IMPACT FEES

I. Statutory Authorization

RSA 674:21 authorizes the establishment of impact fees as an innovative land use control.

II. Impact Fees-RSA 674:21

The legislature has given municipalities the authority per RSA 674:21 to impose impact fees as an innovative land use control (see RSA 674:21, I(m)), through the amendment of the zoning ordinance. An impact fee may not be adopted through the Town's subdivision or site plan regulations and may not be adopted through amendments to the building code.

RSA 674:21, V, defines "impact fee" to mean a fee or assessment imposed upon development, including subdivision, building construction or other land use change, in order to help meet the needs occasioned by that development for the construction or improvement of capital facilities owned or operated by a municipality.

These capital facilities include **and are limited to** the following types of improvements:

- Water treatment and distribution facilities;
- Waste water treatment and disposal facilities;
- Sanitary sewers;
- Storm water, drainage or flood control facilities;
- Public road systems and rights-of-way;
- Municipal office facilities;
- Public school facilities;
- The municipality's proportionate share of capital facilities of a cooperative or regional school district of which the municipality is a member;
- Public safety facilities;
- Solid waste collection, transfer, recycling, processing and disposal facilities;
- Public library facilities; and
- Public recreational facilities, **not including public open space.**

Questions frequently arise as to what is included within the scope of "capital facility"? Police cars, ambulances, public works trucks, school buses--none of these expenditures which might otherwise be sometimes characterized as capital equipment constitutes a "capital facility." Impact fees cannot be assessed for purposes of public open space, but improvements for recreational facilities such as the creation of ball fields and supporting structures or improvements certainly seem to fall within the scope of what constitutes a "public recreational facility."

A municipality must enact a capital improvements program pursuant to RSA 674:5-7 as a precursor to adopting an impact fee ordinance.

RSA 674:21, V(a) specifies that any impact fee shall "be a proportional share of municipal capital improvement costs which is recently related to the capital needs created by the development and to the benefits accruing to the development from the capital improvements financed by the fee. Creating of existing facilities and infrastructures, the need for which is not created by new development, shall not be paid by impact fees.

What does this mean?

In practical terms, it means that in most instances the municipality must contract with an impact fee consultant who will be able to evaluate the existing infrastructure capacity and the infrastructure needs of the municipality and then to fairly apportion the needs between impacts of future growth and the municipality's share of such impacts. In practical terms, if a municipality has a deficient school system in terms of its ability to serve the existing capacity requirements of the town's school population, it cannot saddle the cost of the existing deficiency on development. The taxpayers and town are responsible for costs created by new growth and additional impacts to the system, but they cannot be required to remedy the existing facility deficiencies. By way of example, I am aware of an impact fee consultant who did a study for a fast growing Hillsborough County municipality. The types of facilities that the consultant examined included the municipality's recreational facilities. The consultant found that the municipality's recreational

facilities were deficient at the time that the study was done and that significant expenditures would be required by the municipality to bring its facilities up to a growth service norm that would support the levying of impact fees on new growth. At that time, the municipality made a judgment that it would not assess recreational impact fees, given the existing deficiencies within the system.

Generally, development and maintenance of an impact fee methodology and the need to periodically review any data to confirm that the impact fee assessments are rationally related to the proportional share of municipal capital improvement costs that the fee seeks to collect, which are rationally related to the capital needs created by new growth and development, is a task that is generally beyond the capability of most planning boards, given their other responsibilities. What planning board wants to run the risk of having its impact fee methodology invalidated when it can delegate the responsibility for developing and updating the impact fee methodology to a professional with training and experience in this field?

The impact fee ordinance should delegate the administration of the ordinance to the planning board and should authorize the planning board to adopt, review and revise the impact fee methodology and the actual fees assessed pursuant to that methodology as is necessary while within the requirements of RSA 674:21, and New Hampshire Supreme Court case law. The problem with having either the impact fee methodology or the impact fees themselves in the zoning ordinance is that, generally, authorities other than city councils and towns operating under the Town Council form of government only revise their zoning ordinances annually at Town Meeting. Delegating the administrative oversight of the impact fee ordinance and its pertinent methodologies and fees to the planning board, the ordinance confers much more flexibility in the administration of the ordinance and allows the planning board to react quickly to changing data to address review and possible revisions to the fees and methodology in a timeframe that does not necessarily have to be in lock-step with the Town Meeting zoning ordinance amendment calendar. See generally, R.J. Moreau Companies, Inc. v. Town of Litchfield, 148 N.H. 773, 813 A.2d 527 (2002)(review and revision of impact fee schedules delegated by ordinance to the planning board subject to approval by the board of selectman).

When must impact fees be spent after which there is an obligation to return them if not spent?

RSA 674:21, V(e) specifies that the municipality state in the ordinance the reasonable time after which any portion of an impact fee which has not been encumbered or otherwise legally bound to be spent for the purpose for which it was collected must be refunded, with accrued interest. The maximum time to be considered reasonable is 6 years. What this means in practical terms is that by the time that 6 year period is reached, the municipality should have appropriated the funds to be spent for the facility for which the impact fee was collected.

Can Impact Fees Be Collected While a Growth Management Ordinance is Being Applied to the Same Project?

RSA 674:21, V(h) provides that "the adoption of a growth management limitation or moratorium by a municipality shall not affect any development with respect to which an impact fee has been paid or assessed as part of the approval for that project." This issue was addressed by the New Hampshire Supreme Court in the case of Monahan-Fortin, LLC v. Town of Hudson, 148 N.H. 769 (2002). In that case, the court ruled that once an impact fee had been assessed or paid, any subsequent adoption of a growth management ordinance could not apply to limit issuance of development permits for that project.

When the project is approved subject to impact fees, because these fees arise from the authority of the zoning ordinance, is the project subject to impact fee revisions?

RSA 674:39 was recently amended to provide at RSA 674:39, II, that impact fees adopted pursuant to RSA 674:21 and 675:2-4 are not afforded the same rights protection that other plans are afforded by RSA 674:39 for substantial completion of the improvements as shown on the plan has occurred. So called "vesting" of rights under New Hampshire law occurs via two avenues: one is codified in statute in RSA 674:39 and the other occurs in New Hampshire common law developed by decisions for the New Hampshire Supreme Court. For projects that gained substantial completion prior to this 6/7/04 amendment to RSA 674:39, it is unclear at this time whether the New Hampshire Supreme Court would find this exemption of impact fees from vested rights, once substantial completion has occurred, to be

consistent with the Court's view of common law vested rights that attach at the time that substantial completion is obtained.

What authority does the planning board have to negotiate an impact fee assessment with an applicant in the instance where the board has yet to adopt an impact fee?

The 2005 amendments to RSA 674:21,V (d) make it clear that the town has two bites at the apple to assess an impact fee. The fees shall be assessed at the time of subdivision or site plan approval; however, if no planning board approval was required or if the planning board's approval of the plan preceded the adoption or amendment of the impact fee ordinance, then impact fees are assessed at the time of or as a condition of issuance of a building permit.

So, if the Planning Board has an impact fee in the pipeline, but it hasn't been adopted yet, can the Board engage the applicant in a discussion to negotiate the assessment of an impact fee as a condition of approval? Yes, providing the applicant understands that any agreement to reach an assessment at this stage is voluntary, and the applicant has the right to hold off and have the fee assessed at the building permit issuance stage. Applicants need to know their development costs. In some instances, impact fee certainty is preferable to uncertainty. The Planning Board could offer to discuss an impact fee, with the understanding that the fees adoption is en route. The applicant and the Board could agree to a sum, and that sum could be assessed by the Board.

How does the Planning Board/Town address the collection of impact fees when the fee increases?

It depends. When a fee is assessed by the Planning Board, RSA 674:39 controls to provide a limited window of protection from subsequent changes to the fee. The four year exemption applies to those plans that qualify per RSA 674:39 (plan is recorded, active and substantial development begins within 12 months of approval), but RSA 674:39, II makes clear that the legislature did not intend to extend an exemption beyond this initial 4 year period for impact fee changes that are adopted thereafter. So, if an applicant had been paying an impact fee of $3,000 per unit for the first four years of the project, and then

comes in for a building permit in year 5, when the fee has risen to $8,000 a unit, it would appear that the $8,000 a unit fee applies. As I mentioned earlier, the NH Supreme Court may have a different notion of what vested rights mean under NH common law on facts such as these, but until then, I think the $8,000 fee would be applicable.

What if the application has been approved and recorded, but active and substantial development did not occur per the terms of the approved plan within 12 months of approval?

No ticket: no laundry. Active and substantial development must begin within 12 months of approval, otherwise, you have no exemption ticket, and must pay any subsequently adopted fee increase.

Closing Thought:

Much of the litigation that has arisen with respect to impact fees has focused on issues relating to the exercise of municipal authority and there has been little litigation that I am aware of that focuses on the methodology. At some point in time, I expect that this will be more fertile ground for examining the proportionality of the fees assessed by municipalities.

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TITLE LXIV
PLANNING AND ZONING

CHAPTER 674
LOCAL LAND USE PLANNING AND REGULATORY POWERS

Regulation of Subdivision of Land

Section 674:39

674:39 Four-Year Exemption. –

I. Every subdivision plat approved by the planning board and properly recorded in the registry of deeds and every site plan approved by the planning board and properly recorded in the registry of deeds, if recording of site plans is required by the planning board or by local regulation, shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, impact fee ordinances, and zoning ordinances adopted by any city, town, or county in which there are located unincorporated towns or unorganized places, except those regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements, for a period of 4 years after the date of approval; provided that:

(a) Active and substantial development or building has begun on the site by the owner or the owner's successor in interest in accordance with the approved subdivision plat within 12 months after the date of approval, or in accordance with the terms of the approval, and, if a bond or other security to cover the costs of roads, drains, or sewers is required in connection with such approval, such bond or other security is posted with the city, town, or county in which there are located unincorporated towns or unorganized places, at the time of commencement of such development;

(b) Development remains in full compliance with the public health regulations and ordinances specified in this section; and

(c) At the time of approval and recording, the subdivision plat or site plan conforms to the subdivision regulations, site plan review regulations, and zoning ordinances then in effect at the location of such subdivision plat or site plan.

II. Once substantial completion of the improvements as shown on the subdivision plat or site plan has occurred in compliance with the approved subdivision plat or site plan or the terms of said approval or unless otherwise stipulated by the planning board, the rights of the owner or the owner's successor in interest shall vest and no subsequent changes in subdivision regulations, site plan regulations, or zoning ordinances, except impact fees adopted pursuant to RSA 674:21 and 675:2-4, shall operate to affect such improvements.

III. The planning board may, as part of its subdivision and site plan regulations or as a condition of subdivision plat or site plan approval, specify the threshold levels of work that shall constitute the following terms, with due regard to the scope and details of a particular project:

(a) ""Substantial completion of the improvements as shown on the subdivision plat or site plan," for purposes of fulfilling paragraph II; and

(b) ""Active and substantial development or building," for the purposes of fulfilling paragraph I.

IV. Failure of a planning board to specify by regulation or as a condition of subdivision plat or site plan approval what shall constitute ""active and substantial development or building" shall entitle the subdivision plat or site plan approved by the planning board to the 4-year exemption described in paragraph I. The planning board may, for good cause, extend the 12-month period set forth in paragraph

I(a).

Source. 1983, 447:1. 1989, 266:17, 18. 1991, 331:1, 2. 1995, 43:5, eff. July 2, 1995; 291:7, 8, eff. Aug. 20, 1995. 2004, 199:1, eff. June 7, 2004.

TITLE LXIV
PLANNING AND ZONING

CHAPTER 674
LOCAL LAND USE PLANNING AND REGULATORY POWERS

Zoning

Section 674:21

674:21 Innovative Land Use Controls. –

I. Innovative land use controls may include, but are not limited to:

(a) Timing incentives.
(b) Phased development.
(c) Intensity and use incentive.
(d) Transfer of density and development rights.
(e) Planned unit development.
(f) Cluster development.
(g) Impact zoning.
(h) Performance standards.
(i) Flexible and discretionary zoning.
(j) Environmental characteristics zoning.
(k) Inclusionary zoning.
(l) Accessory dwelling unit standards.
(m) Impact fees.
(n) Village plan alternative subdivision.

II. An innovative land use control adopted under RSA 674:16 may be required when supported by the master plan and shall contain within it the standards which shall guide the person or board which administers the ordinance. An innovative land use control ordinance may provide for administration, including the granting of conditional or special use permits, by the planning board, board of selectmen, zoning board of adjustment, or such other person or board as the ordinance may designate. If the administration of the innovative provisions of the ordinance is not vested in the planning board, any proposal submitted under this section shall be reviewed by the planning board prior to final consideration by the administrator. In such a case, the planning board shall set forth its comments on the proposal in writing and the administrator shall, to the extent that the planning board's comments are not directly incorporated into its decision, set forth its findings and decisions on the planning board's comments.

III. Innovative land use controls must be adopted in accordance with RSA 675:1, II.

IV. As used in this section:

(a) ""Inclusionary zoning" means land use control regulations which provide a voluntary incentive or benefit to a property owner in order to induce the property owner to produce housing units which are affordable to persons or families of low and moderate income. Inclusionary zoning includes, but is not limited to, density bonuses, growth control exemptions, and a streamlined application process.

(b) ""Accessory dwelling unit" means a second dwelling unit, attached or detached, which is permitted by a land use control regulation to be located on the same lot, plat, site, or other division of land as the permitted principal dwelling unit.

V. As used in this section ""impact fee" means a fee or assessment imposed upon development, including subdivision, building construction or other land use change, in order to help meet the needs occasioned by that development for the construction or improvement of capital facilities owned or operated by the municipality, including and limited to water treatment and distribution facilities; wastewater treatment and disposal facilities; sanitary sewers; storm water, drainage and flood control facilities; public 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 of which the municipality is a member; public safety facilities; solid waste collection, transfer, recycling, processing and disposal facilities; public library facilities; and public recreational facilities not including public open space. No later than July 1, 1993, all impact fee ordinances shall be subject to the following:

(a) The amount of any such fee shall be a proportional share of municipal capital improvement costs which is reasonably related to the capital needs created by the development, and to the benefits accruing to the development from the capital improvements financed by the fee. Upgrading of existing facilities and infrastructures, the need for which is not created by new development, shall not be paid for by impact fees.

(b) In order for a municipality to adopt an impact fee ordinance, it must have enacted a capital improvements program pursuant to RSA 674:5-7.

(c) Any impact fee shall be accounted for separately, shall be segregated from the municipality's general fund, may be spent upon order of the municipal governing body, shall be exempt from all provisions of RSA 32 relative to limitation and expenditure of town moneys, and shall be used 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.

(d) All impact fees imposed pursuant to this section shall be assessed at the time of planning board approval of a subdivision plat or site plan. When no planning board approval is required, or has been made prior to the adoption or amendment of the impact fee ordinance, impact fees shall be assessed prior to, 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 at the time of the issuance of the building permit. Impact fees shall be collected at the time a certificate of occupancy is issued. If no certificate of occupancy is required, impact fees shall be collected when the development is ready for its intended use. Nothing in this subparagraph shall prevent the municipality and the assessed party from establishing an alternate, mutually acceptable schedule of payment of impact fees in effect at the time of subdivision plat or site plan approval by the planning board. If an alternate schedule of payment is established, municipalities may require developers to post bonds, issue letters of credit, accept liens, or otherwise provide suitable measures of security so as to guarantee future payment of the assessed impact fees.

(e) The ordinance shall establish reasonable times after which any portion of an impact fee which has not become encumbered or otherwise legally bound to be spent for the purpose for which it was collected shall be refunded, with any accrued interest. Whenever the calculation of an impact fee has been predicated upon some portion of capital improvement costs being borne by the municipality, a refund shall be made upon the failure of the legislative body to appropriate the municipality's share of the capital improvement costs within a reasonable time. The maximum time which shall be considered reasonable hereunder shall be 6 years.

(f) Unless otherwise specified in the ordinance, any decision under an impact fee ordinance may be appealed in the same manner provided by statute for appeals from the officer or board making that decision, as set forth in RSA 676:5, RSA 677:2-14, or RSA 677:15, respectively.

(g) The ordinance may also provide for a waiver process, including the criteria for the granting of such a waiver.

(h) The adoption of a growth management limitation or moratorium by a municipality shall not affect any development with respect to which an impact fee has been paid or assessed as part of the approval for that development.

(i) Neither the adoption of an impact fee ordinance, nor the failure to adopt such an ordinance, shall be deemed to affect existing authority of a planning board over subdivision or site plan review, except to the extent expressly stated in such an ordinance.

(j) The failure to adopt an impact fee ordinance shall not preclude a municipality from requiring developers to pay an exaction for the cost of off-site improvement needs determined by the planning board to be necessary for the occupancy of any portion of a development. For the purposes of this subparagraph, ""off-site improvements" means those improvements that are necessitated by a development but which are located outside the boundaries of the property that is subject to a subdivision plat or site plan approval by the planning board. Such off-site improvements shall be limited to any necessary highway, drainage, and sewer and water upgrades pertinent to that development. The amount of any such exaction shall be a proportional share of municipal improvement costs not previously assessed against other developments, which is necessitated by the development, and which is reasonably related to the benefits accruing to the development from the improvements financed by the exaction. As an alternative to paying an exaction, the developer may elect to construct the necessary improvements, subject to bonding and timing conditions as may be reasonably required by the planning board. Any exaction imposed pursuant to this section shall be assessed at the time of planning board approval of the development necessitating an off-site improvement. Whenever the calculation of an exaction for an off-site improvement has been predicated upon some portion of the cost of that improvement being borne by the municipality, a refund of any collected exaction shall be made to the payor or payor's successor in interest upon the failure of the local legislative body to appropriate the municipality's share of that cost within 6 years from the date of collection. For the purposes of this subparagraph, failure of local legislative body to appropriate such funding or to construct any necessary off-site improvement shall not operate to prohibit an otherwise approved development.

VI. (a) In this section, ""village plan alternative" means an optional land use control and subdivision regulation to provide a means of promoting a more efficient and cost effective method of land development. The village plan alternative's purpose is to encourage the preservation of open space wherever possible. The village plan alternative subdivision is meant to encourage beneficial consolidation of land development to permit the efficient layout of less costly to maintain roads, utilities, and other public and private infrastructures; to improve the ability of political subdivisions to provide more rapid and efficient delivery of public safety and school transportation services as community growth occurs; and finally, to provide owners of private property with a method for realizing the inherent development value of their real property in a manner conducive to the creation of substantial benefit to the environment and to the political subdivision's property tax base.

(b) An owner of record wishing to utilize the village plan alternative in the subdivision and development of a parcel of land, by locating the entire density permitted by the existing land use regulations of the political subdivision within which the property is located, on 20 percent or less of the entire parcel available for development, shall provide to the political subdivision within which the property is located, as a condition of approval, a recorded easement reserving the remaining land area of the entire, original lot, solely for agriculture, forestry, and conservation, or for public recreation. The recorded easement shall limit any new construction on the remainder lot to structures associated with farming operations, forest management operations, and conservation uses. Public recreational uses shall be subject to the written approval of those abutters whose property lies within the village plan alternative subdivision portion of the project at the time when such a public use is proposed.

(c) The submission and approval procedure for a village plan alternative subdivision shall be the same as that for a conventional subdivision. Existing zoning and subdivision regulations relating to emergency access, fire prevention, and public health and safety concerns including any setback requirement for wells, septic systems, or wetland requirement imposed by the department of environmental services shall apply to the developed portion of a village plan alternative subdivision, but lot size regulations and dimensional requirements having to do with frontage and setbacks measured from all new property lot lines, and lot size regulations, as well as density regulations, shall not apply.

(1) The total density of development within a village plan alternate subdivision shall not exceed

the total potential development density permitted a conventional subdivision of the entire original lot unless provisions contained within the political subdivision's land use regulations provide a basis for increasing the permitted density of development within a village plan alternative subdivision.

(2) In no case shall a political subdivision impose lesser density requirements upon a village plan alternative subdivision than the density requirements imposed on a conventional subdivision.

(d) If the total area of a proposed village plan alternative subdivision including all roadways and improvements does not exceed 20 percent of the total land area of the undeveloped lot, and if the proposed subdivision incorporates the total sum of all proposed development as permitted by local regulation on the undeveloped lot, all existing and future dimensional requirements imposed by local regulation, including lot size, shall not apply to the proposed village plan alternative subdivision.

(e) The approving authority may increase, at existing property lines, the setback to new construction within a village plan alternative subdivision by up to 2 times the distance required by current zoning or subdivision regulations, subject to the provisions of subparagraph (c).

(f) Within a village plan alternative subdivision, the exterior wall construction of buildings shall meet or exceed the requirements for fire-rated construction described by the fire prevention and building codes being enforced by the state of New Hampshire at the date and time the property owner of record files a formal application for subdivision approval with the political subdivision having jurisdiction of the project. Exterior walls and openings of new buildings shall also conform to fire protective provisions of all other building codes in force in the political subdivision. Wherever building code or fire prevention code requirements for exterior wall construction appear to be in conflict, the more stringent building or fire prevention code requirements shall apply.

Source. 1983, 447:1. 1988, 149:1, 2. 1991, 283:1, 2. 1992, 42:1. 1994, 278:1, eff. Aug. 5, 1994. 2002, 236:1, 2, eff. July 16, 2002. 2004, 71:1, 2, eff. July 6, 2004. 2004, 199:2, eff. June 1, 2005; 199:3, eff. June 7, 2004. 2005, 61:1, 2, eff. July 22, 2005.