

## Monahan-Fortin and R.J. Moreau Companies

The Supreme Court handed down two opinions this morning dealing with impact fees.

### [Monahan-Fortin Properties v. Hudson](#)

In this case, the supreme court held in favor of the town, stating properties could be subjected to both a growth management ordinance and an impact fee ordinance--in that order. Here, the court construed the meaning of RSA 674:21,V(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." (<http://www.gencourt.state.nh.us/rsa/html/lxiv/674/674-21.htm>).

The superior court took a prospective view of the statute, suggesting that because the collection of impact fees was inevitable, then they had already been assessed. Alternatively, the superior court noted that a preliminary calculation of the impact fees was included in the application to the planning board, then the fees had been assessed. The supreme court rejected both lines of thought, finding that the superior court ignored the verb tense in the statute, thus changing the statute's meaning; and that a preliminary calculation of the fee as part of the application process did not constitute actual "assessment" of the fee.

Timing is the key to the interplay between growth management and impact fee ordinances. Developments can be subjected to a growth management ordinance, and then have impact fees assessed and/or paid, but not the other way around.

There's an important detail in this case that's easy to miss: the initial posting of an proposed ordinance is what will control how it affects development applications pending before a local board, even if there are material changes to the proposed ordinance. In this case, the original growth management ordinance was posted on November 3, 1999, but exempted elderly housing. The developer's elderly housing development application should have been accepted by the planning board on November 29 (according to the superior court, it was sufficiently complete at that time). Following a hearing, on December 22 the planning board posted a revision to the proposed ordinance eliminating the elderly housing exemption. The superior court held that the subsequently posted change applied to the application pending before the board. This issue was apparently not appealed to the supreme court, but given the question's potential to dispose of this case, the supreme court could have raised the issue on its own if it had disagreed.

The second case is [R.J. Moreau Companies, Inc. v. Litchfield](#)

In this case, there were two developments that were clearly subject to the town's impact fee ordinance, and that had been fully approved by the planning board. The question revolves around a change to the ordinance, and whether or not the developments were vested against changes to the ordinance (the four-year exemption, [RSA 674:39](#), raises its head again.) The ordinance change involved a delegation of authority to the planning board to change the fee schedule included in the ordinance, rather than requiring any fee schedule change to go to town meeting. Town meeting approved this delegation of authority on March 14, 2000; the planning board subsequently revised the fee schedule, which was approved by the board of selectmen on August 28, 2000.

The first development was fully approved by the planning board on October 5, 1999. The court found that this development was immune from the changed fee schedule (for at least four years, per the statute). The second development did not get final planning board approval until August 1, 2000. The court found this immune as well, given that the ordinance amendment did not "substantively change" the impact fee schedule--it only delegated authority, which was finally exercised August 28 (the court's opinion doesn't state when the planning board posted its proposed change to the schedule, and if that action had predated the acceptance of the development application, the court's conclusion might have been different).

The town made a novel argument, suggesting that RSA 674:39 should apply only to those ordinance changes that would result in "prohibiting completion of development", but the court didn't bite.

I'm struggling to reconcile some of the language of these cases. In R.J. Moreau, the court said that "the town's impact fees are not a matter of unfettered discretion, but instead depend upon a fixed schedule based upon the living area in the developer's planned houses" and that the ordinance change "did not affect the developer's statutory reliance interest in the fee schedule existing" at the time of approval. But in Monahan-Fortin, the court said that "a preliminary estimate of an impact fee by a municipality does not constitute an assessment within the meaning of the statute, and that a municipality does not assess fees implicitly by merely receiving an application wherein fees are represented."

I think the base of the problem between these opinions rests in the statute's (RSA 674:21,V) lack of clarity when it addresses the "assessment" of impact fees, but leaves the term undefined. And if you read Monahan-Fortin, you'll see that the court refused to define it.

**Benjamin D. Frost, Senior Planner**  
NH Office of State Planning