

# NEW ENGLAND

## UPDATE

### Impact Fees: Fair Fees or Sneaky Taxes?

Impact fees — the real estate transfer or permitting fees used by many towns to fund development-related and other expenses — have been a concern to the building industry since their use began in the 1970s. However, what was a back-burner issue for the construction industry only five years ago has lately emerged as a prime regulatory and financial issue, both nationally and in New England.

In Massachusetts, the state Home Builders Association (HBA) stands ready to do legislative and perhaps legal battle with two towns and all of Cape Cod over existing and proposed real estate transfer fees. In Connecticut, the HBA is challenging the state's impact fee mechanism, and several developers are suing towns over the issue. And at the National Association of Home Builders (NAHB), virtually no regulatory issue commands more attention.

"Two years ago," says Bob McNamara of the NAHB's state and local government affairs department, "impact fees were just one of several things I attended to. Now I'm almost overwhelmed with impact fee questions. Some days it seems that's all I do."



**Why the fuss?** Impact fees first emerged twenty years ago, when California's Proposition 13, which limited property tax increases to the inflation rate, forced towns to find new ways to raise money to pay for extra school space, water and sewer treatment expansions, and other development-related expenses. As other states experienced similar economic strains, the use of impact fees spread nationwide.

By the late 1980s the building industry had grudgingly accepted that impact and real estate transfer fees provided a logical way to pay for infrastructure needs created by new development. Recently, however, some towns have begun using the fees for broader needs, such as community recreational facilities or the purchase of open space. That expansion in use, along with a key 1994 Supreme Court decision calling it into question, is spurring

the building industry's present reevaluation of impact fees. To help preserve open space in the face of development, some New England towns have turned to using impact fees to finance the purchase of open space — a practice that has ignited debate between developers and towns.

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**Much ado in Mass.** Nowhere is this more true than in Massachusetts, where the Massachusetts HBA, along with other real estate and building associations, is challenging both established and newly proposed real estate transfer fees dedicated to the purchase of open space

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on Cape Cod, Nantucket, and Martha's Vineyard. Last November, voters in Barnstable County (Cape Cod) approved a referendum calling for the establishment of a real estate transfer fee to fund a land bank on the Cape. If approved by the state legislature and Governor Weld, the fee will levy a 1% fee on every real estate sale. (The first \$100,000 and any money in excess of \$1,000,000 is exempt.) Thus a property selling for \$150,000 would send 1% of \$50,000, or \$500, to the county land-bank fund, most of which would be redistributed for town-directed purchases of open space.

The Massachusetts HBA opposes this proposed fee as well as similar existing land-bank fees in Martha's Vineyard and Nantucket. "These fees cross the bounds of fairness," says the HBA's Bill Habib. "They're asking the few to pay for something enjoyed by all. And there's no sufficient connection between the sale and the use of the money."

This last issue is a key point in the national debate over impact fees. In the 1994 case *Dolan v. City of Tigard*, the U.S. Supreme Court ruled that money from an impact or other development fee must be used to meet needs created in a fairly direct manner by the development paying the fee. That basic principle has since become a litmus test in legislatures and courts weighing impact-fee questions. And while the land-bank fees in Massachusetts may dodge this test in court (since courts treat real-estate transfer fees somewhat differently than they do impact fees on new development or subdivisions), the Massachusetts HBA hopes that it

can convince the legislature to force towns to follow similar principles in related legislation.

Meanwhile, the Connecticut HBA is watching closely as several builders challenge town statutes that require developers



The big question: Do fees pay for actual development costs? Or are they being used to control growth or fund other projects?

subdividing land to give the town a certain percentage of the land or money of equal value. The state's authorizing legislation (crafted before the Dolan decision) authorizes a 10% fee, but is rather vague on what the land or money should be used for.

"On the face of it," says Connecticut HBA legal counsel Bill Either, "the fees may seem fair. But this is a law that lets you take 10% of the land from the developer of, say, a senior housing center to create a kid's playground? Is that fair? That's what's being challenged."

Part of the problem in

Massachusetts and Connecticut may be the lack of impact-fee legislation in those states consistent with the Dolan decision and other case law. In Vermont, New Hampshire, Maine, and Rhode Island, which already have such legislation, impact fees create less friction. Even in these states, of course, building associations are watching to make sure fees stay in line with the Dolan case and state law. The Maine HBA, for instance, is watching closely as the town of Standish debates whether to levy impact fees on new building permits. The town last year dropped (partly in response to a suit by the HBA) a growth-control ordinance that limited building permits. The HBA is concerned that the proposed impact fee is an attempt to control growth rather than to pay for its costs. The HBA's Kendall Buck says the association intends to hold the town responsible for proving that any fees it collects are used to pay costs caused directly by the developments in question.

In general, however, it appears that the more sensible, straightforward impact-fee legislation in Maine, Vermont, Rhode Island, and New Hampshire has reduced conflicts over such fees.

As the Rhode Island Building Association's Ross Dagata puts it, "Most of the impact fees are pretty fair. We look at it as a cost of doing business."

The Vermont HBA's Kevin Dorn agrees. "I don't question the motives of the towns levying impact fees. If their fees are reasonable, great. If they're not, we want to work with them to make them so. The law calls for development to pay its fair share, but no more. We're willing to do that." ■

## Straw-Bale Adventure: A Stick-Builder's Story

When cabinetmaker and builder Lawrence "Laurie" Smith set out to build his first straw-bale house, he made sure it was one he was going to live in. "I figured it was a lot better to have myself be a guinea pig than a client."

That was over a year ago, and Smith is now completely sold on the method — and finds himself lined up to build two or three more for clients as well. He didn't even get to completely finish his own place before some friends convinced him to build one for them.

"I've done houses a lot of ways," says Smith. "But I am just incredibly impressed with this."

Smith first learned of straw bale houses about five years ago from a *National Geographic* story. He began talking to others who had built straw-bale houses and researching moisture and degradation issues. The more he learned, the more convinced he became that it's a sound system.

By 1995, he was ready to put straw bales to the test. He designed a large (2,700 square feet), three-story house with a fairly conventional R-60 roof; R-50 walls consisting of 16 inches of straw sandwiched between two 2-inch-thick layers of stucco; and solar domestic hot water and hydronic heating systems. He designed a pole-barn structure to carry the load in the tall walls. (In the two-story house he's building now, he let the bales carry the load.) Then he set to work.

"There's a definite learning curve the first time," he says.

"Learning how to handle the bales and trim the straw, what needs support and what doesn't, how to keep things plumb and straight. This one now is going up twice as fast as the first one I built.

"But I actually like the learning curve. Stick building is a pretty mature industry, which makes it efficient. But with this you get to

trim won't suffer moisture problems. To discourage moisture infiltration from indoors, he ventilates the house well, uses vapor barrier paint on the insides of exterior walls, and uses less porous stucco on the inside walls than on the outside.

As for the bottom line, Smith says he built his own house — complete with superinsulation,



Lawrence Smith used straw bales to construct this 2,000-square-foot house for himself. "I've done houses a lot of ways," says Smith. "But I am incredibly impressed with this approach."



learn a lot, and everyone is always sharing information — that 'Look at this!' that's so much fun. You feel an excitement you don't get so often anymore with traditional building."

Smith also likes the bale walls' deep windows, soft edges, and sound-deadening qualities. As for moisture, he believes that a straw bale house with good stucco work, a wide overhang (he uses 2-foot eaves), and well-installed

the solar heating panels and hydronic system, a lot of stucco work, and custom-stained concrete floors — for around \$60 a square foot, including his own labor charged at his usual contractor's rate. "I can't say you save tons of money," he says. "But you do get a custom superinsulated house for about the same cost you'd pay for a noncustom house with standard insulation." ■



## Latest on the Law

### R.I. builders split on workers comp

Rhode Island's builders are divided on whether to support a bill in that state's legislature to require mandatory workers compensation, according to a survey conducted by the Rhode Island Builders Association and reported in RIBA's December 1996 newsletter. Of 321 RIBA members responding to the survey, 160 favored the legislation and 161 opposed it. Accordingly, RIBA's board voted to take no position on the bill, which was defeated in the legislature in 1996 but is being resubmitted this year.

Under Rhode Island's current workers comp law, only companies with three or more employees must carry comp insurance. The new bill would require all companies to do so.

### Vt. debates demand-side management energy policy

Builders, regulators, and utilities are debating a mandatory "demand-side management" program proposed by Vermont's Department of Public Safety (DPS). The program would require new homes to meet a variety of energy-efficiency standards before hooking up to the power grid. The Vermont Home Builders Association opposes the proposal and is working to get it set aside or modified to reduce its effect on builders. The HBA objects because the proposed program would add several fees (some of them refundable), such as a \$350 "energy assessment fee" that would fund an energy audit of blueprints and finished construction, to the cost of

building a house. The HBA argues such fees will impose needless extra costs on builders in a state where most homes are already built to high standards. The association also objects that the program's requirements would be largely designed by the DPS without input from builders.

As of this writing the HBA, DPS, utilities, and other interested parties were discussing whether the DPS program or some other alternative might best create sensible energy-efficient building standards for the state. To put in your two cents or for more information, contact Kevin Dorn at the Vermont HBA (802/879-7766).

### N.Y. group proposes wetland bank

A New York group of developers has proposed building a 200-acre wetland in the state's far northwestern corner to use as a "bank" with which to mitigate wetlands lost through development.

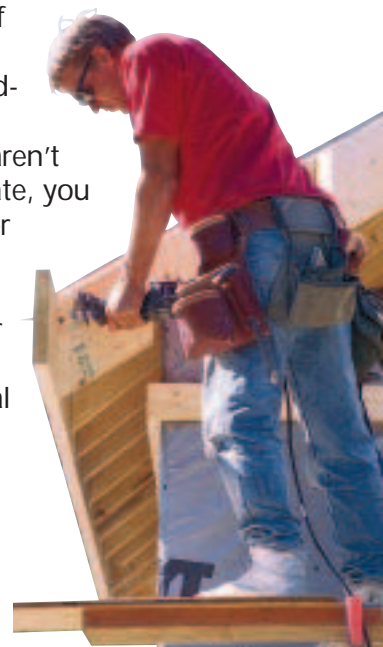
Developers could buy into the wetland and pay for the right to claim part of it as a replacement for wetlands they develop elsewhere. Such wetland banks, still controversial, have been proposed in several spots around the country (and used in a few) in recent years as a way to meet the federal government's "no net loss of wetlands" policy and still allow development.

While the idea of a wetland bank works fine in theory — create a wetland here to replace one developed there — experts disagree on whether created wetlands can adequately perform all the vital ecological functions of natural wetlands. ■

## Safety Glasses May Not Be So Safe

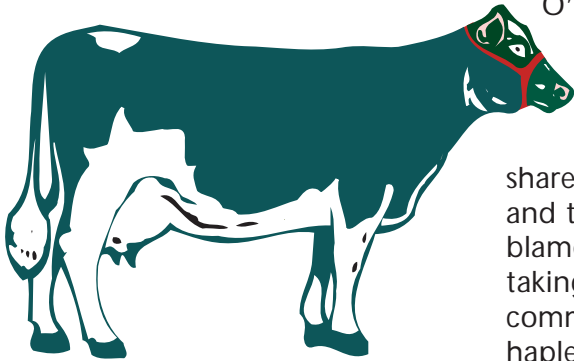
Unless they're made of polycarbonate plastic, those "safety lenses" in your prescription glasses or sunglasses may not be so safe, according to some vigorous testing done recently by Dr. Paul F. Vinger of Tufts Medical School. Vinger zinged dozens of pairs of prescription eyeglasses with baseballs, tennis balls, lacrosse balls, golf balls, air gun pellets, and other projectiles, and found that most lenses meeting government standards as safe failed to stand up to these fairly common hazards. Only polycarbonate lenses — which, because they're more expensive than most other lenses, account for only about 20% of prescription lenses and probably a far smaller proportion of sunglass lenses — resisted the onslaught.

For those who depend on ordinary prescription sunglasses with lenses labeled as "safety" or "shatterproof," this should be disquieting news. Most carpenters and other construction workers seeking eye protection behind ordinary shades or eyeglasses are probably leaving their eyes at risk. Most goggles or wraparounds made specifically for eye protection, on the other hand, provide adequate protection. So if you're presently hiding behind lenses that aren't polycarbonate, you should either upgrade to polycarbonate lenses or begin using the industrial models. ■



## O'Leary's Cow a Scapegoat? Sleuth Questions Cause of Great Chicago Fire

Miss O'Leary's cow, long blamed for kicking over a lantern to start the fire that destroyed much of Chicago in 1871, was quite likely given a bum rap,



according to an article written by Chicago title lawyer and amateur historian Dick Bales for a recent issue of the Illinois State Historical Society's journal. After reviewing newly available historical documents, Bales concluded that the cow was probably made a scapegoat — or scapecow — by neighbor Daniel "Peg Leg" Sullivan after Sullivan accidentally started the fire himself.

According to news reports, historian Bales created this theory after carefully examining over 1,000 pages of building records that have been previ-

ously unavailable to researchers and using those records to construct a detailed map of the O'Leary neighborhood. Bales's study of the map convinced him that Sullivan, who claimed he saw the burning barn from his house and then ran (on his wooden leg) to the barn to rescue animals as the fire spread, could not have done so because several buildings blocked the view between his house and

O'Leary's. Instead, Bales speculates, Sullivan probably accidentally started the fire himself when he went to feed his own cow, which shared the barn with O'Leary's, and then in a weak moment blamed O'Leary's cow instead of taking the heat himself. No comment from either cow or the hapless Mr. Sullivan. But Bales's theory that the fire was started by something other than bovine intervention will doubtless reinvigorate the long-running investigation into the infamous fire. ■

### Worth Noting: Events and Resources

From March 12 to 15, in Cromwell, Ct., the Northeast Sustainable Energy Association (NESEA) will present a program on "Building Energy: Ensuring a Sustainable Future." Conference highlights include half- and full-

day workshops on ecological landscaping and wastewater treatment; air sealing, pressure testing, and infrared scanning; advanced residential heating systems; small-house design; and photovoltaics. The program also features dozens of 90-minute seminars and plenaries on building sustainable communities and how builders can help ensure a sustainable future. You may attend all or any part of the conference. For information, call NESEA at 413/774-6051.

Connecticut's "Premium Adjustment Program for Workers Compensation" offers contractors who pay at least 50% of their workers comp premiums for workers with construction classification, but who have good safety records, a way to reduce the payroll amounts on which their premiums are calculated. The program is meant to reduce the "penalty" paid by contractors who pay their skilled workers more than the state's average construction wage of \$18.01 an hour. Contractors get credit toward their premiums starting at 5% for the \$18.01 wage and increasing up to 25% of their premiums for hourly wages of \$38.01 or higher. For information, contact your insurance agent or broker, or Kim DiMatteo of A.A. DiMatteo Insurance Service Center (a private firm) at 203/268-1576. ■