

BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY

ORDINANCE No. 20-18

AN ORDINANCE AMENDING CHAPTER 30, "ZONING", SECTION 19 ENTITLED, "AFFORDABLE HOUSING DEVELOPMENT FEE" OF THE BOROUGH CODE BY REPEALING AND REPLACING EXISTING SECTIONS IN THEIR ENTIRETY.

Chapter 30, Section 19 of the Borough Code entitled "Affordable Housing Development Fee" is hereby amended as follows:

SECTION I. Existing Sections of Chapter 30, Section 19 entitled "Affordable Housing Development Fee" are hereby repealed and replaced in their entirety with the following new Sections 30-19.1 through 30-19.10 to be entitled "Affordable Housing Development Fees" which shall read as follows:

30-19. AFFORDABLE HOUSING DEVELOPMENT FEES

30-19.1 Purpose

- a) In *Holmdel Builder's Association v. Holmdel Borough*, 121 N.J. 550 (1990), the New Jersey Supreme Court determined that mandatory development fees are authorized by the Fair Housing Act of 1985 (the Act), N.J.S.A. 52:27D-301 et seq., and the State Constitution, subject to the Council on Affordable Housing's (COAH's) adoption of rules.
- b) Pursuant to P.L.2008, c.46 section 8 (C. 52:27D-329.2) and the Statewide Non-Residential Development Fee Act (C. 40:55D-8.1 through 8.7), COAH is authorized to adopt and promulgate regulations necessary for the establishment, implementation, review, monitoring and enforcement of municipal affordable housing trust funds and corresponding spending plans. Municipalities that are under the jurisdiction of the Council or court of competent jurisdiction and have a Court approved spending plan may retain fees collected from non-residential development.
- c) This ordinance establishes standards for the collection, maintenance, and expenditure of development fees pursuant to COAH's regulations and in accordance P.L.2008, C.46, Sections 8 and 32-38. Fees collected pursuant to this ordinance shall be used for the sole purpose of providing low- and moderate-income housing. This ordinance shall be interpreted within the framework of COAH's rules on development fees, codified at N.J.A.C. 5:93-8.

30-19.2 Basic requirements

- a) This ordinance shall not be effective until approved by the Court pursuant to N.J.A.C. 5:93-8.1(b). Nothing herein shall impact that currently the Borough has a development fee ordinance previously approved by COAH and this ordinance, upon approval, shall supersede the development fee ordinance approved by COAH.
- b) The Borough of Englewood Cliffs shall not spend development fees until the Court has approved a plan for spending such fees in conformance with N.J.A.C. 5:93-8.9. Nothing

herein shall impact that currently the Borough has a Spending Plan previously approved by COAH and, upon approval by the Court of a new Spending Plan, that newly approved Spending Plan shall supersede the Spending Plan previously approved by COAH.

30-19.3 Definitions

- a) The following terms, as used in this ordinance, shall have the following meanings:
- i. *“Affordable housing development”* means a development included in the Housing Element and Fair Share Plan, and includes, but is not limited to, an inclusionary development, a municipal construction project or a 100 percent affordable development.
 - ii. *“Court”* or *“Court approved entity”* means the entity that has primary jurisdiction for the administration of housing obligations in accordance with sound regional planning consideration in the State pursuant to the Supreme Court decision issued in Mount Laurel IV on March 10, 2015.
 - iii. *“Development fee”* means money paid by a developer for the improvement of property as permitted in N.J.A.C. 5:93-8.
 - iv. *“Developer”* means the legal or beneficial owner or owners of a lot or of any land proposed to be included in a proposed development, including the holder of an option or contract to purchase, or other person having an enforceable proprietary interest in such land.
 - v. *“Equalized assessed value”* means the assessed value of a property divided by the current average ratio of assessed to true value for the municipality in which the property is situated, as determined in accordance with sections 1, 5, and 6 of P.L.1973, c.123 (C.54:1-35a through C.54:1-35c).
 - vi. *“Green building strategies”* means those strategies that minimize the impact of development on the environment, and enhance the health, safety and well-being of residents by producing durable, low-maintenance, resource-efficient housing while making optimum use of existing infrastructure and community services.

30-19.4 Residential Development Fees

- a) Imposed fees
- i. Within all zoning district(s), residential developers, except for developers of the types of development specifically exempted below, shall pay a fee of one and a half (1.5) percent of the equalized assessed value for residential development provided no increased density is permitted.
 - ii. When an increase in residential density pursuant to N.J.S.A. 40:55D-70d(5) (known as a "d" variance) has been permitted, developers may be required to pay a development fee of six (6) percent of the equalized assessed value for each additional unit that may be realized. However, if the zoning on a site has changed

during the two-year period preceding the filing of such a variance application, the base density for the purposes of calculating the bonus development fee shall be the highest density permitted by right during the two-year period preceding the filing of the variance application.

Example: If an approval allows four units to be constructed on a site that was zoned for two units, the fees could equal one and a half percent of the equalized assessed value on the first two units; and the specified higher percentage up to six percent of the equalized assessed value for the two additional units, provided zoning on the site has not changed during the two-year period preceding the filing of such a variance application.

- b) Eligible exactions, ineligible exactions and exemptions for residential development
 - i. Affordable housing developments, developments where the developer is providing for the construction of affordable units elsewhere in the municipality, and developments where the developer has made a payment in lieu of on-site construction of affordable units shall be exempt from development fees.
 - ii. Developments that have received preliminary or final site plan approval prior to the adoption of a municipal development fee ordinance shall be exempt from development fees, unless the developer seeks a substantial change in the approval. Where a site plan approval does not apply, a zoning and/or building permit shall be synonymous with preliminary or final site plan approval for this purpose. The fee percentage shall be vested on the date that the building permit is issued.
 - iii. Development fees shall be imposed and collected when an existing structure undergoes a change to a more intense use, is demolished and replaced, or is expanded, if the expansion is not otherwise exempt from the development fee requirement. The development fee shall be calculated on the increase in the equalized assessed value of the improved structure.
 - iv. Developers of residential structures demolished and replaced as a result of a fire, flood or natural disaster shall be exempt from paying a development fee.

30-19.5 Non-Residential Development Fees

- a) Imposed fees
 - i. Within all zoning districts, non-residential developers, except for developers of the types of development specifically exempted, shall pay a fee equal to two and one-half (2.5) percent of the equalized assessed value of the land and improvements, for all new non-residential construction on an unimproved lot or lots.
 - ii. Non-residential developers, except for developers of the types of development specifically exempted, shall also pay a fee equal to two and one-half (2.5) percent of the increase in equalized assessed value resulting from any additions to existing structures to be used for non-residential purposes.

- iii. Development fees shall be imposed and collected when an existing structure is demolished and replaced. The development fee of two and one-half (2.5) percent shall be calculated on the difference between the equalized assessed value of the pre-existing land and improvement and the equalized assessed value of the newly improved structure, i.e. land and improvement, at the time final certificate of occupancy is issued. If the calculation required under this section results in a negative number, the non-residential development fee shall be zero.

As to any non-residential development, in the event of any conflict with the requirements of the ordinance previously approved by COAH, this ordinance and the Non-residential Development Fee Act ("NRDFA"), the NRDFA shall control.

b) Eligible exactions, ineligible exactions and exemptions for non-residential development

- i. The non-residential portion of a mixed-use inclusionary or market rate development shall be subject to the two and a half (2.5) percent development fee, unless otherwise exempted below.
- iii. Non-residential developments shall be exempt from the payment of nonresidential development fees in accordance with the exemptions required pursuant to P.L.2008, c.46, as specified in the Form N-RDF "State of New Jersey Non-Residential Development Certification/Exemption" Form. Any exemption claimed by a developer shall be substantiated by that developer.
- iv. A developer of a non-residential development exempted from the nonresidential development fee pursuant to P.L.2008, c.46 shall be subject to it at such time the basis for the exemption no longer applies, and shall make the payment of the non-residential development fee, in that event, within three years after that event or after the issuance of the final certificate of occupancy of the non-residential development, whichever is later.
- v. If a property which was exempted from the collection of a non-residential development fee thereafter ceases to be exempt from property taxation, the owner of the property shall remit the fees required pursuant to this section within 45 days of the termination of the property tax exemption. Unpaid nonresidential development fees under these circumstances may be enforceable by the Borough of Englewood Cliffs as a lien against the real property of the owner.

30-19.6 Collection Procedures

- a) Upon the granting of a preliminary, final or other applicable approval, for a development, the applicable approving authority shall direct its staff to notify the zoning officer and other construction official responsible for coordinating with the State Construction Office for the issuance of a building permit.
- b) For non-residential developments only, the developer shall also be provided with a copy of Form N-RDF "State of New Jersey Non-Residential Development Certification/Exemption" to be completed as per the instructions provided. The developer of a non-residential development shall complete Form N-RDF as per the instructions

provided. The construction official shall verify the information submitted by the non-residential developer as per the instructions provided in the Form N-RDF. The Tax assessor shall verify exemptions and prepare estimated and final assessments as per the instructions provided in Form N-RDF.

- c) The construction official responsible for the issuance of a building permit shall notify the local tax assessor of the issuance of the first building permit for a development which is subject to a development fee.
- d) Within ninety (90) days of receipt of that notice, the municipal tax assessor, based on the plans filed, shall provide an estimate of the equalized assessed value of the development.
- e) The construction official responsible for the issuance of a final certificate of occupancy notifies the local assessor of any and all requests for the scheduling of a final inspection on property which is subject to a development fee.
- f) Within ten (10) business days of a request for the scheduling of a final inspection, the municipal assessor shall confirm or modify the previously estimated equalized assessed value of the improvements of the development; calculate the development fee; and thereafter notify the developer of the amount of the fee.
- g) Should the Borough of Englewood Cliffs fail to determine or notify the developer of the amount of the development fee within ten (10) business days of the request for final inspection, the developer may estimate the amount due and pay that estimated amount consistent with the dispute process set forth in subsection b. of section 37 of P.L.2008, c.46 (C.40:55D-8.6).
- h) Fifty percent of the development fee shall be collected at the time of issuance of the building permit. The remaining portion shall be collected at the issuance of the certificate of occupancy. The developer shall be responsible paying the difference between the fee calculated at building permit and that determined at issuance of certificate of occupancy.
- i) Appeal of development fees
 - i. A developer may challenge residential development fees imposed by filing a challenge with the County Board of Taxation. Pending a review and determination by the Board, collected fees shall be placed in an interest bearing escrow account by the Borough of Englewood Cliffs. Appeals from a determination of the Board may be made to the tax court in accordance with the provisions of the State Tax Uniform Procedure Law, R.S.54:48-1 et seq., within ninety (90) days after the date of such determination. Interest earned on amounts escrowed shall be credited to the prevailing party.
 - ii. A developer may challenge non-residential development fees imposed by filing a challenge with the Director of the Division of Taxation. Pending a review and determination by the Director, which shall be made within forty-five (45) days of receipt of the challenge, collected fees shall be placed in an interest bearing escrow account by the Borough of Englewood Cliffs. Appeals from a determination of the Director may be made to the tax court in accordance with the provisions of the State

Tax Uniform Procedure Law, R.S.54:48-1 et seq., within ninety (90) days after the date of such determination. Interest earned on amounts escrowed shall be credited to the prevailing party.

30-19.7 Affordable Housing Trust Fund

- a) A Development Fee Ordinance creating a dedicated revenue source for affordable housing was adopted by the Borough on December 23, 2008, by way of Ordinance No. 30-2008; and subsequently amended on July 6, 2010, by Ordinance No. 10-2010. Said Development Fee Ordinance established the Borough's Affordable Housing Trust Fund. All development fees and interest generated by the fees are deposited in a separate interest-bearing Affordable Housing Trust Fund at TD Bank, located at 457 Sylvan Ave, in Englewood Cliffs Borough, for the purposes of affordable housing. These funds shall be spent in accordance with N.J.A.C. 5:93-8.16 as described in the sections that follow and the account is to be maintained by the Chief Financial Officer.
- b) The following additional funds shall be deposited in the Affordable Housing Trust Fund and shall at all times be identifiable by source and amount:
 - i. Payments in lieu of on-site construction of affordable units;
 - ii. Developer contributed funds to make ten (10) percent of the adaptable entrances in a townhouse or other multistory attached development accessible;
 - iii. Rental income from municipally operated units;
 - iv. Repayments from affordable housing program loans;
 - v. Recapture funds;
 - vi. Proceeds from the sale of affordable units; and
 - vii. Any other funds collected in connection with the Borough of Englewood Cliffs' affordable housing program.
- c) The Borough of Englewood Cliffs shall provide the Court with written authorization, in the form of a three-party escrow agreement between the municipality, TD Bank and a Court approved entity to permit the Court to direct the disbursement of the funds as provided for in N.J.A.C. 5:93-8.19 and 8.20.
 - (1) In the event of a failure by the Borough of Englewood Cliffs to comply with trust fund monitoring and reporting requirements or to submit accurate monitoring reports; or a failure to comply with the conditions of the judgment of compliance or a revocation of the judgment of compliance; or a failure to implement the approved Spending Plan; or the expenditure of funds on activities not approved by the Court; or for other good cause demonstrating the unapproved use(s) of funds, the Court may authorize the State of New Jersey, Department of Community Affairs (DCA), Division of Local Government Services (LGS), to direct the manner in which the funds in the Affordable Housing Trust Fund shall be expended, provided that all such funds shall, to the extent practicable, be utilized for affordable housing programs within the Borough of Englewood Cliffs, or, if not practicable, then within the County or the Housing Region.

(a) Any party may bring a motion before the Superior Court presenting evidence of such condition(s), and the Court may, after considering the evidence and providing the municipality a reasonable opportunity to respond and/or to remedy the non-compliant condition(s), and upon a finding of continuing and deliberate non-compliance, determine to authorize LGS to direct the expenditure of funds in the Trust Fund. The Court may also impose such other remedies as may be reasonable and appropriate to the circumstances.

d) All interest accrued in the housing trust fund shall only be used on eligible affordable housing activities approved by the Court.

30-19.8 Use of Funds

a) The expenditure of all funds shall conform to a spending plan previously approved by COAH, and a new Spending Plan approved by the Court.

b) The Court previously approved the Borough's right to use trust fund to purchase a 1.9 million dollar parcel to be added to land the Borough controlled for a 100 percent set-aside. That expense and related costs shall be a permissible use of trust fund money.

c) Funds shall not be expended to reimburse the Borough of Englewood Cliffs for past housing activities.

d) At least thirty (30) percent of all development fees collected and interest earned shall be used to provide affordability assistance to low- and moderate-income households in affordable units included in the municipal Fair Share Plan. One-third of the affordability assistance portion of development fees collected shall be used to provide affordability assistance to those households earning thirty (30) percent or less of median income by region.

i. Affordability assistance programs may include down payment assistance, security deposit assistance, low interest loans, rental assistance, assistance with homeowners association or condominium fees and special assessments, and assistance with emergency repairs.

ii. Affordability assistance to households earning thirty (30) percent or less of median income may include buying down the cost of low or moderate income units in the municipal Fair Share Plan to make them affordable to households earning thirty (30) percent or less of median income.

iii. Payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls shall be exempt from the affordability assistance requirement.

iv. The 30 percent requirement may be satisfied as set forth in the Borough's Spending Plan.

- d) The Borough of Englewood Cliffs may contract with a private or public entity to administer any part of its Housing Element and Fair Share Plan, including the requirement for affordability assistance, in accordance with N.J.A.C. 5:93-8.16.
- e) No more than 20 percent of all revenues collected from development fees, may be expended on administration, including, but not limited to, salaries and benefits for municipal employees or consultant fees necessary to negotiate a settlement with FSHC and any developer, to prepare a Housing Element and Fair Share Plan, and to implement a Housing Element and Fair Share Plan. Administrative funds may be used to retain an administrative agent, for income qualification of households, monitoring the turnover of sale and rental units, and compliance with COAH's monitoring requirements. Administrative funds may be used to pay the fees of the Master and Special Counsel appointed by the Court to assist in formulating and implementing settlement(s), formulating a housing element and fair share plan, reviewing and making recommendations to the Court in conjunction with the Borough's efforts to secure approval of settlements and its housing element and fair share plan. Administrative fees may also be used to pay for the expense of the Special Hearing Officer in conjunction with duties the Court assigns to him. Administrative fees may be used for any other purpose permitted by COAH regulations. Legal or other fees related to litigation opposing affordable housing sites or objecting to COAH's regulations and/or any Court action are not eligible uses of the affordable housing trust fund.

30-19.9 Monitoring

- a) On the first anniversary of the Court's approval of the Spending Plan, and on every anniversary of that date thereafter through July 1, 2025, the Borough of Englewood Cliffs agrees to work with the Special Master so that the Special Master shall provide annual reporting of Affordable Housing Trust Fund activity to the State of New Jersey, Department of Community Affairs, Council on Affordable Housing or Local Government Services or other entity designated by the State of New Jersey, with a copy provided to Fair Share Housing Center and for posting by the Borough on the municipal website, using monitoring forms provided by FSHC developed for this purpose by the New Jersey Department of Community Affairs, Council on Affordable Housing or Local Government Services. The reporting shall include an accounting of all Affordable Housing Trust Fund activity, including the sources and amount of funds collected and the amounts and purposes for which any funds have been expended.

30-19.10 Ongoing Collection of Fees

- a) The ability for the Borough of Englewood Cliffs to impose, collect and expend development fees shall expire with its substantive certification or judgment of compliance unless the Borough of Englewood Cliffs has filed an adopted Housing Element and Fair Share Plan with the Court, has petitioned for substantive certification or a judgment of compliance, and has received the Court's approval of its development fee ordinance. If the Borough of Englewood Cliffs fails to renew its ability to impose and collect development fees prior to the expiration of substantive certification or any judgment of compliance, it may be subject to forfeiture of any or all funds remaining within its municipal trust fund. Any funds so forfeited shall be deposited into the "New Jersey Affordable Housing Trust Fund" established pursuant to section 20 of P.L.1985, c.222 (C.52:27D-320). The Borough of Englewood Cliffs shall not impose a residential development fee on a development that

receives preliminary or final site plan approval after the expiration of its substantive certification or judgment of compliance, nor shall the Borough of Englewood Cliffs retroactively impose a development fee on such a development.

SECTION II. If any provision of this ordinance is held invalid by a court of competent jurisdiction, the remaining provisions of the ordinance shall not be invalidated and shall remain in full force and effect.

SECTION III. All ordinances and parts of ordinances which are inconsistent with the provisions of this ordinance are hereby repealed to the extent of such inconsistency

Effective Date

This ordinance shall take effect at such time as the Court enters a final Judgment of Compliance and Repose (“JOR”) approving the Housing Element and Fair Share Plan the Borough placed on file on November 13, 2020, which final JOR may have conditions the Court deems necessary to implement the settlement agreement dated October 08, 2020 between the Borough of Englewood Cliffs and Fair Share Housing Center , following a duly-noticed fairness and compliance hearing..