

BOROUGH OF KENILWORTH

ORDINANCE NO. 2016-08

AN ORDINANCE AMENDING AND SUPPLEMENTING CHAPTER 225 PART 5 OF THE 'LAND USE ORDINANCE' OF THE BOROUGH OF KENILWORTH, COUNTY OF UNION, STATE OF NEW JERSEY ENTITLED LAND DEVELOPMENT

CHAPTER 225 – LAND USE ORDINANCE

Part 5 - AFFORDABLE HOUSING DEVELOPMENT FEES

This Part 5 shall take effect upon approval by the Superior Court of the State of New Jersey or appropriate state regulatory agency of the State of New Jersey.

Section 225 - 501 - Findings and purposes

- a. The New Jersey Supreme Court, in Holmdel Builder's Ass'n v. Holmdel Twp, 121 N.J. 550 (1990), determined that mandatory development fees are both statutorily and constitutionally permissible. The Court further anticipated that COAH would promulgate appropriate development fee rules specifying, among other things, the standards for these development fees. The purpose of this section is to provide such rules pursuant to N.J.A.C. 5:94, et seq.
- b. The Borough Council finds and declares that the creation and preservation of affordable housing in the Borough serves the public interest. Maintaining and improving a stock of sound affordable housing requires affirmative steps by local government working cooperatively with public bodies at all levels and with the private sector. The purpose of this Section is to create in the Borough of Kenilworth a trust fund from payment of development fees to assist in the marshaling of public and private monies dedicated to affordable housing projects and programs.

Section 225 - 502 - Definitions

- a. Affordable Housing. Any housing unit with an acquisition price or rent level not exceeding the maximum resale or rent level for low and moderate income housing as set forth in N.J.A.C. 5:94, et seq.
- b. COAH. The New Jersey Council on Affordable Housing, established under the Fair Housing Act of 1985, and which has primary jurisdiction for the administration of low and moderate housing obligation in accordance with sound regional planning considerations in the State.
- c. Development Fees. Money paid by an individual, person, partnership, association, company, or corporation for the improvement of property as permitted in N.J.A.C. 5:94, et seq.
- d. Equalized Assessed Value. The value of a property determined by the Borough Tax Assessor through a process designed to ensure that all property in the Borough is assessed at the same assessment ratio or ratios required by law. Estimates at the time of building permit may be obtained by the Tax Assessor utilizing estimates for construction cost. Final equalized assessed value will be determined at project completion by the Tax Assessor.

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e. Substantive Certification. A determination by COAH approving Kenilworth Borough's Housing Element and Fair Share Plan in accordance with the provisions of the Fair Housing Act and the rules and criteria as set forth therein. A grant of "substantive certification" shall be valid for a period of ten years in accordance with the terms and conditions contained therein.

Section 225 - 503 - Development fee schedule

a.

Residential Development.

- 1) Residential development fees shall be one percent (1.0%) of the equalized assessed value for residential development, within the OR, OR-B and LI zones districts, which is not exempt from the provisions of this Article as set forth below, provided no increase in density is permitted.
- 2) If a "d" variance is granted by the Kenilworth Borough Zoning Board of Adjustment, pursuant to N.J.S.A. 40:55D-70d(5), the additional residential units realized (above what is permitted by right under the existing zoning) will incur a bonus development fee of six percent (6%) rather than the development fee of one percent (1%). However, if the zoning on a site has changed during the two (2) year period preceding the filing of the "d" 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 (2) years preceding the filing with the Kenilworth Borough Zoning Board of Adjustment of the "d" variance application.

b.

Nonresidential Development.

- 1) Nonresidential development fees shall be two percent (2%) of the equalized assessed value for nonresidential development within the B-D, AC, C, OR, I, OR, OR-B and LI zones districts, which is not exempt from the provisions of this subsection as set forth in this article.
- 2) If a "d" variance is granted by the Kenilworth Borough Zoning Board of Adjustment, pursuant to N.J.S.A. 40:55D-70d(4), then the additional floor area ration (FAR) realized (above what is permitted by right under the existing zoning) will incur a bonus development fee of six percent (6%) rather than the development fee of two percent (2%). However, if the zoning on a site has changed during the two (2) year period preceding the filing of the "d" 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 (2) years preceding the filing with the Kenilworth Borough Zoning Board of Adjustment of the "d" variance application.

Section 225 - 504 - Eligible exactions, ineligible exactions and exemptions

- a. Except as provided in Subsection 503 (a) (2) above, developers of low and moderate income units shall be exempt from development fees.

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- b. Development fees may only be collected for any residential structure which requires the installation of a new foundation (excluding foundations required for an addition to or renovation of an existing residential structure or a foundation required for an accessory structure to an existing residential structure).
- c. All forms of new nonresidential construction shall be subject to development fees; provided, however, that development fees may only be collected for improvements which add useable or rentable footage to an existing non-residential structure. In the event that a development fee is collected for a nonresidential structure and thereafter usable or rentable footage is obtained through modification of the said structure, a development fee may be collected for the additional useable or rentable footage based upon the increase in the equalized assessed value of the improved structure.
- d. Developments that have received preliminary or final approval prior to the adoption and final publication of this Ordinance shall be exempt from development fees unless the developer seeks a substantial change in the approval.
- e. The Borough exempts the following types of development from imposition of development fees:
 - 1) Development by the Borough or any of its instrumentalities;
 - 2) development by charitable or not-for-profit entities formed and legally established in accordance with the laws of the State of New Jersey; and

Section 225 - 505 - Collection of development fees

The Borough shall collect fifty percent (50%) of the fee on any specific development prior to and as a condition of the issuance of the building permit therefore. The remaining portion shall be collected prior to and as a condition of the issuance of the certificate of occupancy. Once the final equalized assessed value of a particular development has been determined by the Tax Assessor, and such final equalized assessed value is greater than the estimated equalized assessed value, the developer shall, within ten (10) business days from receipt of notification from the Borough, pay to the Borough the difference between the development fees required to be paid by the developer once such final equalized assessed value has been determined and the estimated development fees actually paid by the developer. The failure of the developer to make timely payments of the aforesaid deficiency shall entitle the Borough to file, without notice to the developer, a lien against the subject development. In the event that Borough shall file such lien, the Borough may add to the aforesaid deficiency amount reasonable attorney fees to file and discharge such lien, together with any and all costs incurred to file and discharge said lien. In the event that the estimated equalized assessed value proves to have been too high, the Borough shall promptly refund the difference between the estimated development fees actually paid by the developer and the development fees required to be paid by the developer once such final equalized assessed value has been determined.

Section 225 - 506 - Contested fees

Imposed and collected development fees that are challenged shall be placed in an interest-bearing escrow account by the Chief Financial Officer of the Borough. If all or a portion of the contested fees are returned to the developer, the accrued interest on the returned amount shall also be returned.

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Section 225 - 507 - Housing trust fund

All development fees shall be deposited with the Chief Financial Officer of the Borough in a separate designated interest-bearing housing trust fund. The development fees placed in the housing trust fund shall be deemed "dedicated revenues" as such term is defined in the N.J.S.A. 40A:4-36. In establishing the housing trust fund, the Borough shall provide written authorization, in the form of a three-party escrow agreement between the Borough, the bank and COAH, to permit COAH to direct the disbursement of the funds as provided for in N.J.A.C. 5:94-6.16(b). This three-party escrow agreement shall be submitted to COAH within seven (7) days from the opening of the trust fund account. All interest accrued in the housing trust fund shall only be used on eligible affordable housing activities approved by COAH.

Section 225 - 508 - Use of money

- a. The Borough shall use revenues collected from development fees for any activity approved by COAH for addressing the Borough's fair share obligation. Such activities include, but are not limited to, rehabilitation, new construction, regional contribution agreements, purchase of new land for low and moderate income housing, improvement of land to be used for low and moderate income housing, extension and/or improvements of roads and infrastructure to low and moderate income housing sites, assistance designed to render units to be more affordable and administration of the implementation of the Housing Element and Fair Share Plan. The expenditure of all money shall conform to a spending plan approved by COAH.
- b. Funds shall not be expended to reimburse the Borough for past housing activities.
- c. After subtracting development fees collected to finance a regional contribution agreement, a rehabilitation program or a new construction project that are necessary to address the municipality's affordable housing obligation, at least thirty percent (30%) of the balance remaining shall be used to provide affordability assistance to low and moderate income households in affordable units included in a 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.
 - 1) Affordability assistance programs may include down payment assistance, security deposit assistance, low interest loans, and rental assistance.
 - 2) Affordability assistance to households earning thirty percent (30%) or less of median income may include buying down the cost of low income units in a municipal Fair Share Plan to make them affordable to households earning thirty percent (30%) or less than median income. The use of development fees in this manner shall entitle a municipality to bonus credits pursuant to N.J.A.C. 5:94-4.22.
 - 3) 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.
- d. No more than twenty percent (20%) of the revenues collected from development fees shall be expended on administration, including, but not limited to, salaries and benefits for Borough

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Employees or consultant fees necessary to develop or implement a rehabilitation program, a new construction program, a regional contribution agreement, a Housing Element and Fair Share Plan, and an affirmative marketing program. Administrative funds may be used for income qualification of households, monitoring the turnover of sale and rental units, and compliance with COAH's monitoring requirements. Development fees shall not be used to defray the costs of existing staff.

Section 225 - 509 - Monitoring

The Borough shall complete and return to COAH all monitoring forms related to the collection of development fees, expenditures of revenues, and implementation of the spending plan (discussed in Subsection 510 below) certified by COAH. Financial reports, annual program implementation, and monitoring reports shall be completed by the Borough on forms designed by COAH.

Section 225 - 510 - Spending plans

The Borough shall submit to COAH a spending plan for the development fees collected by it prior to the expiration of its substantive certification period. Plans to spend development fees shall consist of the following information;

- a. a projection of revenues anticipated from imposing fees on development, based on historic activity;
- b. a description of the administrative mechanism that the Borough will use to collect and distribute revenues;
- c. a description of the anticipated use of all development fees;
- d. a schedule for the creation or rehabilitation of housing units;
- e. in the event of the Borough envisions being responsible for public sector or nonprofit construction of housing, a pro forma statement of the anticipated costs and revenues associated with the development;
- f. the manner through which the Borough will address any expected or unexpected shortfall if the anticipated revenues from development fees are not sufficient to implement the plan;
- g. a description of the funds anticipated; and
- h. a schedule for spending.

Section 225 - 511 - Penalties

- a. In the event that any of the conditions set forth in Paragraph b. of this Subsection occur, COAH shall be authorized, on behalf of the Borough, to direct the manner in which all development fees collected pursuant to Section 507 shall be expended. Should any such condition occur, such revenues shall immediately become available for expenditure at the direction of COAH upon the Borough Clerk's receipt of written notification from COAH that such a condition has occurred.

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- b. Occurrence of the following may result in COAH taking an action pursuant to Paragraph a. of this Subsection:
 - (1) failure to submit a spending plan pursuant to Subsection 510 above within the time limits improved by COAH;
 - (2) failure to meet deadlines for information required by COAH in its review of the Borough's Housing Element and Fair Share Plan, or its spending plan;
 - (3) failure to proceed through COAH's administrative process toward substantive certification in a timely manner;
 - (4) failure to address COAH's conditions for approval of a plan to spend development fees within the deadlines improved imposed by COAH;
 - (5) failure to address COAH's conditions for substantive certification within the deadlines imposed by COAH;
 - (6) failures to submit accurate, monitoring reports within the time limits imposed by COAH;
 - (7) failures to implement the spending plan for development fees within the time limits imposed by COAH, or within reasonable extensions granted by COAH;
 - (8) expenditure of development fees on activities not permitted by COAH;
 - (9) revocation of the Borough's substantive certification; or
 - (10) other good cause demonstrating that the revenues are not being used for the intended purpose.

Section 225 - 512 - Ongoing collection of development fees

The ability for Kenilworth Borough to impose, collect and expend development fees shall expire with the expiration of its substantive certification unless the Borough has filed a revised and adopted Housing Element and Fair Share Plan, has petitioned for substantive certification for the succeeding round, and has received COAH's approval of a revised development fee ordinance prior to the expiration. If Kenilworth Borough fails to act before the expiration of its substantive certification, the Borough may only resume the imposition and collection of development fees by filing a revised and adopted Housing Element and Fair Share Plan, petitioning for substantive certification for the succeeding round and after receiving COAH's approval of a revised development fee ordinance. Kenilworth Borough shall not impose a development fee on a development that receives preliminary or final approval after the expiration of its substantive certification, nor shall Kenilworth Borough retroactively impose a development fee on such a development. Kenilworth Borough shall not expend development fees after the expiration of its substantive certification.

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Anthony DeLuca, Jr., Mayor

INTRODUCTION						COUNCILPERSON	FINAL ADOPTION					
Moved	Sec.	Aye	Nay	Abs.	NP		Moved	Sec.	Aye	Nay	Abs.	NP
	✓	✓				KAY CECERI		✓	✓			
✓		✓				LAWRENCE CLEMENTI		✓				
				✓		PETER CORVELLI						
		✓				GERRY LAUDATI			✓			
		✓				NICHOLAS MASCARO						✓
		✓				SCOTT PENTZ				✓		
Introduced: July 13, 2016	I hereby certify the above ordinance was adopted by the Borough Council of the Borough of Kenilworth, County of Union, State of New Jersey on the aforementioned date.											
Final Adoption: September 28, 2016	 Laura Reinerssen, Borough Clerk											