

I. Historical Background

A. Subdivision Review

A planning board's authority to require a developer to pay the cost of off-site improvements necessitated by the development has long been considered to be inherent in a planning board's statutory authority. In *Land/Vest Properties, Inc. v. Town of Plainfield*, 117 N.H. 817 (1977), the New Hampshire Supreme Court held that the statutes enabling planning boards to review and approve subdivisions authorized planning boards to condition such approval on the payment of costs related to the upgrading of off-site improvements occasioned by the subdivision. *Land/Vest*, 117 N.H. at 820. The Court further concluded that a developer may be compelled "only to bear that portion of the cost which bears a rational nexus to the needs created by, and [special] benefits conferred upon, the subdivision." *Id.* at 823 (further citations omitted). "The proportionality test contemplates the burdens imposed upon the town either forthwith or in the demonstrably immediate future." *Id.* at 823-24 (quotations and further citations omitted).

B. Site Plan Review

In *New England Brickmaster v. Town of Salem*, 133 N.H. 655 (1990), the New Hampshire Supreme Court reviewed the permissibility of a planning board conditioning site plan approval on contribution to off-site improvements. In that case, New England Brickmaster had applied to the Salem Planning Board for site plan approval to construct two industrial buildings. The planning board approved the site plan on the condition that New England Brickmaster contribute \$39,397.51 for future off-site roadway improvements. The planning board based this requirement on the results of a traffic study commissioned by the town.

New England Brickmaster appealed the planning board's decision to the superior court, and the superior court affirmed the board's decision. The question on appeal to the Supreme Court was whether RSAs 674:43 and :44, the statutes governing site plan review, authorize municipal planning boards to condition the approval of site plans on payment for off-site improvements. As did the Court in *Land/Vest* relative to subdivisions, the Court concluded that the enabling statutes authorized planning boards to condition site plan approval on the payment of costs related to off-site improvements.

C. Impact Fee Legislation

In 1991, the New Hampshire Legislature amended RSA 674:21 to authorize municipalities to adopt ordinances relative to the collection of impact fees. An impact fee, as defined by the 1991 amendment, was:

[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.

N.H. RSA 674:21, V. The statute further provided:

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.

N.H. RSA 674:21, V(i).

D. Preempted

The New Hampshire Supreme Court had occasion to review the 1991 amendments to RSA 674:21 in the case of *Simonsen v. Town of Derry*, 145 N.H. 382 (2000). The plaintiffs in that case owned a nine-hole golf course at their campground in Derry. They sought site plan approval from the planning board to add an additional nine holes and to open the course to the public. The planning board approved the plan, contingent upon the payment of \$7,500.00 for off-site improvements alleged to be necessitated by an increase in traffic.

The plaintiffs appealed the imposition of the off-site improvement costs to the superior court. On appeal, the plaintiffs argued that since the town had not enacted an impact fee ordinance pursuant to RSA 674:21, it lacked authority to require payment for costs related to off-site improvements. The superior court entered an order in favor of the plaintiffs on that basis. The town appealed to the New Hampshire Supreme Court, arguing that RSA 674:21 was not the sole authority for conditioning approval of a site plan upon an applicant's payment for the cost of off-site improvements. The town relied upon the Court's reasoning in *New England Brickmaster*.

The Supreme Court began its analysis of the case by repeating the fundamental axiom that has been expressed in numerous decisions involving municipalities: "Municipalities have only powers that are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto." *Simonsen*, 145 N.H. at 385. (citations omitted). As a result, a municipality may not delegate to a municipal board more authority than that possessed by the municipality. *Id.* The Court further recognized that in the *New England Brickmaster* case, the Court had held that RSAs 674:43 and :44 authorized municipalities to condition site plan approval upon the payment of off-site road improvements.

The town of Derry argued that the authority to collect off-site improvements costs under *New England Brickmaster* continued to exist, even after the amendments to RSA 674:21, because the statute provided:

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.

N.H. RSA 674:21, V(i) (emphasis added). The plaintiffs argued that the amendments to RSA 674:21 relative to the imposition of impact fees were intended to supersede the authority recognized by the Court in *New England Brickmaster*. The Court found the plaintiffs' argument persuasive, and held that RSA 674:21, V(i) did not preserve the existing authority of a planning board under RSA 674:44 to condition site plan approval on the payment of off-site improvements costs. In so holding, the Court reasoned that the comprehensive nature of RSA 674:21, V reflected a legislative intent to preempt the common law rule established in *New England Brickmaster*. In order for a municipality to charge fees related to off-site improvements, it must adopt an impact fee ordinance. The Court did note, however, that RSA 674:21 preserved a planning board's authority to impose conditions on site plan or subdivision approval requiring expenditures to improve some aspect of the applicant's own property.

Following *Simonsen*, attempts were made to legislatively restore the planning board's authority to condition site plan and subdivision approval on the payment of costs for off-site improvements. For example, during the 2003 legislative session, Representatives Bruno, Hallyburton and Dokmo introduced House Bill 531 which would have amended RSA 674:21, V(i) as follows:

(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. *The planning board shall, in the course of site plan or subdivision review, have the authority to impose a requirement that a developer, as a condition of approval of such subdivision or site plan proposal, be responsible for the payment of the cost of such developer's proportional share of any off-site improvements that the board determines are necessitate by the development proposal. Such authority shall not be affected by the adoption of or failure to adopt an impact fee ordinance as provided herein. For purposes of this subparagraph "off-site improvements" means an exaction imposed to meet capital needs occasioned by a particular application outside the development site.*

(New language in italics.) House Bill 531 was passed by the House in March, 2003, but killed in the Senate in May.

The 2003 legislature did agree to establish a committee to study a planning board's authority to require off-site improvements (along with vesting of development rights discussed elsewhere in these materials). Senate Bill 157, which called for the study committee, was passed and became law at Chapter 179 of the 2003 legislative session. The study committee, made up of three members of the House and three members of the Senate, was charged with studying "the planning board's authority to require

off-site improvements in light of the New Hampshire [S]upreme [C]ourt decision in *Simonsen v. Derry* issued November 15, 2000.” 2003 N.H. Laws 179:3.

The results of the study committee’s work were incorporated into Senate Bill 414, introduced during the 2004 legislative session. In addition to the members of the study committee, language was drafted and submitted by such lobbying groups as the Office of Energy and Planning, the Home Builders & Remodelers Association of New Hampshire, the Associated General Contractors of New Hampshire and the New Hampshire Municipal Association.

II. Off-Site Improvement Authority Restored

Senate Bill 414 became law at Chapter 199 of the 2004 legislative session. Section 3 relative to off-site exactions became effective June 7, 2004. It reads as follows:

(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 above language is codified at RSA 674:21, V(j).

An important element of the new law is that an exaction may only be collected for highway, drainage, sewer and water improvements related to the development. Off-site exactions may not be collected for a development’s share of other kinds of capital improvements (such as schools, municipal buildings, solid waste facilities, recreational facilities, etc.). An impact fee ordinance must be enacted for such purposes.

Echoing the Supreme Court’s holding in *Land/Vest*, the new law also requires:

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.

N.H. RSA 674:21, V(j). While the statute requires the exaction to be assessed at the time of planning board approval, the developer does have the option of constructing the necessary improvements him/herself, "subject to bonding and timing conditions as may be reasonably required by the planning board." *Id.*

Finally, if an exaction collected from a developer is to be used in conjunction with municipal funds to cover the cost of an off-site improvement, the amount of the exaction must be refunded to the developer if the municipal share of the off-site improvement cost is not appropriated by the local legislative body within six years of the date of collection. This, of course, is the same time limit imposed upon municipalities to spend money collected pursuant to impact fee ordinances. The failure of the local legislative body to appropriate the municipality's share of off-site improvement costs "shall not operate to prohibit an otherwise approved development." *Id.*

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