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Impact Fees: A Blueprint for Frustration

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Developers and taxpayers beware of communities wrestling with budget shortfalls and dwindling state and federal contributions that are relying on "innovative" land use controls to fund capital improvements.

"Innovation" frequently comes with a hefty price in the form of exorbitant impact fees and taxes on development.

Impact fee ordinances, or IFOs, are intended to draw a direct connection between capital improvements and the increased need for services created by new development. By statute, such improvements include roads, schools and emergency services. But developers may find themselves fleeced by carelessly drafted IFOs that overstate a development's proportionate share of costs.

Taxpayers similarly suffer, since desirable commercial development and new affordable housing projects are indirectly discouraged by a speculative and often substantial additional cost of development.

As in all permitting processes, timing is everything. Despite having adopted authorizing legislation for impact fees in 1991, relatively few New Hampshire communities have enacted IFOs. However, as local budgets and infrastructures are increasingly strained, you can be certain that all community planners are exploring their options.

To avoid a poorly executed result that inhibits beneficial development and limits new construction of affordable housing, developers and taxpayers in communities contemplating an ordinance should take an active role in the public dialogue surrounding consideration of IFOs or amendments to existing IFOs.

The New Hampshire Superior Court in *Drowne v. Town of Sandown/Caparco v. Town of Danville* has demonstrated its reluctance to overturn an IFO once the ordinance has been approved by voters — even when the IFO delegates broad authority to the planning board to adjust impact fees "as needed." An appeal of the ruling is pending in the New Hampshire Supreme Court.)

This broad delegation of discretion can be dangerous because it risks sliding assessments of disproportionate fees based on potentially outdated, irrelevant or inaccurate reference data. A more carefully drafted IFO would clearly define the data and sources that determine the impact fee calculation and would require that these sources be regularly updated and policed.

In addition, a poorly drafted IFO makes the development review process appear ad hoc and discourages orderly planning. Where the fees levied exceed a development's growth-related share of capital facility costs, this increased expense is usually passed to future buyers, thereby undermining the ability to deliver affordable housing. In fact, IFOs have been attributed to pricing low- and middle-income families out of housing markets and contribute to many of the affordable housing issues receiving considerable attention in New Hampshire.

Legal uncertainties

Raising awareness of this alignment of private development and public interests — prior to the enactment of a new IFO or during the period of public discourse that should accompany an existing IFOs amendment — is essential to creating an IFO that mutually serves the needs of developers, buyers and their communities.

The state Legislature recently removed some of the uncertainties surrounding the administration of IFOs. This action should make IFOs less susceptible to legal challenge, thereby contributing to the overall attractiveness of the ordinances. Whereas previously there was confusion as to when fees should be levied, RSA 674:39 was amended to create a default standard, requiring the assessment of impact fees at the time of planning board approval and collection of the fee when the certificate of occupancy is issued.

Another source of confusion within the Subdivision Regulation Statute (RSA 674:39) concerns whether a newly enacted IFO would apply to projects that had already obtained site plan approval, but were not yet commenced or had just recently commenced development.

This too has been clarified with language stating that where a developer performs "active and substantial development or building" within the first year after subdivision or site plan approval, such development is immune from new or increased impact fees for four years.

As legal uncertainties are removed and economic conditions increasingly favor reliance on IFOs, towns and developers are at risk from poorly drafted ordinances. To promote an IFO that serves the mutual interests of developers and taxpayers, consider the following:

- Make the implementation of IFOs contingent on sound master and capital improvement planning.
- Select and identify reference data determining the fee calculation and update sources regularly.
- Exempt affordable housing.
- Exempt 55-and-over developments from school-related impact fees.
- Regionalize fees so that developers are not assessed fees by different municipalities for the same project.

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