.rrs, however, presented credible evidence indicating this improvement could have been achieved earlier and without another inspector if the work was allocated more efficiently or the program was restructured.

The BHC Department currently begins the annual, rental permit, renewal process by

36 (N.T. 6.25.02 at 137.)

37 (Exhibit P-9, D-31.); Code, Chapter 66, art. 10, P}..f-1OOO.5; (N.T. 2.2502 at 137, 139, 216); (N.T. 6.25.02 at J85.)
38 (Exl1ibit P-9.); (N.T. 2.25.02 at 135); Code, Chapter 66, art. 10.
39 (N.T. 6.17.02 at 108, 109.)
40(1 (N.T.6.17.02 atJ08-109.)
41 (Exhibit P-16.)
42 (ExhibjtP-16.)

sending out renewals in ear1y May.43 The Rental Permit Fees are due by July 1.44 The Renta1 Pem1it Fees are received by the Borough Treasurer's office.45 The receipts are stamped paid and the BHC Department enters the data of paid and unpaid Rental Permit Fees into their system.46 In July a follow up report is done on delinquent Rental Permit Fees. About three to four weeks after the fees are due, a second notice is sent to those who have not paid and the land1ord is called.47 If by the end of September the Rental Permit Fee is not received, citations are filed with I the District Court.48 This process of sending out the renta1 permit renewa1s has nothing to do with the scheduling of the routine Rental Housing Inspections.49

Rental Housing Inspection scheduling is arranged by the BHC Department according to the alphabetica1 order of the landlords' last names.50 Letters are sent out asking the land1ords to respond to the BHC with a convenient date and time for the inspection.51 Alphabetical order cannot be the Borough's sole means ofdetem1ining order. Plaintiffs introduced evidence that some properties were inspected on a yearly basis while the majority were not. For example, Plaintiff John O'Conne1l's units were inspected every 12 to 14 months during the period when other landlords were being inspected within a 30 month-cycle.52

In 1999, Director Perrone issued a Memorandum to the Borough Counci1. Director Perrone provided the following estimates for inspection: 20 to 40 minutes for a sing1e family rental unit, 15 to 20 minutes for rooming houses with a common area, and 10 to 15 minutes per

43 (N.T. 6.17.02 at 103.)
44 (N.T.6.17.02 at 103.)
45 (N.T. 6.17.02 at103, 104)
46 (N.T. 6.17.02 at 103,104.)
47 (N.T. 6.17.02 at 105.)
48 (N.T.6.17002at 105.)
49 (N.T. 6.17.02 at 106.)
50 (ExhibitP-16.);(N.T.6.17.02 at 106, 111.)

apartment unit. Plaintiffs offered testimony to dramatically shorter inspection times. Plaintiff O'Connell testified that in 1996 the inspection time was 10 minutes per Llnit.53 He said it took 10 minutes to perform an inspection on a two-unit building and 20 minutes to do a boarding house.54 In 1997, Plaintiff O'Connell 's 23 units, which included one boarding house, four two- unit properties, and one fourteen-unit property, took only two hours to inspect.55

Based on Director Perrone's inspection times, Plaintiffs presented testimony that a Borough Housing Inspector should be able to inspect and re-inspect the Borough's 4,200 rental units in 189 work days, leaving approximately 30 days for administration time.56 Plaintiff Grant Nelson presented credible testimony that the Borough housing inspector should be able to inspect and re-inspect the Borough's 4,200 rental units in 147 days, leaving 83 days for administration time.57 Mr. Mallon estimates that an inspector, on average can pel- fom115 -18 routine housing inspections each day.58 Mr. Ma11on concluded only one fi1l1-time inspector and one fu11-time secretary is sufficient to administer and enforce the Borough's Rental Housing Program.59

Re- inspections

In the event that the Code Officia1 finds the renta1 unit in vio1ation of Chapter;. 66 or any other Borough Ordinance, then the "Code official shall issue the necessary notice and order as provided by this code to abate the il1egal or unsafe conditions and to ensure compliance with this

51 (N.T. 6.17.02 at 106.)
52 (N.T. 5.23.02 at 214.)
53 (N. T. 5.23.02 at 206.)
54 (N.T.5.23.02 at 206.)
55 (N.T. 5.23.02 at 207.)
56 (ExhibitP-17.);(N.T.5.24.02 at18-20.)
57 (ExhibitP-29.);(N.T.5.24.02 at21.)
58 (N.T. 2.25.02 at 160.)

code. The Code Official after [re-inspection] to ensure compliance with this code and the other codes and ordinances of the Borough of West Chester, shall then issue pem1it to the owner(s) or responsible local agent."60 Director Perrone estimated re-inspection rates for 2000 and 2001 to be 45% and 49 % respectively.61 Mr. Mallon estimates that re-inspections, however, should 62 occur at a 2% rate.

Both Mr. Mallon and Mr. Burd agree that not all types of violations warranted re- inspection.63 Mr. Mallon testified the Borough was experiencing a high rate of inspection due to a failure to communicate with the property owners and attempting alternative means to resolve violations. Mr. Burd agrees that there is discretion in a code inspection to decide whether a re- inspection is required.64 The Plaintiffs presented credible evidence that the discretionary aspects of the Housing Inspection played a significant role in whether a violation notice was issued and a re-inspection was required. The Borough does not provide a checklist of what the inspectors are looking for during the Rental Housing Inspection. The Borough simply refers rental-property owners to the Code and BOCA Code as a guide. Plaintiffs presented evidence that the re- inspection rate could be reduced by the Borough providing the landlord with a checklist of what is expected at inspection and greater feedback to landlord questions.

<u>Inspectors</u>

The amount of time a BHC Department employee spends on a Rental Permits Program

59 (N.T 2.25.02 at 221,222.)
60 Code, Chapter 66, art. 10, PM -1000.5.
61 (N.T. 6.17.02 at 130.)
62 (N.T. 2.25.02 at 186.)
63 (N.T. 6.25.02 at 174.)
64 (N.T. 6.25.02 at 174,175.)

related task is not recorded, since the BHC Department does not keep time records.65 Director Perrone offered only the estimations and "guesstimates" to the amount of time employees spent in Rental Permits Program administration and enforcement work. Director Perrone's numbers are based on his experience, memory, and a two-week cost study he performed.66 Mr. Burd, unlike Director Perrone, opined that he would periodically review his inspector's time records and logs.67

From 1996 through 1998, the Rental Permits Program budgeted one Housing or Building Inspector at a 100% time allocation. In 1999, the Borough hired a second Building Inspector to perform Rental Housing Inspections under Chapter 66.68 From 1996 through 2000, the Rentals Permits Program also budgeted one Codes Enforcement Officer at a 65% time allocation. Director Perrone's August 7,2000 memorandum, however, states that only one inspector, a Housing Inspector, was actually conducting inspections in 1997, 1998, and during the month of October 1999.69 The evidence reveals an inconsistent pattern of Codes Enforcement Officers switching positions and responsibilities in regard to the Rental Housing Program.

Code Enforcement Officer is a different and distinct position from Building Inspector.70 The two positions were previously under the supervision of different Borough Departments. Prior to 1991, a Code Enforcement Officer was an exterior and nuisance inspector under the supervision of the Mayor. In 1991, the Code Enforcement Officer's duties were transferred into

65 (N.T.6.17.02at55.)
66 (N.T.6.17.02at201-203.) 67 (N.T. 6.25.02 at 176, 178.)
68 (N.T. 5.24,02 at 127.)
69 (Exhibit P-16.)
70 (N.T. 2.25.02 at 118.)

the Department of Building, Housing and Code Enforcement. 71

The Codes Enforcement Officer perform exterior code enforcement and nuisance inspections of all properties.72 Codes Enforcement Officers issue notices of violation enforcing minimum health, safety, and welfare laws contained more often in Code sections other than Chapter 66.73 The Borough Codes Enforcement Officer position, includes: visually inspecting exterior of properties including sidewalks, recycling, snow and ice removal, abandoned vehicles, grass, trash, dumpsters, signs, banners, porches, fences, and exterior structures for Code violations; visually inspecting all basements, attics, and living areas in buildings for BOCA Code violations; processing and ensuring all requirements for building, plumbing, and electrical pem1jts are met; issuing and reviewing rental pen11its for all rental properties; investigating violations and resolving complaints; preparing violation letters with reference to the appropriate Borough Ordinances; scheduling re-inspections of all properties to ensure all violations are brought into compliance; preparing files for Borough court cases; maintaining a property file for all properties inspected; issuing building, plumbing, and electrical construction applications; supervising abandoned vehicles towed from Borough properties and noting any articles found or any damage; driving Borough vehicle down streets, alleys, and parking lots to document all violations observed; and performing all other duties directed by the Department Director or the Borough Manager.74 The Plaintiffs have shown that the Code Enforcement Officers performed Housing Inspections and Rental Permits Program related functions only on an infrequent basis.

Director Perrone testified that 65% of the Codes Enforcement Officer's "time, his

71 (N.T. 6.17.02 at 200); (N.T. 5.24.02 at 132- 135.)
72 (N.T. 5.24.02 at 132,139.); (N.T. 6.17.02 at 15,18,142,143.)
73(N:T. 6.17.02 at 143.); (N.T. 6.25.02 at 84,85.)
74 (Exhibit D-45.)

allocation, is to the exteriors of properties predominately in the southeast/southwest where we have a large concentration of student homes and [it is] vital that he does that in order to keep the exterior of these properties maintained and free of code violations. They require just constant daily inspection and vigilance as opposed to our owner-occupied properties that [do not] require the same type of scrutiny. „75 Director Perrone stated the exterior Codes Enforcement Officer is enforcing Borough Codes parallel to the provisions of the BOCA Code.76 In 1999, Codes Enforcement Inspector's Rental Housing Inspections were 0 for January, 13 for February, and 17 for March.77 Despite this low number, Director Perrone testified the 65% allocation includes "code enforcement as well as routine housing inspections."78 Director Pen-one maintains that exterior code enforcement inspections are interlocked with the Rental Housing Inspections. Mr. Burd, however, opined that exterior Code violations under Chapters such as 41 and 62, would still be necessary under the Borough' s Code if you eliminated Chapter 66 and the Rental Permits

79
Program.

Unlike the Codes Enforcement Officer, the Building Inspector has a 100% time

allocation to the Rental Permits Program.80 Plaintiffs presented credible evidence contradicting this figure. Plaintiffs' evidence and Director Perrone's testimony established that the Borough Building Inspectors performed Rental Housing Inspections less than 50% of their work day. Specifically, Plaintiffs showed Building Inspector Julianne McCarthy performed Rental Housing

75 (N.T. 6.17.02. at 142.)
76 (N.T. 6.17.02 at 142- 144,146.)
77 (N.T.6.17.02at202-208.)
78 (N.T. 6.17.02 at 202.)
79 (N.T. 6.17.02 at 185.)
80 (Exhibit P-19.)

Inspections on average 3.39 hours each day in March 2000.[81] Likewise, Building Inspector Glenn Holt performed Rental Housing Inspection on average only 3.57 hours each day in August 2001.[82]

Plaintiffs showed that the Building Inspectors spent the majority of their time perfol1lling duties not directly related to the administration and enforcement of the Rental Permits Program. Building Inspectors responded to complaints in the nature of code enforcement matters;[83] waited on Borough customers at the department desk;[84] performed exterior code enforcement duties[85] and sidewalk inspections unrelated to the Rental Housing Inspections;[86] and assisted in preparation for the Borough's Super Sunday.[87]

<u>Rental Permit Fees and Revenue Generated</u>

From the years 1996 through 2001, the Borough has required and collected annual Permit Fees generating income in the following amounts:[88]

~	Rental Dwelling Unit	Rooming House Unit	Revenues
1996	$25.00	$20.00	$103,325.00
1997	$36.00	$30.00	$149,224.00
1998	$36.00	$30.00	$162,421.00
1999	$42.00	$36.00	$178,938.00
2000	$42.00	$36.00	$183,506.00

By comparison, Mr. Burd's offered testimony that Centre Region's permit fees were $16.00 per year for a rental dwelling unit[89] and $11.00 per year for the equivalent of a rooming house unit.[9°]

81 (Exhibit P-34.); (N.T. 6.25.02 at 44- 48.)
82 (N.T. 6.25.02 at 49- 52.)
83 (N.T. 6.25.02 at 41,85.)
84 (N.T. 6.25.02 at 85,86.)
85 (N.T. 6.25.02 at 85.)
86 (N.T. 5.24.02 at 188.)
87 (N.T. 5.24.02 at 187.)
88 (Exhibits P-20, P-28, D-47.)
89 (N.T. 6.25.02 at 148- 154.)
90 (N.T. 6.25.02 at 153,154.)

In 1997, the Borough passed a resolution91 increasing the Permit Fee to $36.00 per rental dwelling unit and $30.00 per rooming house unit.92 The increase was first realized in 1997. This increase was based on Director Perrone's detem1ination that if the Pel111it Fee stayed at the 1996 rate there would be over a $37,000.00 deficit. In making this determination, Director Perrone relied on budgeted numbers in his cost study.93 In 1998, the Borough again passed a resolution94 increasing the fee. Commencing on December 16, 1998, the Pel111it Fee became $42.00 per rental dwelling unit and $36.00 per rooming house unit. This increase accompanied the hiring of second Building Inspector to do Rental Housing Inspections.

The Borough does not use its own inspectors for an Borough permit inspections. The Borough currently uses private industry inspectors for electrical and plumbing inspections.95

The Borough contracts electrical and plumbing inspectors on a fee-sharing basis, the Borough receives 20% of the fee. The Borough faxes the inspector the electrical and plumbing paperwork, then the inspector returns the paperwork to the Borough indicating whether the inspected passed or failed.96 In 1996, the Borough's plumbing permit fees revenue was $16,885.00 compared to the plumbing inspectors fees of $ll, 720.00, and the Borough's

electrical inspector pel111it fee revenue was $26,825.00 compared to the electrical inspector fees of$7,654.00.97

<u>Rental Pen11its Program Cost Studies</u>

Director Penone, aided by Mr. McNeely and Douglas Kapp, prepared a cost study for

91 Resolution #4- 1997 92 (ExhibitD-44.); (N.T. 6.17.02 at68.) 93 (N.T.6.17.02 at 77.) 94 Resolution #8- 1998 95 (N.T.6.17.02at178,179.) 96 (N.T. 6.17.02 at 181.)

each year ("Perrone's Cost Study") in order to estimate the Rental Permits Program's administration and enforcement costs. Director Perrone's Cost Studies are problematic in that the Studies use: budgeted numbers, a highly flawed methodology developed by Director Perrone and Mr. McNeely, a labor utilization factor based on a mere two week observation period,98 an "Additional Overhead" figure comprised of general fund expenditures not attributable to the Rental Permits Program, and "Other Housing" costs not properly attributed to the Rental Permits Program. The Borough relied on Director Perrone's Cost Study figures in determining whether to increase the Permit Fee in 1997 and 1999, and in hiring an additional Housing Inspector in 1999. Later, the Borough's Finance Director and Treasurer Douglas Kapp refined Director Perrone's Cost Studies with actual numbers.

In October 2001, Douglas Kapp prepared a "Year End Actual Dollar, Cost Study for Rental Housing Enforcement" ("Cost Study") for each year from 1996 unti12000 in preparation for litigation.99 Mr. Kapp has been the Borough's Finance Director and Treasurer since 1986. He had provided Director Pen-one with the figures for annual health benefits, social security, workers' compensation insurance, and pension benefits.]00 Mr. Kapp relied on Director Pen-one's budgeted numbers for the utilization factorsl01 and used the same methodology developed by Mr. McNeely and Director Pen-one.]02 "Other Housing" is from the Borough's budget line 413.300. 1 03 " Additional Overhead" is comprised of selected Borough general fund expenditures selected by Mr. McNeely and Director Pen-one as having a 2.2% allocation as

97 (N.T. 5.24.02 at 103- 105.)
98 (N.T. 5.24.02 at 148.)
99 (Exhibit P-19.); (N. T. 5.24.02 at 68- 70.)
100 (N.T. 5.24.02 at 68, 69.)
101 (N.T.5.24.02at69-71.)
102 (N.T. 5.24.02 at 71.

if applicable to the BHC Department. 104

Pamela W. Baker is a partner in the firm Barbacane Thorton & Co. ("BTC Accounting").105 BTC Accounting has conducted independent audits of the Borough's financial statements for the past 10 years, excluding 1998.106 Baker explained the financial audit as gaining an understanding of the Borough's internal control structure, designing and completing tests of certain transactions as they relate to those internal control Is, then opining to the fair presentation of the financial statements that are developed from the financial transactions and recording of the same.107 The audit's overall purpose is to determine whether costs were properly allocated to a particular department. In regard to the Borough's audit, Ms. Baker was the partner responsible for the planning, supervision, review, and ultimate signature on the audit opinion. 108

In addition, BTC Accounting and Ms. Baker were engaged to audit the Borough's Cost Study for the Years 1996 through 2000.109 The audit was conducted according to the American Institute of Certified Public Accountants ("AICP A") attestation standards. 1 10 Ms. Baker explained the steps taken in auditing the Borough's Cost Studies, as follows: (1) obtained the Borough's Cost Studies; (2) recalculated the Borough's Cost Study math; (3) checked the total expenditures; (4) compared the numbers previously audited by BTC Accounting against numbers provided in Cost Studies; (5) interviewed the people responsible for putting together the Cost

103 (N.T.5.24.02 at 72.)
104 (N.T. 5.24.02 at 72,73.)
105 (N.T. 10.18.02 at 4.)
106 (N.T. 10.18.02 at 6.)
107 (N.T. 10.18.02 at 7.)
108 (N.T. 10.18.02 at 13.)
109 (ExhibitP-19.); (N.T. 10.18.02 at 140)
110 (N.T. 10.18.02 at 170)

Studies as to their roles; (6) determined reasonableness of the methodology; (6) determined whether methodology was reasonable as applied; and (7) compared Borough' s Cost Studies with other municipalities programs. 111

Cost Study Methodology

According to Ms. Baker, the Borough's methodology uses GAAP basis of accounting for governments.ll2 The Borough's methodology utilized a direct cost allocation as well as an indirect cost allocation. 1 13 The direct cost allocation the Borough utilized was to take the direct cost of BHC Department employees' salaries and related benefits based on the employees' time allocation to the Rental Permits Program. J 14 In auditing the Borough's Rental Permits Program, Ms. Baker relied on the information provided by the Borough, specifically Director Perrone, Mr. McNeely, and Mr. Kapp.115 The utilization factors were from Director Perrone's Cost Studies, and are as follows: Director is attributed as having allocated 35% of his time to the Rental Permits Program, the Building Inspector 100%, the Codes Enforcement Officer 65%, the Administrative Assistant 40%, and an additional Building Inspector is listed at 100% beginning in 1999.116 Ms. Baker did not conduct an independent study to check the accuracy of the Borough's time allocations, which were based on Director Perrone's estimations rather than actual records. Ms. Baker testified that unlike private industry, government maintenance of time allocation records is cost prohibitive. 117 Ms. Baker opined that government is not mandated to keep such records and governments have generally accepted accounting principles particular to

111 (N.T. 10.18.02 at 21,22.)
112 (N.T. 10.18.02 at 23.)
!!3 (N.T. 10.18.02 at 23.)
114 (N.T. 10.18.02 at 23.)
115 (N.T.10.18.02at24,25.)
!16 (Exhibit P-19.)

118 governments.

The Borough's indirect costs are all those things the Borough attributes to the Support and delivery of the Rental Permits Program. The indirect costs are listed in the Cost Study as "Actual Addnl. (Additional) Overhead." The Cost Study's Actual Addition Overhead is comprised of the BHC Department's Other Housing and Additional Overhead costs attributed to the Rental Permits Program ("Actual Additional Overhead").119 These figures include the Borough's general fund expenditures and the BHC Department's additional overhead costs.

The BHC Department is attributed as having a percentage of all the expenditures that it takes to run the Borough.12° General fund expenditures are the Borough's general government expenditures inclusive of all departments within the Borough's accounting system. 121 The Cost Study allocates a portion of select general fund expenditures to the Rental Permits Program as AdditionalOverhead.122 In the Cost Study, Additional Overhead is 2.2% to 2.7% of these select general and expenditures. The percentage was 2.2% in 1996- 1998,2.4% in 1999, and 2.7% in 2000. These select general fund expenditures were chosen by Director Perrone and Mr. McNeely's external to the BHC Department, but attributable to the Rental Permits Program's administration and enforcement. 123 The select expenditures are listed in the Cost Study as "General Fund Expenditures To Be Allocated Building, Housing, & Codes Enforcement" ("BHC General Fund Expenditures").

Additional Overhead, therefore, includes a percentage of the
(1) Mayor and Council's salaries, (2) Manager and Treasurer's salaries, (3) office supplies, (4) , 0"

117 (N.T. 10.18.02 at30.)
118 (N.T. 10.18.02 at30, 31.)
119 (N.T. 10.18.02 at38.)
120 (N.T. 10.18.02 at40.)
121 (N.T. 10.18.02 at39.)
122 (N.T. 10.18.02 at 39.)

postage and printing, (5) premium on bond costs, (6) association dues, (7) administration expenses, (8) capital outlay, (9) legal fees, (10) clerical salaries, (11) materials and supplies, (12) repairs to building, (13) fuel, electricity, water, and phone, (14) major equipment, (15) salaries of Director of Public Works, Deputy, Administrative Assistant, and Secretary, (16) gas and oil, (17) equipment repair wages, (18) equipment maintenance and repair, (19) tools, safety equipment, (20) tax anticipation loan, (21) Municipal Building and Public Works Building debt, (22) administrative personnel benefits, (23) public works administrative benefits, (24) equipment repair personnel benefits, (25) social security, and (26) reserve for contingencies. 124 The 2.2% to 2.7% utilization factor is based on the Borough's budgeted number-S,]25 even though actual numbers were available at the time of the Cost Study. 126 Ms. Baker opines that due to tight budgetary control, the fact that budgeted numbers instead of actual numbers were used does not

make a material difference. 127

The Additional Overhead is added to the Other Housing figure. Other Housing includes water cooler supplies, land phones, cell phones, postage, printing costs, office supplies, conferences, seminars, zoning civil action, and computer software. 128 In the Cost St11dy, the Rental Permits Program is given a cost allocation in relationship to the BHC Department.J29 Relative to the year, 58% to 61% of the sum of the Additional Overhead and Other Housing is taken as allocated to the Rental Permits Program and results in the Cost Study's Actual

123 (N.T. 5.24.02 at 73.); (N.T. 10.18.02 at40.)
124 (Exhibit P-19.)
125 (N.T. 10.18.02 at41.)
126(N.T. 5.24.02 at 83- 86.)
127 (N.T. 10.18.02 at41.)
128 (Exhibit D-59.); (N. T. 5.24.02 at 77, 78)
129 (N.T. 10.18.02 at 40.)

Additional Overhead figure. :30 The percentage was 58% in 1996- 1998 and 61% in 1999 - 2000. The Actual Additional Overhead figures in Ms. Bakel-'s report are slightly different than those in the Borough's Cost Study. Ms. Baker opined that the minor differences between her report and the Cost Study are due to the Borough utilizing an Excel format, which in calculating percentages was formatted to be two decimals.131

Sol I. Cohn has been a Certified Public Accountant since 1961. He is a partner in Fallconiero & Company, a full service accounting firm that performs audits for nonprofit organizations, government agencies, government offices, municipalities, manufacturing films, and all phases of business activities.132 Sol I. Cohn reviewed and analyzed the Borough's Cost Sttldy.133 Mr. Cohn testified a direct cost is one that is expended for a particular cost objective and accounts for that objective specifically. 134 There must be a direct relationship between the cost expanded and the cost's objective. 135 The examples provided by Mr. Cohn include supplies specifically used for that cost objective and payroll.136 He defined an indirect cost as an unrelated cost that is general in nature and cannot be specifically identified with the cost objective on a reasonable basis.137 Mr. Cohn opined that the Mayor's salary is an indirect cost since it is too far removed and does not have any real involvement or direct involvement in the inspection program. 138 Likewise, he opined that legal fees, premium on bond, fuel and electricity, equipment repair, Municipal Building in Public Works Building debt, as indirect

130 (N.T. 10.18.02 at40.)
131 (N.T. 10.18.02 at 75,76.)
132 (N.T. 2.25.02 at 239.)
133 (N.T.2.25.02at241.)
134 (N.T.2.25.02at242.)
135 (N.T. 2.25.02 at 242.)
136 (N.T. 2.25.02 at 241,242.)
!37 (N.T. 2.25.02 at 242.)

costs and general expenses costs of running a government that would continue if the Rental Pem1its Program was terminated. 139 Mr. Cohn's analysis of the Cost Study concluded that in 1996 Rental Permit Program was near the break even point after eliminating those costs not directly related to the Rental Permits Program.

Ms. Baker's and Mr. Cohn's definition m1d application of indirect and direct costs differed slightly. We find that direct costs are those costs that are directly attributable to a particular program and can be specifically identified with that program. Typical direct program costs are the salaries and benefits of employees working in the program, including contract employees, and the cost of supplies and equipment used solely in the program's administration and enforcement. Indirect costs are costs not directly attributable or too far removed from the program's cost and administration. Here, indirect costs are costs the Borough would incur even if the Rental Permits Program was terminated.

The Additional Overhead figure is largely comprised of indirect costs not attributable to the Rental Permits Program. For instance, the salaries of the public officials such as the Mayor and Council are included in Additional Overhead. We disagree with Director Perrone's assertions that the Mayor's duty to sign legislation and the Council's role in the creation of ordinances is a direct cost of the Rental Permits Program.]40 "Association dues" refers the membership dues of the Treasurer and Manager in associations such as the Pennsylvania League of Cities. 141 Association dues are not direct costs and are inappropriately attributed to the Rental Housing Program. Further, legal fees are not properly attributable to the Rental Program because

138 (N.T. 2.25.02 at 242,243.); (N.T. 5.23.02 at 34- 36.)
139 (N.T. 5.23.02 at 34- 36.)
140 (N.T. 6.17.02 at 64.)
141 (N.T. 5.24.02 at 92.)

the Code provides for penalties to reimburse the Borough for its costs to prosecute a violation .14?
notice

Cost Study Breakdown 143

The following is a breakdown of the Borough's Cost Studies by year:

Actual	Salaries & Benefits +	Additional Overhead -	Permit Fee Revenue =	Deficit/Excess
1996	$107,308.20	$38,241.09	$103,325.00	-$42,224.29
1997	$110,966.10	$38,651.93	$149,224.00	-$394.03
1998	$116,881.90	$41,678.78	$162,421.00	+$3,860.32
1999	$138,115.21	$47,866.33	$178,938.00	-$7,043.54
2000	$160,875.77	$50,494.59	$183,506.00	-$27,864.36

Key:

Year = Dates

Salaries and Benefits = Total Salary and Benefits based on BHC Department employees and utilization factors provided by Director Perrone.

AO = Additional Overhead (2.2% in 1996- 1998,2.4% in 1999,2.7% in 2000 of General Fund Expenditures selected by Director Perrone and Mr. McNeely as attributable to Rental Permits Program)

OH = Other Housing of BHC Department (Based on line 413.300 of Borough's Budget)

Actual Additional Overhead = 58%(AO + OH) in 1996- 1998, 61%(AO + OH) in 1999- 2000 Private Industry Costs to Run

Rental Pern1its Program

Private industry would provide a municipal wide inspection and licensing of the Rental Permits Program at the rate of

$25.00 to $35.00 per dwelling unit and rooming house unit.144 At

142 (N.T. 2.25.02 at 226,227.)

the high end of$35.00, private industry inspection service would include yearly inspections and administrative efforts such as mailing the pel1l1it, contacting the rental property owner, scheduling the appointment, issuing the permit, inspecting each unit every year, submitting a monthly report to the Borough, and meeting with the Borough Administration approximately six times each year. 145 At due low end of $25.00- $27.00, private industry would not handle the administrative functions. 146

John Mallon testified that he would charge approximately $32.00 per rental dwelling unit, and would have inspected each unit every year from 1996 through the present. 147 J ohn Mallon would perform all of the administration of the housing inspection program mail for $32.00 a rental dwelling unit, and $27.00 a rooming house unit, including renewal notices and maintain property owner information as part of the annual fee.148 His $32.00 per rental dwelling unit, figure includes re-inspections for the first year and an estimated profit between $5.00 to $7.00 per inspection. 149 J ohn Mallon estimated that he would experience approximately a 2% re- inspection rate. He would not conduct re-inspections the first year. The re-inspection fee after

the first year would be $18.75.150 If the re-inspection fee is added to the $32.00 per unit charge, the fee would be $32.50.151 The annual inspection fee charged by John Mallon of$32.00 for each rental dwelling Unit and $27.00 for each rooming house unit includes profit.J52 The Borough currently uses private industry inspectors for electrical and plumbing

143 (Exhibit P-19.)
144 (N.T. 2.25.02 at 148.)
145 (N.T. 2.25.02 at 142- 145,148.)
146 (N.T. 2.25.02 at 143,145,148, *lSS* -158.)
147 (N.T. 2.25.02 at 190.)
148 (N.T. 2.25.02 at 196,197.) 149 (N.T.2.25.02at 176.) 150 (N. T. 2.25.02 at 225.)

inspections.153 The Borough contracts with inspectors on a fee sharing basis whereby the Borough receives 20% of the fee. The Borough faxes the electrical and plumbing paperwork to the inspector contracted to do the work, then the inspector returns the paperwork to the Borough indicating whether the inspectee passed or failed. 154 The Borough offered testimony that this was not a suitable alternative for the Rental Pern1its Program due to the Borough's need to keep detailed records in house. The rec01-d, however, does not support this contention.

Plaintiffs

Plaintiff Robert Kappe of Kappe Associates is the owner of residential rental property located at 400-402 N. Church Street, which contains nine residential units; and at 50 Marshall Street, which contains nine residential apartment units. The eighteen units are configured in duplex, triplex, and multi-family structures. 155

Mr. Kappe has paid annual Permit *Fees* for his residential rental properties from 1997 through 2001 as follows: 156

Date	Permit Fees
6/27/97	$648.00
6/30/98	$648.00
6/28/99	$756.00
6/21/00	$756.00
6/21/01	$756.00

On July 1, 1996, Mr. Kappe presented the Borough with a Claim for Refund under 72 P .S. Section 5566, requesting a refund of the Permit *Fees* paid from July 1, 1996 through 2001.157

151 (N.T. 2.25.02 at 225.) 152 (N.T.2.25.02at 227.)
153 (N.T.6.17.02at178,I79.) 154 (N.T. 6.17.02 at 181.)
155 (N.T. 2.25.02 at 42,43.)
156 (Exhibit P-4.); (N.T. 2.25.02 at 46- 48.)
157 (Exhibit P-I.); (N. T .2.25.02 at 53.)

The Borough rejected Kappe's claim.158 From July 1,1996 through December 31,1999, Mr. Kappe paid Pennit Fees of $2,052.00 and inspections occurred on a 30-month cycle.159 From January 1,2000 through December 31,2001, Robert Kappe paid Permit Fees of$1,512.00 and inspections occurred on a 14 to 15 month cycle.160

Plaintiffs, Grant E. Nelson, III, Henry Hiddleson, and George A. Roos are partners in HNR Associates, a Pennsylvania general partnership ("HNR"). From 1996 to 2000, HNR owned 30 residential rental units in the Borough. 161 HNR has paid annual Permit Fees for its residential rental properties from 1997 through 2001 as fo11ows:162

Date	Permit Fees
7/02/97	$1,002.00
7/02/98	$1,002.00
6/04/99	$1,182.00
7/05/00	$1,182.00
7/09/01	$1,224.00

On July 29, 1999, HNR Associates presented the Borough with a Claim for Refund under 72 P.S. Section 5566, requesting a refund of the Pennit Fees Paid from July 1, 1996 through 2001.163

The Borough denied the c1aim.164 From 1997 through December 31,1999, HNR Associates paid Permit Fees of $3,186.00 and inspections occurred on an 18 to 24 month cyc1e.165 From January 1,2000 through December 31,2001, HNR Associates paid Pem1it Fees of$2,406.00 and inspections occurred on a 13-month cyc1e.166

158 (N.T. 2.25.02 at 54.)
159 (ExhibitP-4.); (N.T. 2.25.02 at 46, 55,78-79,103,105.)
160 (Exhibit P-4.); (N.T. 2.25.02 at 46,48,63,78- 79, 103.)
161 (N.T. 5.24.02 at 6,7.)
162 (Exhibit P-5.); (N. T. 5.24.02 at 7- 9.)
163 (Exhibit P-2.)
164 (N.T. 5.24.02 at 9.)
165 (ExhibitP-5.); (N.T. 5.24.02 at 8- 13.) 166 (Exhibit P-5.); (N.T. 5.24.02 at 8- 13.)

Mr. Nelson was part of the Southeast Advisory Committee. The Mayor formed the Southeast Advisory Committee to review the quality of life in West Chester, in particular the Southeast section.167 This Committee recommended the hiring of another inspector to increase the frequency of Rental Permits Program inspections.J68 In addition, Mr. Nelson testified that on occasion the BHC Department inspector Bill Miller would permit Rental Permits Program inspection violations without re-inspection.169

Plaintiff John P. O ' Connell, individual1y and trading as O ' Connel1 Associates, owns residential rental property in West Chester, Chester County, Pennsylvania. Mr. O'Connell owned between three and fifty-one residential rental units in the Borough from 1996 to 2001.170 Mr. O'Connell testified that his residential rental properties were inspected at a higher frequency. He testified that his properties have been inspected every 12 to 14 months.171 Mr. O'Connel1 testified BHC inspector Bill Miller would sometimes not re-inspect. 172 In the year 2001, Mr. O'Connell paid annual Permit Fees in the amount of$2,562 for his residential rental properties. 173 On August 11, 1999, Mr. O'Connell presented the Borough with

a Claim for Refund under 72 P .S. Section 5566, requesting a refund of the Permit Fees for July 1, 1996 through 2001. The Borough denied the claim.174

167 (N.T. 5.24.02 at 17.)
168 (N.T. 5.24.02 at 18,47.) !69 (N.T.5.24.02at48.)
170 (N.T. 5.23.02 at 200- 202.) 171 (N. T. 5.23.02 at 204- 206.)
172 (N.T. 5.23.02 at 207,212,213.)
173 (ExhibitP-7.); (N.T. 5.23.02 at221.) 174 (ExhibitP-3.); (N.T. 5.23.02 at211.)

DISCUSSION

The Borough has five means to legally raise revenue: (1) taxes; (2) assessments; (3) sale of municipal service; (4) fines; and (5) license fees. 175 In the present case, we must determine whether the Borough's Permit Fee is a license fee or tax. Plaintiffs assert the Borough's Permit Fee is not commensurate with the Rental Permits Program's actual costs and, therefore, is an invalid tax scheme, The Borough argues the Permit Fee is a valid license fee necessary to recoup the Rental Permit Program's administration and enforcement cost,

Specific Powers Given to the Borough

The specific powers given to the Commonwealth Boroughs are delineated at 53 P,S, § 46202. Among these, the Borough may "prescribe reasonable fees for the services of [its]

officers and to enforce the payment oftl1e same[;]" "make such regulations as may be necessary for tl1e health, safety, morals, general welfare and cleanliness and tl1e beauty, convenience, comfort and safety of the [B]orough[;]" and enact ordinances related to buildings and housing, and access reasonable fines in order to enforce such regulations.J76 A municipality, however,

does not have the power to levy, assess, or collect taxes, absent an express grant or delegation of that right by the General Assembly of the Commonwealth of its taxing powel-,177 A grant of the right to levy taxes given to a municipal corporation is to be strictly construed and not extended by implication.

. Inc, v. Wil1dber Borough, 59 Pa. D. & C.2d 726 (1972). 176 53 P.S, § 46202(1), (6), and (24).

177 Appeal of HaTrisburg School Dish.ict, 417 A.2d 848 (Pa. Cnm1w.1980).

178 Hillman Coal & Coke Co. v. JenneT TQ., 150 A. 293 (Pa. 1930).

A Tax Different Than a License Fee

A tax is "a revenue producing measure characterized by the production of a high proportion of income relative to the costs of collection and supervision."179 A tax is different than a license fee. 180 In Mastrangelo v. Buckley,181 the Pennsylvania Supreme Court defined a license fee as:

> A license fee is a sum assessed for the granting of a privilege. In most instances, where a license is granted the City invariably incurs expense such as the cost of registration and inspection; it is only proper that the one who seeks and receives a license should bear this expense. To defray the cost of a license a fee is charged to the licensee; however, this fee must be commensurate with the expense incurred by the City in connection with the issuance and supervision of the license or privilege. (footnote omitted.)182

Essentially, a license fee is a charge for the privilege of the Borough 's inspection and regulation services used to defray the Borough's expense.

The requisites of a regulatory license fee are: (I) the business or activity licensed must be subject to governmental regulation under its police power; (2) the licensing ordinance must expressly or by clear implication regulate the licensed business, activity, property or instrumentalities; (3) the regulation must be reasonably and substantially related to the police power objective; and (4) the license fee may not exceed the actual or probable cost of the special

179 Tallev v. Commonwealth, 553 A.2d 518,519 (Pa. Cmmw. 1989); *(citing* Greenacres ADartlnents.l11c. v. Bristol TownshiR, 482 A.2d 1356 (Pa. Cmmw. 1984)).
180 Id.
181 250 A.2d 447,464 (Pa. 1969).
182 Id. at 464 (footl1otes omitted).

municipal services rendered to enforce the regulation, which are not otherwise furnished or required.183

The Borough may prescribe and enforce payment of reasonable license fee for its building inspectors' services, incurred in providing special services needed and actually rendered to enforce the licensing regulation. 184 The Borough, however, may not use its power to collect special service fees as a means of raising revenue for other purposes. 185 In other words, a license fee may be used to recoup the costs to provide the "special service" as required by the regulatory ordinance but not costs for services t11at are otherwise furnished or required."186 A license fee that is greater t11an t11e expense of administering the license becomes tax revenue and ceases to be a valid license fee. I 87 In the present case, the Plaintiffs, as the challenging party, have the burden of proving the Pe1111it Fee is unreasonable and all doubt must be weighed in favor of the reasonableness of the fee.188 If the Permit Fee is grossly disproportionate to the necessary and probable expense of the Rental Pel111its Program, the fee must be struck down as invalid.189

Rental Permits and Housing Inspections

The Rental Pennits Program requires a habitability inspection for minimum health, safety, and welfare pu~oses to certify the rental-property is in basic compliance with the Code.

183 University Park Cinemas. Inc., 59 Pa. D. & C.2d 726; National Biscuit Co. v. Citv of PhiJadel12hia, 98 A.2d 182 (Pa. 1953).

184 53 P.S. § 46202(1); Skepton v. Borough ofNorthamj2ton, 486 A.2d 1022 (Pa. Cmnlw. 1985); University Park Cinemas. Inc., 59 D & C 2d at 734- 735.

185 National Properties. Inc. v. Borou(!h ofMacungie, 595 A.2d 742 (Pa. Cmmw. 1991) *(citing* Go\1a v. H$)peweJ1 Townshi12 Board of Su12ervisors, 452 A.2d 273 (Pa. Clllli11W. 1982)).

186 See Warner Bras. Theatres. Inc. v. Borough ofPottstown. 63 A.2d 101, 103 (Pa. Super. 1949); 1Iniw~ Park Cinemas. Inc.. 59 D & C 2d at 734- 735.

187 Talley, 553 A.2d 518.

188 Id.

189 Phil1ips v. Borou(!h ofFolcroft, 403 A.2d 194 (Pa. Cmmw.1979).

This inspection is a special service and is separate from the other Code related inspections.19o The Borough's special service (1) ensures the Borough's properties are habitable and in basic Code compliance, and (2) provides rental property owners with certification, and their renters with notification, that the rental unit is in compliance with the Code.

Since 1996, the process of sending out the rental permit renewal fees has had nothing to do with the scheduling of the routine Rental Housing Inspections. 191 In fact, Rental Housing Inspections have varied in frequency fi-om 14 to 30 months.192 In 1996, the frequency was 30 months, which increased to a 14-monfu schedule in 2000 -2001. Director Perrone credits the improvement from a 30-month cycle to a 14-month cycle to the Rental Permits Program's addition of another inspector in 1999.193 Plaintiffs' evidence shows this implement could have been achieved earlier and without another inspector if the work was allocated more efficiently or the program was restructured.

The Rental Pem1its Program being run without inspection means only half the Borough's service is being provided. The Borough has argued a yearly inspection is not mandated. If we accepted the Borough's argument that yearly inspection is not required, then why must the

pennit be renewed annually and why was an additional inspector required to meet the goal of annual inspections. The Borough cannot have it both ways. The Borough has been deficient in their obligation to provide a yearly inspection. A pem1it issued without inspection cannot certify the rental unit's habitability or Code compliance. Thus, only half the regulation is being administered and enforced if an inspection is not annually conducted.

190 (Exhibit P-9.); (N.T. 2.25.02 at 135); Code, Chapter 66, art. 10. 191 (N.T. 6.17.02 at 104.)
192 (N.T. 6.17.02 at 108,109.) 193 (Exhibit P-16.)

Borough's Methodology

As a rule of limitation, the measure of the costs related to an administrative license fee program are only the municipality's direct costS.194 The Rental Permit Program's direct costs are those costs that can be directly attributed to the program. These costs include the salaries and benefits ofBHC Department employees involved in the Rental Permits Program, and the cost of supplies and equipment used to administer and enforce the program. The Rental Housing Program's indirect costs are those costs that are far removed from the program's cost and administration. These are costs the Borough would incur even if the Rental Permits Program was terminated. Direct costs should be included in the Rental Permits Program 's cost, while indirect costs that are too tenuous should not. This applies to the employees' salaries and benefits, as well as supplies, equipment, utilities, and other BHC Department costs.

A. Rental Housing Program Employees

The Borough' s Cost Study numbers for BHC Department employee utilization are as follows: the Director is attributed as having allocated 35% ofhis time to the Rental Permits Program, one Building Inspector at 100%, one Codes Enforcement Officer at 65%, and an Administrative Assistant at 40%. In 1999, an additional Building Inspector is listed at 100%.195 The BHC Department does not keep time records.196 The amount of time a BHC Department employee spends on a Rental Permits Program related task is not recorded. Director Perrone offered only estimations and "guesstimates" to the amount of time employees spent in Rental Permits Program administration and enforcement work. Director Perrone's numbers do not

194 *See* !v[artin Media v. Hemj2field TQ. Zonin~ ETearing Ed., 651 A.2d 1211 (Pa. Cn1ffiw. 1996).
195 (Exhibit P-19.)
196 (N.T. 6.17.02 at 55.)

accurately reflect the employees' actual time allocation to the Rental Permits Program and are merely guesstimates, based on a two-week study, unsupported by the record. While a municipality is not required to keep time sheets, and this practice may be cost prohibitive, a municipality's estimations must be supported by the evidence. Here, the numbers were clearly unsupported by the weight of the evidence.

Director Perrone attributes 35% of his time to the Rental Permit Program' s administration and enforcement. Director Perrone's number of35% leaves only 65% ofhis time to other BHC Department duties and his roles as Fire Marshall, liaison to the Zoning Board and Planning Commission, as well as supervisor for the Parking Enforcement Department. Director Perrone's estimation that 35% of his time can be attributed to the Rental Permits Program is inflated and unsupported by the record.

A Codes Enforcement Officer is attributed with a 65% time allocation to the Rental permits Program. Director Perrone testified that 65% of the Codes Enforcement Officer's "time, his allocation, is to the exteriors of properties predominately in the southeast/southwest where we have a large concentration of student homes and [it is] vital that he does that in order to keep the exterior of these properties maintained and free of code violations. They require just constant daily inspection and vigilance as opposed to our owner-occupied properties that [do not] require the same type ofscrutiny."197 Director Perrone maintains that exterior code enforcement inspections are interlocked with the Rental Housing Inspections. Defendant's witness Mr. Burd agreed with Plaintiffs' witness Mr. Mallon that exterior Code violations under Chapters such as 41 and 62, would still be necessary under the Borough's Code if you eliminated Chapter 66 and

197 (N.T. 6.27.02. at 142.)

the Rental Permits Program. 198 The Codes Enforcement Officer's time may be attributed to the Rental Permits Program, but his primary duties would still be required even in the absence of the Rental Permits Program. The 65% figure offered by Director Perrone and presented in the Cost Study is inaccurate.

The Building Inspector has a 100% time allocation to the Rental Penl1its Progrmn.199 Plaintiffs presented credible evidence that the Borough Building Inspectors performed Rental Housing Inspections less than 50% of their workday.2oo Plaintiffs showed that the Building Inspectors spent the majority of their time performing duties not directly related to the Rental Permits Program. Building Inspectors responded to complaints in the nature ofcode enforcement matters;201 waited on Borough customers at the department desk;2o2 performed exterior code enforcement duties20J and sidewalk inspections unrelated to the Rental Housing Inspections;2o4 and assisted in preparation for the Borough's Super Sunday.205 Further, the record reveals an inconsistent pattern of Codes Enforcement Officers switching positions and responsibilities in regard to the Rental Housing Program.

In 1999, the additional inspector was added to Rental Permits Program. Director Perrone testified and the Southeastern Committee found the Rental Permit Program required an additional inspector. John Mallon, however, opined from his experience that only one full-time inspector and one full-time secretary are required to administer the West Chester Borough

198 (N.T.6.15.02 at 185.) 199 (Exhibit P-19.)
200 (N.T.6.25.02 at41.)
201(N.T.6.25.02at41,85.)
202 (N.T.6.25.02 at 85.)
203 (N.T. 6.25.02 at 85.)
204(N.T. 5.24.02 at 188.
205 (NoT. 5.24.02 at 187)

housing inspection and licel1sing program in West Chester.206 Given the record as a whole, an additional il1spector may have beel1 unnecessary had the Rental Permits Program been restructured 01- operated more efficiently.

B. Additional Overhead and Other Housing

The Additional Overhead figure is comprised of indirect costs not attributable to the Rental Permits Program. The majority of the general fund expenditures are the general costs of running the municipality, which the Borough would incur even if the Rental Permits Program was terminated. For instance, the salaries of the Mayor and Council are too far removed from the Rental Permits Program to be anything but the definition of an indirect cost. We completely disagree with Director Perrone's assertion that the Mayor's duty to sign legislation and the Council's role in the creation of ordinances is a direct cost of the Rental Permits Program.207 Anot11er example, are the "Association dues," which refers to the Treasurer's and Manager's membership dues in associations such as the Pennsylvania League of Cities.2os This cannot be attributed to the Rental Pem1its Program's administration and enforcement. Moreover, the Borough's Municipal Building and Public Works Building Township costs were fixed before the Rental Housing Program was enacted, and are inappropriately included in the Program's cost.209

Some of the Other Housing costs are app1'op1-iately allocated to the Rental Housil1g Program, but others are not. The Borough has not performed any study or analysis to detem1ine the proper allocation of costs that are attributable to the Rental Housing Program. Just as the BNC Department staff is not required to keep time allocation records, the Borough is not

206 (N. T 2.25.02 at 221, 222.); *See* Martin Media, 651 A.2d at 1216.
207 (N.T. 6.17.02 at 64.)
208 (N.T. 5.24.02 at 92.)
209 Martin Media, 651 A.2d at 1216 (Commonwealth Court found the cost for "Facility Usage" has no place in

required to keep records of supply allocation to a particular program. This being said, the Borough's inability to accurately account for the Rental Permit Program's postage fees, printing costs, supplies, and other related expenses, does not excuse an accurate accounting of what supplies are attributed to the Rental Permits Program. The Borough offers only estimations based on budgeted numbers and percentages for these costs. We find this unacceptable given the simple methods cost counting methods that could be utilized at minimal expense, such as: bulk mail, copy cards, and dedicated phone lines.

Revenue Generating License Program Is Invalid

The Borough asserts that it has suffered a deficit of over $75,000.00 in administering and enforcing the Rental Permits Program between 1996- 2000. This deficit, however, is based on the Borough's faulty methodology and inclusion of indirect costs. The Borough's Costs Studies I are, therefore, inaccurate. General services, such as the Codes Enforcement Officer's nuisance or complaint enforcement of the Borough's Code, are services otherwise provided to Borough taxpayers and cannot be recouped or included in a license fee charge. The Borough's figure for " Additional Overhead" contains indirect costs, not legally attributed to the registration and inspection of rental housing program. The testimony of Harry Burd and Pamela W. Baker does not support the Borough's Cost Studies since both rely on the Borough's flawed methodology.

In calculating the license fee, the Borough has applied costs incurred through the supervision, administration, and enforcement of the Borough's other Code Enforcement and government related activities. An annual license fee at $42.00 for a rental dwelling unit and $36.00 for a rooming house unit is not commensurate with the reasonable costs to conduct and

the Township's calculation of actual *costs).*

administer the Borough's habitability inspection and licensing program The Permit Fee at that rate is grossly disproportionate to the Rental Permits Program's cost and is an unlawful special

tax for general tax purposes The Permit Fee at $36000 for :1 rental dwelling unit and $30000 for a rooming house unit is still disproportionate based on the evidence The Permit Fee at $25000 for a rental dwelling unit and $20000 for a rooming house unit, however, is near a break-even point when the indirect costs discussed above are eliminated and the employee time allocations are adjusted for accuracy based on the record This break-even point is reached by eliminating the Additional Overhead, reducing the Other Housing to actual Rental Housing Program usage, and decreasing the employee time allocation to a number that reflects employee's time spent solely in

administration and enforcement of the Rental Permits Program

After 1996, the Borough knew the inspections were not being completed on an annual basis and their program was not running efficiently within the proposed budget Changes could have been made at this time to avoid an increase in the fee and ensure the inspections would be completed annually the following year Options were open, such as using private industry The Borough said this is not an option since the Borough prefers to handle the administrative details and records in house The Borough's plumbing and electrical permits are handled using contract inspectors on a fee-sharing basis with the inspectors receiving 80% and the Borough 20%0 This allows the Borough to keep the administrative functions in house The Borough chose to raise the fees but did not significantly increase the number of inspections The only thing that changed was the Borough's revenue The Borough increase realized in 1999 accompanied another inspector With another inspector and the increase to $42000 for a rental dwelling unit

and $36.00 for a rooming house unit, the Borough obtained a 14-month frequent cycle for inspections but is still reporting a deficit.

A tax is "a revenue producing measure characterized by the production of a high proportion of income relative to the costs ofco11ection and supervision."2Io A license fee that is disproportiona1 to the expense of administering a license becomes tax revenue and is no longer a valid license fee.211 C1early, the disproportionate revenue generated by the Borough's Renta1 Housing Program renders this program an inva1id taxing scheme.

A dicta analysis of the Borough's Cost Study, one t11at takes into account the inaccuracies and indirect costs based on the evidence, revea1s a more accurate reflection of the Renta1 Permits Program's deficit. For t11e sake of analysis, we will accept the Cost Study's current figures for the employees' salaries and benefits as accurate and fair compensation. We will adjust,

however, the employees' time allocations to a more appropriate percentage based on the record. The Cost Study's

Additional Overhead is eliminated as predicated on faulty methodology, budgeted numbers, and indirect costs

inappropriately attributed to the program. We will include the Other Housing, for the sake of analysis, at the Borough' s

utilization factor for the Rental Housing Program in relationship to the BHC Depaliment.212 The percentage was 58% in

1996 - 1998 and 61% in 1999- 2000.

210 LllkY, 553 A.2d at 519 *(citing* Greenacres ADartments, Inc., 482 A.2d 1356).

211 Id. 212 -
(N.T. 10.18.02 at 40.)

Cost Study Analysis

Actual

Year	Salaries & Benefits	+ Additional Overhead	-Permit Fee Revenue	=Deficit/Excess
1996	$80,965.15	$15,617.66	$103,325.00	+$6, 742.19
1997	$84,571.70	$15,631.00	$149,224.00	+$49,021.30
1998	$89,269.75	$19,057.70	$162,421.00	+$54,093.53
1999	$109,826.90	$20,406.42	$178,938.00	+ $448,703.68
2000	$129,280.27	$16,574.92	$183,506.00	+$36,650.81

KEY:

Year = Dates

Salaries and Benefits = Total Salary and Benefits based on Cost Study figures but Director
Perrone's utilization factors are adjusted to the following, for the years 1999- 2000: Director Perrone at 15%, Building Inspectors at 100%, and Codes Enforcement Officer at 30%.

OH = Other Housing of BHC Department (Based on line 413.300 of Borough's Budget) Actual Additional Overhead = 58%(OH) in 1996- 1998, 61 %(OH) in 1999- 2000

The above analysis reveals $196,211.53 in excess revenue from the Rental Pem11ts Program for the years 1996- 2000, at an average rate of24.2% excess revenue per year. This figure is, however, less than the Borough's actual excess revenue from the Rental Pel111its Program. The above analysis does not reduce the employees' salaries, which if Plaintiffs, credible evidence is taken into account are much higher than the industry's average rate.

Further, the analysis does not alter the Additional Overhead's utilization factor or change the Additional Overhead figure.

The analysis includes utilization factors lower than the Borough's Cost Study numbers but higher than Plaintiffs' evidence.

The analysis does not take into account

at what costs the Rental Permits Program could or should be operating. If the Rental Permits Program's inspection cycle was a factor included in the analysis the excess revenue would be much higher and a more accurate reflection of the Borough's excess revenue since 1996. The above analysis is based on 14- 30 month inspection cycle for the years 1996-2000. Not until 2000, did the Rental Housing Program reach a 14-month cycle. The Permit Fee Revenue, therefore, often includes fees without annual inspections.

The Borough's Permit Fee is grossly disproportionate to the Rental Permits Program's costs and, therefore, must be struck down as an invalid license fee.213 We approximate that the Borough collected over $40,000 a year, on average, for the years 1996 to 2000 in excess Permit Fee Revenue. This revenue has been collected and used to subsidize the costs of nuisance and exterior code enforcement. The large student renter population presents formidable problems for the Borough, but the Rental Pem1its Program cannot be used as pretext to raise revenue to

combat this problem.

Borough Costs vs. Private Industry

The Commonwealth has always required government services to be provided at a reasonable cost related to its purpose.214 The government must provide safe and efficient service, and not be a "repository for exorbitant costS.,,215 For this reason, the fairness, utility, and reasonableness of a government service may be challenged.216 As the Pennsylvania Supreme Court stated in Ridlev Arms,"If government cannot provide services at least of a quality and at a cost commensurate with similar services provided by private enterprise, it is, by definition,

213 rhi11i2s v. Borough ofFo1croft, 403 A.2d 194 (Pa. Cmmw.1979).

214 Rid1ev Arms. Inc. v. Rid1ev Tp" 531 A.2d 414 (Pa. 1987).

215 Id. at418.

216 Id:

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unreasonable to utilize tax dollars for that purpose."217 Here, the Borough has failed to provide a service with a cost reasonably related to its purpose. In fact, the current cost of the Rental Permit Fee is nearly double what private industry would charge to conduct the Rental Permits Program on a fee-sharing basis with the Borough.

Since 1996, the Borough has issued rental housing licenses absent an inspection of the rental housing properties to ensure comp license with the Code and Ordinance of the Borough. The Borough has charged annual permit fees for the license and inspection of the rental

properties and has failed to provide the special inspection service. From 1996 through 1999 t11e inspections were performed on a 30-month cycle, this improved in the year 2000 to a l4-month cycle.

The Permit *Fee* at its current amount of$42.00 per rental dwelling unit and $36.00 per rooming house unit is excessive and not reasonably related to the Borough's actual expenses in the administration and enforcement of the Rental Permits Program. Private industry would inspect and administer the Rental Housing Program for an annual fee ranging from $25.00 to $35.00 per unit. John Mallon opined he would charge $32.00 per unit to inspect and administer the program, including the administrative function of actually mailing out the permit

applications, arranging inspection appointments, generating monthly computerized reports for the Borough, and keeping records. In the alternative, there is substantial evidence to show the Rental Housing Program administration and enforcement could be run at significantly less cost using outside contract inspector in the same manner as the Borough's electrical and plumbing

217 Ridlev Arms, 531 A.2d at 418 ($58,000 payment to government for performance of refuse collection services, which were being provided by the private sector for $23,000, less than half amount charged by government, was not "reasonable," and was therefore in violation of First Class Township Code); Martin Medi~, 671 A.2d 1211.

inspections. This method wou1d a1low the Borough to internally control the Renta1 Housing Program's administrative functions, whi1e operating the program for a lower fee and ensuring better accountabi1ity for costs.

Government shou1d not engage in services if the government cannot provide services at a cost and quality of similar services provided by private industry. Furthermore, it is unreasonable to use tax dollars for that purpose. The revenue generated from the Renta1 Permits Program has amounted to an unlawful special tax used to subsidize exterior Code enforcement and nuisance inspections. The Permit Fee is related to the Renta1 Permits Program inspection and certification of a rental unit's general habitability and Code compliance. The Borough's large student population has increased the demands on the BHC Department and the Borough's exterior Code Enforcement Officers. The dai1y vigilance and scrutiny needed for the exterior code enforcement, however, cannot be subsidized under the guise of the Rental Permits Program.

CONCLUSION

Plaintiffs' have met their burden. The Borough' s 1icensing fee exceeds the ach1al costs for the Rental Permits Program administration and enforcement. Bearing this in mind, we find the Borough's evidence as to due Rental Permits Program's cost is inaccurate and inflated for the years 1997 through 2000. For the year 1996, the Borough's cost in re1ation to the Renta1 Housing Program 's revenue was near the break-even point and, therefore, is not gross1y disproportional.

Accordingly, we enter the following:

ORDER

AND NOW, this 17th day of March, 2003, any and all segments of Borough of West Chester's Code, Chapter 66, Article 10, which impose any fees, taxes, or charges are hereby declared void. Further, the Borough of West Chester is hereby directed to reimburse Plaintiffs an amount equal to Plaintiffs' permit fees paid under the Ordinance No.11-1987 since 1997 With interest.

BY THE COURT: Juan R. Sanchez