

**TOWNSHIP OF UPPER DEERFIELD**

**ORDINANCE 809**

**AMENDING CHAPTER 108, ENTITLED, "AFFORDABLE HOUSING PROCEDURAL AND ELIGIBILITY REQUIREMENTS", TO ADD A DEVELOPMENT FEE SECTION**

**WHEREAS**, the New Jersey Supreme Court and New Jersey Legislature have recognized and mandated in So. Burl. Co. NAACP v. Mount Laurel, 92 N.J. 158 (1983) ("Mount Laurel II") and the Fair Housing Act, N.J.S.A. 52:27D-301, et seq. ("FHA") that every municipality in New Jersey has an affirmative obligation to facilitate the provision of low and moderate income housing; and

**WHEREAS**, the Township Committee of the Township of Upper Deerfield are desirous of ensuring the proper implementation of the Fair Housing Act and associated rules through the adoption of land use regulations by the governing body; and

**WHEREAS**, the Township of Upper Deerfield desires to implement policies established by the New Jersey Supreme Court in In re N.J.A.C. 5:96 and 5:108, 221 N.J. 1, 30 (2015) (Mount Laurel IV) to foster affordable housing opportunities for the production of dwellings and their occupancy by low and moderate income households.

**WHEREAS**, the Township Committee of the Township of Upper Deerfield recognize the need to adopt Affordable Housing Procedural and Eligibility Requirements to implement the Housing Element and Fair Share Plan; and

**WHEREAS**, the Planning Board of the Township of Upper Deerfield has reviewed and recommended the adoption of this ordinance.

**NOW THEREFORE, BE IT ORDAINED** by the Township Committee of the Township of Upper Deerfield, Cumberland County, New Jersey, as follows:

**Section 1.** Chapter 108, Affordable Housing Controls and Procedures, shall be modified by adding the following section relocated from Chapter 405 and revised to comport with present court decisions:

**§108-21      Development Fees.**

A.      Purpose.

1.      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 (the Act), N.J.S.A. 52:27D-301 et seq., and the State Constitution, subject to COAH's adoption of rules.
2.      COAH was authorized by P.L. 2008, c. 46, Section 8 (N.J.S.A. 52:27D-329.2), and the Statewide Nonresidential Development Fee Act (N.J.S.A. 40:55D-8.1 through 40:55D-8.7) 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 COAH or a court of competent jurisdiction and have a COAH- or court-approved spending plan may retain fees collected from nonresidential development.

3. In Re: Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015), also known as the Mount Laurel IV decision, the Supreme Court remanded COAH's duties to the Superior Court. As a result, affordable housing development fee collections and expenditures from the municipal affordable housing trust funds to implement municipal Third Round Fair Share Plans through July 7, 2025 are under the Court's jurisdiction and are subject to approval by the Court.
4. This section establishes standards for the collection, maintenance, and expenditure of development fees pursuant to COAH's regulations and in accordance with P.L. 2008, c. 46, Sections 8 and -32 through -38. Fees collected pursuant to this section shall be used for the sole purpose of providing low- and moderate-income housing. This chapter shall be interpreted within the framework of COAH's rules on development fees, codified at *N.J.A.C. 5:93-8*.

## B. Residential Development Fees

1. Imposed fees.
  - a. Within all Zoning Districts, residential developers, except for developers of the types of development specifically exempted below, shall pay a fee of one-and-one-half-percent (1.5%) of the equalized assessed value for residential development, provided no increased density is permitted.
  - b. When an increase in residential density pursuant to *N.J.S.A. 40:55D-70d(5)* has been permitted, developers may be required to pay a development fee of up to 6% 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 fee would equal one-and-one-half-percent (1.5%) of the equalized assessed value on the first two units; and the specified higher percentage of 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.
2. Eligible exactions, ineligible exactions and exemptions for residential development.

- a. 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.
- b. Developments that have received preliminary or final site plan approval prior to July 7, 2005 (the adoption of ordinance number 561) 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.
- c. Additions to owner-occupied residential dwellings of 1,000 sf. or less shall be exempt from paying a development fee.
- d. In addition to the construction of new principal and/or accessory buildings, development fees shall be imposed and collected for the change or conversion of an existing building to accommodate a more intense use, and/or for the demolition and replacement of an existing building (except as otherwise exempted) in accordance with the following provisions:
  - i. The development fee shall be calculated on the increase in the equalized assessed value of the improved building.
  - ii. No development fee shall be collected for a demolition and replacement of a residential building resulting from fire, flood or other natural disaster.
  - iii. No development fee shall be collected for the construction of an “accessory structure” which is not a “building” as these terms are defined in the Upper Deerfield Township “Zoning and Development Ordinance.”

C. Nonresidential Development Fees

1. Imposed fees.

- a. Within all zoning districts, nonresidential developers, except for developers of the types of development specifically exempted, shall pay a fee equal to two-and-one-half-percent (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, shall also pay a fee equal to two-and-one-half-percent (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 two-and-one-half-percent (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 improvement, at the time 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 two-and-one-half-percent (2.5%) development fee, unless otherwise exempted below.
    - b. The two-and-one-half-percent (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 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 that 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 forty-five (45) days of the termination of the property tax exemption. Unpaid nonresidential development fees under these circumstances may be enforceable by the Township as a lien against the real property of the owner.

D. Collection Procedures.

1. Upon the granting of a zoning permit, preliminary, final or other applicable approval for a development, the approving authority shall 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 that is subject to a development fee.
4. 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.
5. The Construction Official responsible for the issuance of a final certificate of occupancy shall notify the local Assessor of any and all requests for the scheduling of a final inspection on property that is subject to a development fee.
6. 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.
7. Should Upper Deerfield 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 (*N.J.S.A. 40:55D-8.6*).
8. Fifty percent (50%) 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 for paying the difference between the fee calculated at building permit and that determined at issuance of certificate of occupancy.
9. Appeal of development fees.
  - a. 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 Upper Deerfield. 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 ninety (90) days after the date of such determination. Interest earned on amounts escrowed shall be credited to the prevailing party.

- b. 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 forty-five (45) days of receipt of the challenge, collected fees shall be placed in an interest-bearing escrow account by Upper Deerfield. 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 ninety (90) days after the date of such determination. Interest earned on amounts escrowed shall be credited to the prevailing party.

E. Affordable Housing Trust Fund.

1. There is hereby created a separate, interest-bearing housing trust fund to be maintained by the Chief Financial Officer for depositing development fees collected from residential and nonresidential developers and proceeds from the sale of units with extinguished controls. Nothing herein shall require the establishment of a new account for this purpose where an existing account has already been established.
2. The following additional funds shall be deposited in the affordable housing trust fund and shall at all times be identifiable by source and amount:
  - a. Payments in lieu of on-site construction of affordable units;
  - b. Developer-contributed funds to make ten percent (10%) of the adaptable entrances in a townhouse or other multistory attached development accessible;
  - c. Rental income from municipally operated units;
  - d. Repayments from affordable housing program loans;
  - e. Recapture funds;
  - f. Proceeds from the sale of affordable units; and
  - g. Any other funds collected in connection with Upper Deerfield's affordable housing program.
3. Upper Deerfield Township previously provided COAH with written authorization, in the form of three-party escrow agreements between the municipality, its banking institution, and COAH, to permit the state agency to direct the disbursement of the funds as provided for in *N.J.A.C. 5:93-8*. The Superior Court shall now have such jurisdiction to direct the disbursement of the Township's trust funds per *N.J.A.C. 5:93-8* if needed.

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

F. Use of Funds

1. The expenditure of all funds shall conform to a spending plan approved by the Court. Funds deposited in the housing trust fund may be used for any activity approved by the Court to address the Township's fair share obligation and may be set up as a grant or revolving loan program. Such activities include, but are not limited to, preservation or purchase of housing for the purpose of maintaining or implementing affordability controls, rehabilitation, new construction of affordable housing units and related costs, accessory apartment, market to affordable, or regional housing partnership programs, conversion of existing nonresidential buildings to create new affordable units, green building strategies designed to be cost saving and in accordance with accepted national or state standards, purchase of land for affordable housing, improvement of land to be used for affordable housing, extensions or improvements of roads and infrastructure to affordable housing sites, financial assistance designed to increase affordability, administration necessary for implementation of the Housing Element and Fair Share Plan, or any other activity as permitted pursuant to *N.J.A.C. 5:93-8.16* and specified in the approved spending plan.
2. Funds shall not be expended to reimburse Upper Deerfield Township for past housing activities.
3. At least thirty percent (30%) 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 percent (30%) or less of median income by region.
  - a. 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, infrastructure assistance, and assistance with emergency repairs.
  - b. Affordability assistance to households earning thirty percent (30%) 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 percent (30%) or less of median income.
  - c. 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.
4. Upper Deerfield 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*.

5. No more than twenty percent (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, a Housing Element and Fair Share Plan, and/or an affirmative marketing program. In the case of a rehabilitation program, no more than twenty percent (20%) of the revenues collected from development fees shall be expended for such administrative expenses. Administrative funds may be used for income qualification of households, monitoring the turnover of sale and rental units, and compliance with the monitoring requirements set forth in the Court-approved December 8, 2018 executed Settlement Agreement with Fair Share Housing Center. Legal or other fees related to litigation opposing affordable housing sites or objecting to the Council's regulations and/or action are not eligible uses of the affordable housing trust fund.

#### G. Monitoring

1. On or about October 23 of each year through 2025, Upper Deerfield shall provide annual reporting of trust fund activity to the DCA, COAH, or NJLGS, 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 DCA, COAH, or NJLGS. This reporting shall include an accounting of all housing trust fund activity, including the collection of development fees from residential and nonresidential developers, payments in lieu of constructing affordable units on site, funds from the sale of units with extinguished controls, barrier-free escrow funds, rental income, repayments from affordable housing program loans, and any other funds collected in connection with Upper Deerfield's housing program, as well as to the expenditure of revenues and implementation of the plan approved by the Court.

- H. Ongoing Collection of Fees. The ability for Upper Deerfield to impose, collect and expend development fees shall expire with its Court-issued Judgment of Compliance and Repose unless Upper Deerfield Township has filed an adopted Housing Element and Fair Share Plan with the Court or other appropriate jurisdiction, has filed a Declaratory Judgment Action, and has received the Court's approval of its development fee ordinance. If Upper Deerfield Township fails to renew its ability to impose and collect development fees prior to the expiration of its Judgment of Compliance and Repose, 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 (N.J.S.A. 52:27D-320). Upper Deerfield Township shall not impose a residential development fee on a development that receives preliminary or final site plan approval after the expiration of its Judgment Compliance and Repose, nor shall Upper Deerfield Township retroactively impose a development fee on such a development. Upper Deerfield Township shall not expend development fees after the expiration of its Judgment Compliance and Repose.

**Section 2. Severability.** If any portion of this Ordinance is for any reason held to be unconstitutional or invalid by a court of competent jurisdiction, such decision shall not affect the validity of Chapter 108 as a whole, or any other part thereof.

**Section 3. Repealer.** All ordinances or parts of ordinances which are inconsistent with the provisions of this Ordinance are hereby repealed to the extent of such inconsistency only.

**Section 4. Enactment.** This Ordinance shall take effect upon the filing thereof with the Cumberland County Planning Board after final passage, adoption, and publication by the Township Clerk of the Township of Upper Deerfield in the manner prescribed by law.

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James Crilley, Chairman

Adopted: September 5, 2019

Finally Attested:

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Roy J. Spoltore, Township Clerk

First Reading: August 15, 2019

Publication: August 22, 2019

Publication of Final Adoption: September 11, 2019