

A. Clare v. Town of Hudson, 160 N.H. 378 (2010)

Michael Clare was the trustee of the Horizon Realty Trust. *160 N.H. at 379*. The Trust, together with other developers, sought to develop a subdivision in Hudson called Thurston's Landing. *Id.* The Hudson Planning Board approved the "West" portion of the subdivision, upon condition of the payment of an \$81,705 performance bond for improvements to an intersection at Bush Hill Road. *Id.* The Trust paid the full amount of the performance bond on September 8, 2000, and this was placed in a separate Town account. *Id.*

In 2005, the Town engineer found that the sight distance along Bush Hill Road from the intersection was not adequate and proposed improvements to the intersection to address this issue. *Id.* Part of these improvements included smoothing down the right of way area and raising Bush Hill Road at a low point. *Id.* The engineer noted that the funding for these improvements would come from the Thurston performance bond funds and the Board of Selectmen approved the proposal. *Id.* At the time of the Selectmen's approval, the Selectmen further noted that the Town Highway Department would be repaving that same area, as part of a Town-wide repaving project, and that the work to raise the roadway would be done in conjunction with the repaving. *Id.*

In 2006, Clare asked about that status of the trust's performance bond and he was informed that the bond was going to be used for improvements to the intersection and that the work would begin that year and be completed in the spring of 2007. *Id.*

The Bush Hill improvements were done in conjunction with the town-wide repaving work, which was performed by Brox Industries. *Id.* The Town used the full amount of the Trust's performance bond (\$89,153.95 with accrued interest) to pay a portion of the \$251,686.55 bill for the work done to Bush Hill Road. *Id. at 380.* Brox's records showed that the work performed on Bush Hill Road consisted of reclaiming and grading the roadway, at a cost of \$55,014.06, and the placement of the binder on the roadway at a cost of \$196,672.49. *Id.* The work was completed in July 2007 and the payment to Brox from the Trust's performance bond account was dated August 2007. *Id.*

For a second time, Clare inquired about the Trust's performance bond on the basis that six years had passed since the posting of the bond and it did not appear that the bond was needed for any road improvement given that the Town had just repaved Bush Hill Road as part of the town-wide repaving project. *Id.* The Town responded that the bond had been spent for improvements to Bush Hill Road that were completed in July 2007 and which had been encumbered in February 2005 for such improvements. *Id.* Clare contested the use of the performance bond for the repaving project and applied to the Planning Board for the release of the performance bond. *Id. at 381.* Upon denial by the Town, Clare ultimately appealed to the superior court, which upheld the Town's actions. *Id.* Clare appealed to the N.H. Supreme Court.

Clare argued that the Town violated the following provisions in the impact fee statute:

(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.

(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, ... 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.

The Town argued that the repaving project resulted in the desired improvement of the sight distance along Bush Hill Road and that the Trust's performance bond was therefore properly allocated. However, while the Town expended a total of \$116,582.59 for work on the Bush Hill Road and intersection, the Town's records

showed that only \$75,437.05 of that amount was paid to Brox for the work done on Bush Hill Road and at the intersection. *Id.* at 384. As such, the Town's own accounting showed that \$13,716.90 from the Thurston performance bond account was improperly allocated to Brox for the Bush Hill Road work, given that Brox performed only \$75,437.05 worth of work on Bush Hill Road. *Id.* The Town argued on appeal that this accounting allocation error with regard to the work Brox specifically performed was irrelevant to the issue raised by Clare since the Town itself did expend much more than the \$89,153.95 in the Thurston performance bond account for improvements to Bush Hill Road and the intersection. *Id.* at 384.

The Court focused upon the language of RSA 674:21, V(c) which "requires that '[a]ny impact fee shall be accounted for separately, shall be segregated from the municipality's general fund ... and shall be used solely for the capital improvements for which it was collected." *Id.* at 585. Based upon this language, together with "the requirement in RSA 674:21, V(a) that the impact fee not be used for construction or improvements not occasioned by the development," the Court held that "the legislature has established that towns are not entitled to collect and expend impact fees for purposes other than those for which they were collected." *Id.* (*emphasis added*). The Court further noted that based upon the language in the statute requiring that impact fees be segregated from the municipality's general fund, it is "clear that the impact fee funds and Town funds are not fungible." *Id.* Accordingly, the Court concluded that: "[i]n view of these explicit statutory requirements, ... the Town was not authorized to pay the full \$89,153.95 from the Bush Hill Road account to Brox Industries, when only \$75,437.05 was actually attributable to the work for which the impact fee was collected." *Id.*

Notably, however, the Court agreed "with the trial court and the planning board that the reclamation and paving work is properly included within capital improvements for which the bond fund was collected." *Id.* at 585-586 (*internal quotations and brackets omitted*).

The *Clare v. Hudson* decision reminds municipalities to carefully separate out impact fees from general accounting and to be specific in accounting for, and dispersing, impact fees collected. A helpful tip which municipalities should keep in mind is that until the impact fees are encumbered, the fees continue to belong to the developer, not the municipality.

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