

**ORDINANCE 861-22
BOROUGH OF LITTLE SILVER**

AN ORDINANCE AMENDING CHAPTER 16A, LAND USE AND DEVELOPMENT, AS AMENDED BY THE BOROUGH, WHICH SHALL PROVIDE FOR THE COLLECTION OF DEVELOPMENT FEES IN SUPPORT OF AFFORDABLE HOUSING AS PERMITTED BY THE NEW JERSEY FAIR HOUSING ACT

1. Purpose.

- a) In Holmdel Builder's Ass'n 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, N.J.S.A. 52:27D-301 et seq., and the State Constitution, subject to the Council On Affordable Housing's (COAH) adoption of rules.
- b) Pursuant to P.L. 2008, c.46 section 8 (N.J.S.A. 52:27D-329.2) and the Statewide Non- Residential Development Fee Act (N.J.S.A. 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 COAH-approved spending plan may retain fees collected from non-residential development.
- c) The purpose of this section is to establish standards for the collection, maintenance and expenditure of development fees pursuant to COAH's rules and in accordance with P.L. 2008, c.46, Sections 8 and 32-38. Fees collected pursuant to this section shall be used for the sole purpose of providing low- and moderate-income housing. This section shall be interpreted within the framework of COAH's rules on development fees, codified at N.J.A.C. 5:97-8.

2. Basic Requirements.

- a) The ability to impose, collect and spend development fees is predicated on the Borough of Little Silver's participation in COAH's substantive certification process.
- b) The Borough of Little Silver shall not spend development fees until COAH has approved a plan for spending such fees in conformance with N.J.A.C. 5:97-8.10 and N.J.A.C. 5:96-5.3.
- c) This section shall not be effective until COAH has approved, and the Borough has adopted, the ordinance pursuant to N.J.A.C. 5:96-5.1.

3. Definitions.

The following terms, as used in this chapter, shall have the following meanings:

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% affordable development.

COAH or THE COUNCIL

Means the New Jersey Council on Affordable Housing established under the Act which has primary jurisdiction for the administration of housing obligations in accordance with sound regional planning consideration in the State.

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.

DEVELOPMENT FEE

Means money paid by a developer for the improvement of property as permitted in N.J.A.C. 5:97-8.3.

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).

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.

4. Residential Development.

- a) In accordance with N.J.A.C. 5:97-8.3 (c) of COAH's "Substantive Rules", all new development of principal and accessory residential buildings within the Borough of Little Silver, not exempt from the collection of development fees in accordance with the provisions specified in § 16A-3.4U4c hereinbelow, shall pay a fee to Little Silver Borough equal to 1.5% of the equalized assessed value of the residential construction, provided no increased density is permitted.
- b) Notwithstanding the provisions of § 16A-3.4U4a hereinabove, if a "d" variance is granted pursuant to N.J.S.A. 40:55D-70d(5) for more residential units than otherwise permitted by right under the existing zoning, then the additional residential units realized as a result of the "d" variance approval shall pay a bonus development fee to Little Silver Borough equal to 6.0% of the equalized assessed value of the residential

development, rather than the 1.5% development fee otherwise required for the residential units permitted by right.

- c) However, if the zoning of a site has changed during the immediate two years prior to the filing of the "d" variance application, then the base density for the purposes of calculating the bonus development fee shall be the highest density permitted by right during the two-year time period.
- d) In any case, these fees shall not apply to developments exempt from the collection of development fees in accordance with the provisions specified in § 16A-3.4U4c, hereinbelow.
- e) Residential development fees shall only be imposed and collected for the construction of new residential units, including the change or conversion of nonresidential space to a residential unit(s) and the change or conversion to accommodate one more additional residential units in an existing residential building.
- f) Eligible exactions, ineligible exactions and exemptions for residential development.
 - i. All affordable housing developments and developments where the developer has made a payment in lieu of constructing affordable units shall be exempt from paying development fees. All other forms of new construction shall be subject to development fees, except for developments that are subject to and comply with any "Growth Share Affordable Housing Requirements" provisions of the code of Little Silver Borough.
 - ii. Developments that have received preliminary or final site plan approval prior to May 9, 2006 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 construction permit shall be synonymous with preliminary or final site plan approval for this purpose. The fee percentage shall be vested on the date that building permits are issued.
 - iii. Residential development fees shall not be imposed or collected for additions or renovations of existing residential units or replacement of an existing residential unit(s) destroyed by a natural disaster provided that it is reconstructed on its existing foundation or construction or renovations of accessory buildings or structures.
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 - iv. That, in the event that any portion of this section is found to be invalid for any reason by any court or competent jurisdiction, such judgment shall be limited in its effect only to that portion of the section actually adjudged to be invalid, and the remaining portions of this section actually adjudged to be invalid, and the remaining portions of this section shall be deemed severable therefrom and shall not be affected.

- v. That this section shall take effect upon final passage and publication in accordance with the law.

5. Nonresidential Development.

- a) All new non-residential development within the Borough of Little Silver, not exempt from the collection of development fees in accordance with the provisions specified in § 16A-3.5U5c below, shall pay a fee to Little Silver Borough equal to 2.5% of the equalized assessed value of the land and improvements for all new non-residential construction on an unimproved lot(s) or equal to 2.5% of the increase in equalized assessed value resulting from any additions to existing structures to be used for non-residential purposes.
- b) Development fees also shall be imposed and collected when an existing structure is demolished and replaced. The development fee of 2.5% 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.
- c) 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 2.5% development fee, unless otherwise exempted below.
 - ii. The 2.5% fee shall not apply to an increase in equalized assessed value resulting from alterations, change in use within existing footprint, reconstruction, renovations and repairs.
 - iii. Non-residential projects that have received a Certificate of Occupancy or general development plan approval or have entered into a developer's agreement or a redevelopment agreement, all prior to July 17, 2008 (the effective date of P.L. 2008, c.46), shall be exempt from the payment of non-residential development fees, provided that an affordable housing fee of at least 1.5% of the equalized assessed value of the improvements is included in the development plan, developer's agreement or redevelopment agreement.
 - iv. Non-residential developments shall be exempt from the payment of non-residential 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, as may be amended, and listed below. Any exemption claimed by a developer shall be substantiated by that developer.

1. All non-residential construction of buildings or structures on property used by houses of worship, and property used for educational purposes which is tax-exempt pursuant to N.J.S.A. 54:4-3.6, provided that the property continues to maintain its tax exempt status under that statute for a period of at least three years from the date of the Certificate of Occupancy;
 2. Parking lots and parking structures, regardless of whether the parking lot or parking structure is constructed in conjunction with a non-residential development or as a stand-alone non-residential development;
 3. Any non-residential development which is an amenity to be made available to the public, including, but not limited to, recreational facilities, community centers and senior centers as defined in Section 35 of P.L. 2008, c. 46 (C. 40:55D-8.4), which are developed in conjunction with or funded by a non-residential developer;
 4. Non-residential construction resulting from a relocation of or an on-site improvement to a nonprofit hospital or a nursing home facility;
 5. Projects that are located within a specifically delineated urban transit hub, as defined pursuant to Section 2 of P.L. 2007, c. 346 (C. 34:1B-208);
 6. Projects that are located within an eligible municipality, as defined under Section 2 of P.L. 2007, c. 346 (C. 34:1B-208), when a majority of the project is located within a one-half mile radius of the midpoint of a platform area for a light rail system;
 7. Projects determined by the New Jersey Transit Corporation to be consistent with a transit village plan developed by a transit village designated by the New Jersey State Department of Transportation; and
 8. Commercial Farm or Use Group 'U' buildings and structures.
- v. A developer of a non-residential development exempted from the non-residential development fee above shall be subject to it at such time the basis for the exemption set forth in this subsection 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.

- vi. 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 non-residential development fees under these circumstances may be enforceable by the Borough of Little Silver as a lien against the real property of the owner.

6. Collection Of Fees.

Little Silver Borough shall collect development fees for affordable housing in accordance with the following:

- a) The Planning Board Secretary of Little Silver Borough shall notify the Little Silver Borough Construction Code Official whenever either a preliminary or final approval is granted to any development which is subject to the collection of a development fee.
- 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", which is to be completed by the developer as per the instructions provided.
 - i. The Borough Construction Official shall verify the information submitted by the non-residential developer as per the instructions provided in the Form N-RDF.
 - ii. The Borough Tax Assessor shall verify exemptions and prepare estimated and final assessments as per the instructions provided in Form N-RDF.
- c) The Borough Construction Official responsible for the issuance of a building permit shall notify the Borough Tax Assessor of the issuance of the first building permit for a development which is subject to a development fee.
- d) Within 90 days of receipt of that notice, the Borough Tax Assessor, based on the plans filed, shall provide an estimate of the equalized assessed value of the development. The equalized assessed value and the required development fee shall be estimated by the Borough Tax Assessor prior to the issuance of the construction permit, with the understanding that the estimate of the equalized assessed value is not intended to establish the equalized assessed value for tax purposes.
- e) Developers shall pay 50% of the required development fee to Little Silver Borough at the time of the issuance of a construction permit, and the prevailing development fee percentage at the time of the issuance of the construction permit shall remain in effect at the time of the issuance of the Certificate of Occupancy, even if the development

fee percentage has been changed by ordinance between the date of the issuance of the construction permit and the date of the issuance of the Certificate of Occupancy.

- f) Developers shall pay the remainder of the development fee to Little Silver Borough at the time of the issuance of a Certificate of Occupancy.
 - i. The Borough Construction Official responsible for the issuance of a final Certificate of Occupancy notifies the Borough Tax Assessor of any and all requests for the scheduling of a final inspection on property which is subject to a development fee.
 - ii. Within 10 business days of a request for the scheduling of a final inspection, the Borough Tax 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.
 - iii. The equalized assessed value and the required development fee shall be re-estimated by the Borough Tax Assessor prior to the issuance of the Certificate of Occupancy, again with the understanding that the estimate of the equalized assessed value is not intended to establish the equalized assessed value for tax purposes. The developer shall be responsible for paying the difference between the development fee calculated at the time of the issuance of the Certificate of Occupancy and the amount paid at the time of the issuance of the construction permit.
 - iv. Should the Borough fail to determine or notify the developer of the amount of the development fee within 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).
 - v. Upon tender of the remaining development fee, provided the developer is in full compliance with all other applicable laws, the Borough shall issue a final Certificate of Occupancy for the subject property.
- g) Regardless of the time of collection of the development fee, the fee shall be based upon the percentage that applies on the date that the construction permit is issued.
- h) The Construction Code Official shall forward all collected development fees to Little Silver Borough's Chief Financial Officer who shall deposit such fees into the established "Housing Trust Fund".
- i) A developer may challenge the development fees imposed by filing a challenge with the Director of the Division of Taxation for non-residential development and with the County Board of Taxation for residential development.

- i. Pending a review and determination by the Director or County Board of Taxation, as the case may be, which shall be made within 45 days of receipt of the challenge, collected fees shall be placed in an interest bearing escrow account by the Borough.
- ii. Appeals from a determination of the Director or Board, as the case may be, may be made to the tax court in accordance with the provisions of the State Tax Uniform Procedure Law, N.J.S.A. 54:48-1 et seq., within 90 days after the date of such determination.
- iii. Accrued interest earned on escrowed amounts to be returned shall also be returned to the developer.

7. Affordable Housing Trust Fund.

- a) All collected development fees and any proceeds from the sale of units with extinguished controls shall be deposited by the Chief Financial Officer of the Borough of Little Silver into a separate designated interest-bearing "Housing Trust Fund," which shall be maintained by the Borough Chief Financial Officer.
 - i. No money shall be expended from the Housing Trust Fund unless the expenditure conforms to the Spending Plan which has been approved by COAH; and
 - ii. In establishing the Housing Trust Fund, the Borough Council shall provide COAH with written authorization in the form of a three-party escrow agreement between the Borough, COAH and the bank in order to permit COAH to direct the disbursement of development fee funds as provided in N.J.A.C. 5:97-8.13(b) of the "Substantive Rules" of COAH. This authorization shall be submitted to COAH within seven days from the opening of the Housing Trust Fund.
- b) Additionally, the following sources of funding shall be deposited in the Housing Trust Fund and shall at all times be identifiable by source and amount:
 - i. Recapture funds;
 - ii. Proceeds from the sale of affordable units;
 - iii. Rental income from municipally operated units;
 - iv. Payments in lieu of on-site construction of affordable units;
 - v. Affordable housing enforcement fines and application fees;

- vi. Developer contributed funds for barrier free affordable housing pursuant to N.J.A.C. 5:97-8.5;
 - vii. Repayments from affordable housing program loans; and
 - viii. Any other funds collected in connection with the Borough's affordable housing program.
- c) All interest accrued in the Housing Trust Fund shall only be used on eligible affordable housing activities approved by COAH.

8. Use Of Funds.

- a) Funds deposited in the Housing Trust Fund may be used for any housing activity as itemized in the spending plan and approved by COAH to address the Borough's fair share obligation and may be set up as a grant or revolving loan program. Such activities include, but are not limited to:
- i. A rehabilitation program;
 - ii. New construction of affordable housing units and related development costs; in the case of inclusionary developments, eligible costs shall be pro-rated based on the proportion of affordable housing units included in the development;
 - iii. Accessory apartment, market to affordable, or regional affordable housing partnership programs;
 - iv. Financial assistance designed to increase affordability;
 - v. Conversion of existing non-residential buildings to create new affordable units;
 - vi. Acquisition and/or improvement of land to be used for affordable housing;
 - vii. Purchase of existing market rate or affordable housing for the purpose of maintaining or implementing affordability controls, such as in the event of a foreclosure;
 - viii. Extensions or improvements of roads and infrastructure directly serving affordable housing sites; in the case of inclusionary developments, costs shall be pro-rated based on the proportion of affordable housing units included in the development;
 - ix. Green building strategies designed to be cost-saving for low and moderate income households, either for new construction that is not funded by other sources, or as part of necessary maintenance or repair of existing units, in

accordance with accepted Federal or State standards or such guidance as may be provided by the New Jersey State Department of Community Affairs or the New Jersey Housing and Mortgage Finance Agency;

- x. Maintenance and repair of affordable housing units;
 - xi. Repayment of municipal bonds issued to finance low and moderate income housing activity;
 - xii. To defray the costs of structural parking; in the case of inclusionary developments, eligible costs shall be pro-rated based on the proportion of affordable housing units included in the development;
 - xiii. Administration necessary for implementation of the Housing Plan Element and Fair Share Plan, in accordance with § 16A-3.4U8g below; and
 - xiv. Any other activity as specified in the approved spending plan and as permitted pursuant to N.J.A.C. 5:97-8.7 through 8.9.
- b) The Borough also may request authorization for expenditure of Housing Trust Funds on emergent affordable housing mechanisms not included in the Borough's Fair Share Plan in the form of an amendment to the spending plan. In addition to the amendment to the spending plan, the Borough shall submit the following:
- i. A resolution to COAH that includes a certification that the affordable housing opportunity addresses COAH's criteria set forth in N.J.A.C. 5:97-6 and information regarding the proposed mechanism in a format to be provided by COAH; and
 - ii. An amendment to its Fair Share Plan to include the mechanism at the earlier of two years after COAH's approval of the spending plan amendment or the next planned amendment to the Fair Share Plan resulting from the plan evaluation review pursuant to N.J.A.C. 5:96-10.
- c) Funds shall not be expended to reimburse the Borough of Little Silver for past housing activities.
- d) Payments in lieu of constructing affordable housing units on residential and mixed-use sites shall only be used to fund eligible affordable housing activities within the Borough.
- e) At least 30% of all development fees collected and interest earned shall be devoted to provide affordability assistance to low- and moderate-income households in affordable units included in the Housing Element and Fair Share Plan, provided and in accordance with the following:

- i. One-third of the affordability assistance portion of development fees collected shall be used to provide affordability assistance to very-low-income households.
 - ii. 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.
 - iii. Affordability assistance for very-low-income households may include buying down the cost of low- or moderate-income units in the third round Borough's Fair Share Plan to make them affordable to very-low-income households (earning 30% or less of median income). The use of development fees in this manner may entitle the Borough to bonus credits pursuant to N.J.A.C. 5:97-3.7.
 - iv. 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.
- f) The Borough of Little Silver may contract with a private or public entity to administer any part of its Housing Plan Element and Fair Share Plan, including the requirement for affordability assistance, in accordance with N.J.A.C. 5:96-18, subject to COAH's approval.
- g) No more than 20% of development fee revenues collected in any given year from the development fees may be expended on administration, including, but not limited to, the salaries and benefits for Little Silver Borough employees or consultant fees necessary to develop or implement a new affordable housing program, a Housing Element and Fair Share Plan, and/or an affirmative marketing program.
- i. In the case of a rehabilitation program, no more than 20% of the revenues collected from development fees shall be expended for such administrative expenses.
 - ii. Administrative funds may be used for income qualification of households, monitoring the turnover of sale and rental units, preserving existing affordable housing, and compliance with COAH's monitoring requirements.
 - iii. Legal or other fees related to litigation opposing affordable housing sites or objecting to COAH's regulations and/or action are not eligible uses of the Housing Trust Fund.

9. Monitoring.

The Little Silver Borough Municipal Housing Liaison shall coordinate with the appropriate municipal officials the completion and return to COAH of all monitoring forms included in the annual monitoring report related to the collection of development fees from residential and non-residential developers, payments in lieu of constructing affordable units on site, funds from the sale of units with extinguished controls, barrier free escrow funds, recapture funds, proceeds from the sale of affordable units, rental income, repayments from affordable housing program loans, enforcement fines and application fees, and any other funds collected in connection with the Borough's housing program, and the expenditure of revenues and implementation of the plan certified by COAH.

- a) At minimum, the monitoring shall include an accounting of any "Housing Trust Fund" activity, identifying the source and amount of funds collected, the amount and purpose for which any funds have been expended, and the status of the spending plan regarding the remaining balance pursuant to N.J.A.C. 5:97-8.10(a)8.
- b) All monitoring reports shall be completed on forms designed by COAH.

10. Ongoing collection of development fees and expiration of ordinance.

The ability for the Borough of Little Silver to impose, collect and expend development fees shall expire with its "Substantive Certification" unless Little Silver Borough has filed an adopted Housing Element and Fair Share Plan with COAH, has petitioned for "Substantive Certification", and has received COAH's approval of its development fee ordinance.

- a) If the Borough of Little Silver fails to renew its ability to impose and collect development fees prior to the date of expiration of "Substantive Certification", it may be subject to forfeiture of any or all funds remaining within its municipal trust fund.
- b) 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).
- c) The Borough of Little Silver 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", nor shall the Borough of Little Silver retroactively impose a development fee on such a development.
- d) The Borough of Little Silver shall not expend development fees after the expiration of its "Substantive Certification" or judgment of compliance.