New Hampshire Town And City

Demystifying Impact Fees

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By C. Christine Fillmore

The development of land often creates an increased need for capital improvements such as new or improved roads and intersections, water and sewer extensions, and street lighting. New Hampshire towns and cities may charge the developer for these costs in two different ways: off-site exactions and impact fees. This article looks at what impact fees are, how they work, and what has changed over the past year.

Impact Fees v. Off-Site Exactions

Before discussing impact fees, it is important to contrast them with the other method of cost-recovery. RSA 674:21, V(j) allows a municipality to charge a developer an "exaction" for off-site improvement needs determined by the planning board to be necessary for the occupancy of any portion of a development. In this context, "off-site improvements" are those improvements created by the development but located outside the boundaries of the property that is the subject of the site plan or subdivision application. Exactions may only be charged for highway, drainage, sewer, and water upgrades related to the development, and only in reasonable proportion to the benefit accruing to the development from those improvements. These exactions may be assessed whether or not a municipality has adopted an impact fee ordinance and are assessed by the planning board on a case-by-case basis.

The other, more comprehensive method for recovering these costs is for a municipality to adopt an impact fee system through their zoning ordinance under RSA 674:21, V. In this context, "impact fee" means a fee imposed on a development to help meet the needs occasioned by that development for the construction or improvement of capital facilities owned or operated by the municipality. One major difference between off-site exactions and impact fees is that impact fees may be assessed for a much wider variety of capital improvements. They are authorized for: water treatment and distribution facilities; wastewater treatment and disposal facilities; sanitary sewers; storm water, drainage and flood control facilities; municipal road systems and rights of way; municipal office facilities; public school facilities; the municipality's proportional share of capital facilities of a cooperative or regional school district; public safety facilities; solid waste collection, transfer, recycling, processing, and disposal facilities; public library facilities; and public recreational facilities (except for open space).

The fee must be assessed in proportion to the share of municipal capital improvement costs reasonably related to the capital needs created by the development and the benefits accruing to the development from those improvements. Notably, impact fees may *not* be charged for upgrading existing facilities or infrastructure unless the need for the upgrade is created by the development. RSA 674:21, V(a).

Adoption and Administration of Impact Fees

Adopting an impact fee ordinance is a formal process. First, the municipality must have enacted a capital improvements program under RSA 674:4-:7. RSA 674:21, V(b). Next, an impact fee ordinance must be passed by the legislative body (town meeting, town council or city council/board of aldermen) using the ordinary process for zoning ordinances under RSA 675:2-:4. This includes drafting by the planning board, public hearing(s), and a ballot vote by the legislative body (town meeting or city council/board of aldermen). The impact fee ordinance is generally part of a zoning ordinance. This makes sense because it goes hand in hand with the planning board's administration of subdivision and site plan review.

The actual assessment and collection of impact fees falls to the planning board. The ordinance should contain sufficient standards to guide the board in its assessment of the fees, including a methodology and specific measurements for the board to consider. The ordinance (or the planning board's regulations) may also include required procedures for the board to use when setting fees, such as whether the board must hold a public hearing

before fees are set. Obviously, the actual cost of improvements will fluctuate over time and the proportion to be assessed to each development will be different, so a "one fee fits all for all time" approach will not work. Planning boards have discretion to adjust impact fees periodically as part of their administration duties, but they cannot do so in an arbitrary or unwarranted way. Adjustments may be upheld when the board follows the direction set by the standards in the ordinance. The New Hampshire Supreme Court has spoken approvingly of variables to be considered by a planning board that are "factual," that can be "periodically updated," and that require the board to "compile and assess the underlying data." *Caparco v.Danville*, 152 N.H. 722 (2005). The ordinance may also provide for a waiver process, including criteria for the board to consider in granting a waiver. It is important to note that the waiver criteria should be in the ordinance itself rather than in the planning board's regulations. RSA 674:21, V(g).

Impact fees are *assessed* at the time the planning board approves the site plan or subdivision. When no board approval is required, or has been made before the impact fee ordinance was enacted, the impact fees are assessed before, or as a condition for, the issuance of a building permit or other appropriate permission to proceed with development. "Impact fees shall be intended to reflect the effect of development upon municipal facilities as the time of the issuance of the building permit." RSA 674:21, V(d). Once assessed, the fees are collected when the certificate of occupancy is issued. If no certificate of occupancy is required, the fees are *collected* when the development is ready for its intended use. Alternatively, the planning board and developer are free to establish an alternate, mutually acceptable schedule of payment at the time the board approves the development. In this case, the board may require the developer to post some sort of security to ensure the future payment of impact fees. RSA 674:21, V(d).

Once collected, impact fees must be accounted for separately, segregated from the municipality's general fund, and may only be spent on the order of the governing body (i.e., selectmen/town council/city council/board of aldermen). They are exempt from general requirements of the Municipal Budget Act (RSA Chapter 32) regarding limitation and expenditure of municipal funds. Importantly, impact fee revenue may be spent "solely for the capital improvements for which it was collected, or to recoup the cost of capital improvements made in anticipation of the needs which the fee was collected to meet." RSA 674:21, V(c).

Refunding Impact Fees

There is a limit on how long a municipality may hold impact fees after they are collected without using them. The impact fee ordinance must establish a "reasonable time" within which the municipality will use the funds, after which the funds must be refunded with any accrued interest. If the impact fee was calculated as a portion of a project for which the municipality was supposed to pay, the impact fees must be refunded if the municipality fails to appropriate its share of the project costs within that "reasonable time." In any case, the maximum amount of time considered to be "reasonable" is six years. RSA 674:21, V(e).

The requirement to return unused fees after no more than six years places responsibility on the municipality to keep track of the fees separately as they are collected, and review their status periodically (a process called "segregation"). Ideally, a review would take place at least once a year to prevent the municipality from wrongfully holding (and possibly spending) fees that should have been returned. A related issue is identifying who is entitled to the refund. What if the developer has gone bankrupt, or sold all the lots and moved on? If the developer cannot be found and it is not obvious who should receive the refund, the municipality may file a petition with the superior court either for declaratory judgment or a bill of interpleader. This is a type of lawsuit in which the municipality explains the facts and the background, describes their efforts to locate the developer, names everyone who may have a claim to the money, and asks the court to solve the problem. It also deposits the funds with the court at the time the petition is filed. Importantly, when the municipality files a bill of interpleader, it is entitled to collect the costs of the filing fee and its other expenses in filing the petition, so the petition should clarify those costs as well.

Recent Developments

In 2010, these three requirements (segregating impact fees, spending them only for the purpose for which they were collected, and refunding unused fees after six years) combined to create the perfect storm in the Town of Hudson. In connection with a subdivision approval in 2000, a developer was required to pay the Town a fee for improvements to an intersection. The money was placed in a separate account, but the records of expenditures did

not fully explain the purpose for which they were spent. From 2005 to 2007 (now hitting the six-year mark), the Town used the funds to pay for work to the intersection as well as other improvements to the road. The developer claimed the work was "general road maintenance" rather than improvements, and demanded a refund of the money. The Town refused.

In the ensuing lawsuit, the developer claimed the money had been spent for purposes other than those for which it was collected. The Town's records were confusing and the Court was unable to determine exactly which funds had been used for appropriate portions of the intersection improvement. Because of the "lack of adequate accounting," the Court ordered the Town to refund a portion of the money to the developer. *Clare v. Hudson*, 160 N.H. 378 (2010). The lesson from this case was that municipalities must clearly account for all funds paid by a developer for impact fees (or off-site exactions). A municipality that can demonstrate through proper records that funds were spent only for the purpose for which they were collected within the six-year time frame is less likely to be required to refund those funds after a lengthy (and expensive) court proceeding.

The New Reporting Requirement

In 2012, the legislature amended RSA 674:21, V to make the lesson of *Clare v. Hudson* part of the law by adding a new subsection (l): "No later than 60 days following the end of the fiscal year, any municipality having adopted an impact fee ordinance shall prepare a report listing all expenditures of impact fee revenue for the prior fiscal year, identifying the capital improvement project for which the fees were assessed and stating the dates upon which the fees were assessed and collected. The annual report shall enable the public to track the payment, expenditure, and status of the individually collected fees to determine whether said fees were expended, retained, or refunded."

In other words, the law now requires municipalities to track each dollar from beginning to end: why it was collected, when it was collected, when it was spent and exactly why, and at what time any unused portion was refunded to the developer. This recordkeeping has always been a good idea, but it is now legally required.

The New State Highway Provision

The other recent development involves the use of already-collected impact fees for improvements to State highways. Under RSA 674:21, V(k), enacted in 2012, impact fee revenues being held for construction or improvement of municipal roads may be spent for State highways within the municipality, but only for improvements that are related to the capital needs created by the development. These expenses may include items such as (but not limited to) traffic signals and signage, turning lanes, additional travel lanes, and guard rails. Obviously, approval is required from the State Department of Transportation for any such improvements.

The statute makes it clear, however, that municipalities are not permitted to assess impact fees going forward for improvements to State highways. This new provision simply permits municipalities to use fees they have already collected for those improvements to the extent they are related to the development. It is, in a way, an amnesty provision for municipalities that have already collected impact fees for improvements to State highways despite the fact that it was not authorized. The State is allowing municipalities to use those already-collected fees, but does not authorize fees to be assessed specifically for that purpose in the future. Municipalities may still require a developer to make improvements to a State highway without collecting an impact fee to pay for it by using their authority to require off-site improvements (the "exactions" discussed at the beginning of this article).

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