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## **Municipal & Governmental Law: Perils of the Impact Fee Ordinance**

By: **Pat Panciocco**

The authority of local government to regulate the demands of new growth varies from state to state. In New Hampshire, the legislature has provided a variety of tools to local municipalities<sup>[1]</sup> by adopting a number of enabling statutes<sup>[2]</sup>. In addition to granting towns the authority to adopt interim and longer-term growth management ordinances, municipalities also have the authority to collect broadly applied impact fees from all new development once an impact fee ordinance has been properly adopted<sup>[3]</sup>. The local planning board is also authorized under RSA 674:21(V)(j) to assess off-site improvement costs on particular developments when its occupants will specially benefit from the capital facilities for which those costs are assessed<sup>[4]</sup>.

As of November 1, 2011, the New Hampshire Office of Energy and Planning estimated that 81 of the New Hampshire's 234 towns and cities had adopted an impact fee ordinance as part of its zoning ordinance although not all actively assess impact fees. As a regulatory tool governing the use of land, an impact fee ordinance must be incorporated into local zoning after properly noticed public hearings<sup>[5]</sup>. The fees assessed under the authority of an impact fee ordinance are intended to offset the capital costs associated with providing municipal services to new residential and commercial residents, unless expressly waived by the planning board<sup>[6]</sup>. This article provides a general outline of the statutory conditions precedent to the adoption of an impact fee ordinance as well as restrictions imposed by RSA 674:21(V) on the administration and expenditure of those funds. Most of those same restrictions also apply to fees collected from developers as off-site improvement costs since RSA 674:21(V)(j) was amended in 2004.

### **Conditions Precedent to the Adoption of an Impact Fee Ordinance**

Prior to adopting an impact fee ordinance, a municipality must: (a) be growing; (b) have prepared a fairly current master plan; and (c) have adopted a capital improvements plan<sup>[7]</sup>. The master plan sets out the community's goals and priorities<sup>[8]</sup> and the capital improvement plan details costs associated with implementing the master plan's vision<sup>[9]</sup>. Together these documents act as the community's "business plan" for the future.

A properly prepared capital improvements plan prioritizes the need for each capital improvement to be constructed in the future<sup>[10]</sup> with input from town departments and related municipal agencies. The plan must also include estimated budgets for capital projects needed in the future, as well as their anticipated future operating costs<sup>[11]</sup>. However, operating costs must be paid through the general fund.

When a municipality decides to adopt an impact fee ordinance, it retains a consultant to prepare an impact fee methodology. To prepare that methodology, the consultant will necessarily rely upon the information found in the capital improvements plan regarding the facility for which fees will be collected to determine how the cost of that facility will be shared by new growth<sup>[12]</sup> and existing residents. In essence, that consultant is charged with measuring the external impacts of anticipated growth upon the community in the context of that facility, to insure existing residents do not assume the those costs.

When presented to the planning board, a well-ground consultant report aids the public's understanding of how an impact fee ordinance works in addition to explaining how both new growth and existing residents will share the cost of that facility if it is constructed. In addition, this up front time investment will help to

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minimize the burdens associated with properly administering the ordinance once the ordinance is adopted and the municipality begins collecting impact fees.

### Ordinance Administration

As detailed above, the proper implementation of an impact fee ordinance involves a substantial upfront investment in time as well as money. Consultant reports can be expensive and they must be regularly updated. In addition, once that investment is made and the ordinance has been adopted, the municipality is obligated to regularly monitor the ordinance to insure it does not run afoul of the statute's restrictions. Even when a new capital facility has been completed, the town is obligated to continue monitoring compliance with the statute to insure impact fees collected after the facility is construction are applied to any remaining balance due from new growth. In addition, once that balance is paid, the town may not collect impact fees for that facility. Overlooking these details can harm developers in addition to putting the town at risk of violating the statute.<sup>[13]</sup>

When considering the adoption of an impact fee ordinance, municipalities must remain mindful that when it has examined growth controls in the past, the Supreme Court has stated growth management must be based upon scientific studies with an eye toward eventual elimination<sup>[14]</sup>. While an impact fee ordinance is a valuable tool to alleviate certain municipal growing pains, it must be used carefully because it is not a mechanism to increase general revenue.

### Administration Pitfalls

One problem frequently encountered with the administration of an impact fee ordinance is the town's failure to insure all conditions in the statute are met before impact fees are expended. More specifically, a municipality may not expend impact fees until: (a) the voters appropriate the non-growth related share of the identified capital cost; and (b) the governing body signs an official order releasing those funds which must be applied to the new growth balance of the particular capital facility<sup>[15]</sup> for which those fees were collected. Therefore, proper administration of the town's impact fee ordinance should be assigned to a specific town official who will insure all conditions of RSA 674:21(V) have been met when those fees are released and applied. In addition, grants and other revenues received by the municipality from the State or other sources must be applied to the total capital cost of a particular facility before the growth, and non-growth related share of each project are calculated and paid. In other words, funds applied to a new capital facility must also be shared proportionally.

The real challenge associated with implementing an impact fee ordinance is convincing the local voters to appropriate their share of the capital facility needed by the town before collected impact fees begin to expire. For this reason, the legislative body's timely commitment to the construction of a needed capital facility is critical to the success of well-grounded impact fee ordinance. This is because impact fees are owned by the fee payer until the town appropriates the non-growth related share of that capital cost<sup>[16]</sup> and impact fees held for more than 6 years must be returned to the fee payer with interest.<sup>[17]</sup>

The community's understanding of how an impact fee ordinance works is also helpful in this regard because if it fails to appropriate its share of that facility in a timely manner, its up front investment in the adoption of the ordinance begins to erode as fees are returned to fee payers. This likely explains why many municipalities fail to take the necessary affirmative action required by the statute to return lapsed impact fees.

Lastly, impact fee ordinances, budgets and methodologies associated with capital facilities not yet funded by the voters should be regularly updated. This is particularly true with population projections that become dated as soon as they are published. In addition, once the voters fund the non-growth related share of a particular capital improvement and construction costs are confirmed, both shares of those costs should be narrowly tailored to those construction budgets. When towns do not tend to these finer details, they run the risk of exceeding the regulatory purpose of an impact fee ordinance, exposing themselves to allegations that its impact fees are an unauthorized tax.

Few in local government or the development community would deny growth imposes additional demands on local government. Measuring that growth and monitoring the administration of an impact fee ordinance is time consuming and costly in addition to being very complex. For this reason, towns that choose to adopt an impact fee ordinance must also consider whether the costs associated with proper oversight and administration, both of which are not chargeable to impact fees, are worth the anticipated revenue generated by fee collection, or the consequences failed oversight can bring which can be substantial. This is particularly true when a town uses an impact fee that has expired or which has not been matched with funds approved by the voters. In those cases, a town can be called upon to return those fees to the fee payer with interest.

- [1] The terms “municipality”, “town” and “local government” are used synonymously throughout this article.
- [2] See RSA 672:22, RSA 674:23 and RSA 674:21(V)(a)-(j).
- [3] RSA 674:21(V)(a)-(j).
- [4] RSA 674:21(V)(j).
- [5] RSA 675:2.
- [6] RSA 674:21(V)(j).
- [7] RSA 674:21(V)(b).
- [8] RSA 674 :2.
- [9] RSA 674 :5-8.
- [10] Id.
- [11] RSA 674 :
- [12] RSA 674:21(V)(e).
- [13] RSA 674:21(V)(a)
- [14] *Beck v. Town of Raymond*, 118 N.H. 793, 801 (1978).
- [15] RSA 674:21(V)(a)&(c).
- [16] RSA 674 :21(V)d).
- [17] RSA 674:21(V)e).

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