

ORDINANCE NO. 23-13

Chapter 380. Zoning

Article X. Affordable Housing Development Fees

[Added 11-15-1993 by Ord. No. 93-13; amended 12-2-2002 by Ord. No. 02-15; 4-18-2005 by Ord. No. 05-04; 6-20-2005 by Ord. No. 05-08; 9-6-2005 by Ord. No. 05-10; 5-1-2006 by Ord. No. 06-04; 10-16-2006 by Ord. No. 06-13; 11-4-2009 by Ord. No. 09-16; 4-6-2015 by Ord. No. 15-06; 12-19-2016 by Ord. No. 16-18]

WHEREAS, in *Holmdel Builder's Association v. Holmdel Township*, 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 adoption of Rules by the Council on Affordable Housing (COAH); and

WHEREAS, pursuant to P.L. 2008, c. 46, Section 8. (C. 40:55D-8.1 through 8.7), COAH was 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 were under the jurisdiction of COAH and that are now before a court of competent jurisdiction and have a Court-approved Spending Plan may retain fees collected from non-residential development.

NOW, THEREFORE, BE IT ORDAINED by the Borough Council of the Borough of Woodcliff Lake, Bergen County, New Jersey, that the Code of the Borough of Woodcliff Lake is hereby amended to include the following provisions regulating the collection and disposition of mandatory development fees to be used in connection with the Borough's affordable housing programs, as directed by the Superior Court and consistent with N.J.A.C. 5:93-1, et seq., as amended and supplemented, N.J.A.C. 5:80-26.1, et seq., as amended and supplemented, and the New Jersey Fair Housing Act of 1985.

§ 380-68. Purpose.

This Ordinance establishes standards for the collection, maintenance, and expenditure of development fees that are consistent with COAH's regulations developed in response to P.L. 2008, c. 46, Sections 8 and 32-38 (C. 52:27D-329.2) and the Statewide Non-Residential Development Fee Act (C. 40:55D-8.1 through 8.7). Fees collected pursuant to this Ordinance shall be used for the sole purpose of providing very low-, low- and moderate-income housing.

Basic Requirements

- A. This Ordinance shall not be effective until approved by the Court.

- B. The Borough of Woodcliff Lake shall not spend development fees until the Court has approved a plan for spending such fees (Spending Plan).

§ 380-69. Definitions.

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

AFFORDABLE HOUSING DEVELOPMENT

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 one-hundred-percent affordable development.

COAH or THE COUNCIL

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

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

Money paid by a developer for the improvement of property as authorized by Holmdel Builder's Association v. Holmdel Township, 121 N.J. 550 (1990) and the Fair Housing Act of 1985, N.J.S.A. 52:27D-301, et seq., and regulated by applicable COAH Rules.

EQUALIZED ASSESSED VALUE

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 (N.J.S.A. 54:1-35a through 54:1-35c).

§ 380-70. Development fees.

A. Residential development fees.

(1) Imposed fees.

- (a) Within all zone districts, unless invalidated by state statute or court order, developers of residential housing, except for developers of the types of development specifically exempted below, shall pay a fee of 1.5% of the equalized assessed value for all new residential development, provided no increased density is permitted. Development fees shall also be imposed and collected when an additional dwelling unit is added to an existing residential structure; in such cases, the fee shall be calculated based on the increase in the equalized assessed value of the property due to the additional dwelling unit.

- (b) When an increase in residential density has been permitted pursuant to a “d” variance granted under N.J.S.A. 40:55D-70d(5), developers shall be required to pay a “bonus” development fee of a maximum of 6% of the equalized assessed value for each additional unit that may be realized, except that this provision shall not be applicable to a development that will include affordable housing. If 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.
- (2) Eligible exactions, ineligible exactions and exemptions for residential development.
- (a) Affordable housing developments and/or 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, if permitted by Ordinance or by Agreement with the Borough of Woodcliff Lake, shall be exempt from the payment of development fees.
 - (b) Developments that have received preliminary or final site plan approval prior to the adoption of this Ordinance and any preceding Ordinance permitting the collection of development fees shall be exempt from the payment of development fees, unless the developer seeks a substantial change in the original approval or the developer has accepted responsibility to pay a development fee. 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 the purpose of determining the right to an exemption. In all cases, the applicable fee percentage shall be determined based upon the Development Fee Ordinance in effect on the date that the Construction Permit is issued, regardless of the time of collection of the fee.
 - (c) Any repair, reconstruction or improvement of a structure, the cost of which is less than 50% of the market value of the structure before the improvement or repair is started shall be exempt from the payment of development fees. For purposes of this sections, “market value” shall mean the equalized assessed value of the existing improvement as established by the Borough Tax Assessor. The cost of the repair, reconstruction or improvements shall be determined by an itemized construction cost estimate prepared and submitted to the Construction Official. The estimate shall be signed and sealed by an architect or professional engineer licensed by the State of New Jersey, or where no such professionals are retained, signed by the contractor or the homeowner. Where prepared by the homeowner or contractor, the Borough Engineer may review such estimates for accuracy. “Substantial improvement” is considered to commence when the first alteration of any wall, floor or other structural part of the building commences, whether or not the alteration affects the external dimensions of the structure. The term does not, however, include either:
 - i Any project for improvement of a structure to comply with existing state or local building, fire, health, sanitary or safety code specifications which are solely necessary to assure safe living conditions; or
 - ii Any alteration of a structure listed on the National Register of Historic Places or a state inventory of historic places but a development fee shall be charged for any new dwelling constructed as a replacement for a previously existing dwelling on the same lot that was or will be demolished, unless the owner resided in the previous dwelling for a period of one year or more prior to obtaining a demolition permit. Where a

development fee is charged for a replacement dwelling, the development fee shall be calculated on the increase in the equalized assessed value of the new structure as compared to the previous structure.

- (d) Structural alterations that do not increase gross floor area of a building or structure or increase the equalized assessed value of a property shall be exempted from paying a development fee.
- (e) Nonprofit organizations constructing residential projects which have received tax-exempt status pursuant to Section 501(c)(3) of the Internal Revenue Code, providing current evidence of that status is submitted to the Municipal Clerk, together with a certification that services of the organization are provided at reduced rates to those who establish an inability to pay existing charges, shall be exempted from paying a development fee.
- (f) Federal, state, county and local governments shall be exempted from paying a development fee.
- (g) Owner-occupied residential structures demolished and replaced as a result of a fire, flood, or natural disaster shall be exempt from paying a development fee. (This exemption applies only for the owner of record at the time of the fire, flood, or natural disaster.)

Nonresidential development fees.

(1) Imposed fees.

- (a) Within all zoning districts, unless invalidated by state statute or court order, nonresidential developers, except for developers of the types of development specifically exempted, shall pay a fee equal to 2.5% of the equalized assessed value of the land and improvements for all new nonresidential construction on an unimproved lot or lots.
- (b) Nonresidential developers, except for developers of the types of development specifically exempted below, shall also pay a fee equal to 2.5% of the increase in equalized assessed value resulting from any additions to existing structures to be used for nonresidential purposes.
- (c) Development fees 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 preexisting land and improvement and the equalized assessed value of the newly improved structure, i.e., land and improvements, and such calculation shall be made at the time the final certificate of occupancy is issued. If the calculation required under this section results in a negative number, the nonresidential development fee shall be zero.

(2) Eligible exactions, ineligible exactions and exemptions for nonresidential development.

- (a) The nonresidential portion of a mixed-use inclusionary or market-rate development shall be subject to the 2.5% development fee, unless otherwise exempted below.
- (b) 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.
- (c) Nonresidential 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 Nonresidential Development

Certification/Exemption Form. Any exemption claimed by a developer shall be substantiated by that developer.

- (d) A developer of a nonresidential development exempted from the nonresidential development fee pursuant to P.L. 2008, c. 46, shall be subject to it at such time as the basis for the exemption no longer applies and shall make the payment of the nonresidential development fee, in that event, within three years after that event or after the issuance of the final certificate of occupancy of the nonresidential development, whichever is later.
- (e) If a property which was exempted from the collection of a nonresidential 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 Woodcliff Lake as a lien against the real property of the owner.
- (f) Federal, state, county and local governments of nonresidential development shall be exempted from paying a development fee.

§ 380-71. Collection of fees.

A. Collection procedures.

- (1) Upon the granting of a preliminary, final or other applicable approval for a development, the applicable approving authority or entity shall notify or direct its staff to notify the Construction Official responsible for the issuance of a building permit.
- (2) For nonresidential developments only, the developer shall also be provided with a copy of Form N-RDF, State of New Jersey Nonresidential Development Certification/Exemption, to be completed as per the instructions provided. The developer of a nonresidential development shall complete Form N-RDF as per the instructions provided. The Construction Official shall verify the information submitted by the nonresidential 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.
- (3) 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.
- (4) Within 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.
- (5) The Construction Official responsible for the issuance of a final certificate of occupancy shall notify the local Tax Assessor of any and all requests for the scheduling of a final inspection on property which is subject to a development fee.
- (6) Within 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.

- (7) Should the Borough of Woodcliff Lake 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 (N.J.S.A. 40:55D-8.6).
- (8) Except as provided in Section B(1)(c) hereinabove, fifty percent of the initially calculated 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 for paying the difference between the fee calculated at building permit and that determined at the time of issuance of certificate of occupancy.

B. Appeal of development fees.

- (1) 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, if possible, escrow account by the Borough of Woodcliff Lake. Appeals from a determination of the Board may be made to the Tax Court in accordance with the provisions of the State Uniform Tax Procedure Law, N.J.S.A. 54:48-1 et seq., within 90 days after the date of such determination. Any interest earned on amounts escrowed shall be credited to the prevailing party.
- (2) A developer may challenge nonresidential 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 45 days of receipt of the challenge, collected fees shall be placed in an interest-bearing, if possible, escrow account by the Borough of Woodcliff Lake. Appeals from a determination of the Director may be made to the Tax Court in accordance with the provisions of the State Uniform Tax Procedure Law, N.J.S.A. 54:48-1 et seq., within 90 days after the date of such determination. Any interest earned on amounts escrowed shall be credited to the prevailing party.

§ 380-72. Affordable Housing Trust Fund.

- A. There is hereby created a separate interest-bearing affordable housing trust fund to be maintained by the Borough Chief Financial Officer from residential and nonresidential developers and proceeds from the sale of units with extinguished controls.
- 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:
 - (1) Payments in lieu of on-site construction of a fraction of an affordable unit, where permitted by Ordinance or Agreement with the Borough of Woodcliff Lake;
 - (2) Developer-contributed funds to make 10% of the adaptable entrances in a townhouse or other multistory attached development accessible;
 - (3) Rental income from municipally operated units;
 - (4) Repayments from affordable housing program loans;
 - (5) Recapture funds;
 - (6) Proceeds from the sale of affordable units; and

(7) Any other funds collected in connection with the Borough of Woodcliff Lake's affordable housing program.

- C. In the event of a failure by the Borough of Woodcliff Lake 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 and to expend funds within the applicable required time period as set forth in *In re Tp. of Monroe*, 442 N.J. Super 565 (Law Div. 2015) (aff'd 442 N.J. Super. 563); 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, 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 Woodcliff Lake or, if not practicable, then within the County or the Housing Region.
- D. 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 or impose such other remedies as may be reasonable and appropriate to the circumstances.
- E. Interest accrued in the Affordable Housing Trust Fund shall only be used to fund eligible affordable housing activities approved by the Court.

§ 380-73. Use of funds.

- A. The expenditure of funds shall conform to a Spending Plan approved by the Court. Money deposited in the affordable housing trust fund may be used for any activity approved by COAH or in accordance with any directives from the courts for addressing the Borough of Woodcliff Lake's fair share obligation. Such activities may include, but are not necessarily limited to: housing rehabilitation; new construction; the purchase of land for low- and moderate-income housing; preservation or purchase of housing for the purpose of maintaining or implementing affordability controls, including the extension of controls, accessory apartment, market to affordable, or regional housing partnership programs, conversion of existing nonresidential buildings to create new affordable units, extensions and/or improvements of roads and infrastructure to low- and moderate-income housing sites; assistance designed to increase affordability; and administrative costs necessary to implement the Borough of Woodcliff Lake's housing element and Fair Share Plan; and/or any other activity permitted by the Court and specified in the Amended Settlement Agreement with Fair Share Housing Center dated December 14, 2022 or in the approved Spending Plan.
- B. Funds shall not be expended to reimburse the Borough of Woodcliff Lake for past housing activities.
- C. At least 30% of all development fees collected and any 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 very low-income households earning 30% or less of regional median household income by household size for Housing Region 1, in which Woodcliff Lake is located.

- (1) 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. The specific programs to be used for affordability assistance shall be identified and described within the Spending Plan.
 - (2) Affordability assistance to households earning 30% or less of regional median household income by household size 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 30% or less of median income. The specific programs to be used for very low-income affordability assistance shall be identified and described within the Spending Plan.
 - (3) Payments in lieu of constructing affordable units on site, if permitted by Ordinance or by Agreement with the Borough of Woodcliff Lake, and funds from the sale of units with extinguished controls shall be exempt from the affordability assistance requirement.
- D. The Borough of Woodcliff Lake may contract with a private or public entity to administer any part of its Housing Element and Fair Share Plan, including its programs for affordability assistance, in accordance with N.J.A.C. 5:96-18.^[1]
- (1) *Editor's Note: Former Ch. 96 of the New Jersey Administrative Code, Procedural Rules of the New Jersey Council on Affordable Housing for the Period Beginning on June 2, 2008, expired 6-2-2015 in accordance with N.J.S.A. 52:14b-5.1b.*
- E. No more than 20% 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 develop or implement a new construction program, prepare a Housing Element and Fair Share Plan, and/or administer an affirmative marketing program or rehabilitation program. In the case of a rehabilitation program, the administrative costs of the rehabilitation program shall be included as part of the 20% of collected development fees that may be expended on administration. Administrative funds may be used for income qualification of households, monitoring the turnover of sale and rental units, and compliance with the Court's monitoring requirements. Legal or other fees related to litigation opposing affordable housing sites or related to securing or appealing a judgment from the Court are not eligible uses of the affordable housing trust fund.
- F. Monitoring. The Borough of Woodcliff Lake shall provide annual reporting of affordable housing trust fund activity to the State of New Jersey, Department of Community Affairs (DCA), COAH or LGS or other entity designated by the State of New Jersey, with a copy provided to Fair Share Housing Center and posted on the municipal website, using forms developed for this purpose by the New Jersey DCA, COAH or LGS. The reporting shall include an accounting of all affordable housing trust fund activity, including the sources and amounts of funds collected and the amounts and purposes for which any funds have been expended. Such reporting shall include an accounting of development fees collected from residential and non-residential developers, payments in lieu of constructing affordable units on site (if permitted by Ordinance or by Agreement with the Borough), funds from the sale of units with extinguished controls, barrier free escrow funds, rental income from the Borough owned affordable housing units, repayments from affordable housing program loans, and any other funds collected in connection with Woodcliff Lake's affordable housing programs, as well as an accounting of the expenditures of revenues and implementation of the Spending Plan approved by the Court.

- G. This section is intended to be interpreted and applied consistent with the Statewide Non-Residential Development Fee Act (N.J.S.A. 40:55D-8.1 et seq.). In the event of any inconsistency, this section shall be read so as to comply with the Act.

Ongoing Collections of Fees

- A. The ability of the Borough of Woodcliff Lake to impose, collect and expend development fees shall expire with the expiration of the repose period covered by its Judgment of Compliance unless the Borough of Woodcliff Lake has first filed an adopted Housing Element and Fair Share Plan with the Court or with a designated State administrative agency, has petitioned for a Judgment of Compliance from the Court or for Substantive Certification or its equivalent from a State administrative agency authorized to approve and administer municipal affordable housing compliance and has received approval of its Development Fee Ordinance from the entity that will be reviewing and approving the Housing Element and Fair Share Plan.
- B. If the Borough of Woodcliff Lake fails to renew its ability to impose and collect development fees prior to the expiration of its Judgment of Compliance, it may be subject to forfeiture of any or all funds remaining within its affordable housing 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).
- C. The Borough of Woodcliff Lake shall not impose a residential development fee on a development that receives preliminary or final site plan approval after the expiration of its Judgment of Compliance, nor shall the Borough of Woodcliff Lake retroactively impose a development fee on such a development. The Borough of Woodcliff Lake also shall not expend any of its collected development fees after the expiration of its Judgment of Compliance.

§ 380-74. through § 380-77. (Reserved)