

# ORDINANCE

## BOROUGH OF NORTH CALDWELL

O-8-19

### **An Ordinance Repealing And Replacing the Borough's Current Development Fee Ordinance (Article XV) With An Updated Development Fee Ordinance**

**BE IT ORDAINED** by the Borough Council of the Borough of North Caldwell, County of Essex, State of New Jersey, as follows:

**Section 1.** Article XV, Sections 107-95 to 107-106 of the Borough Code entitled "Development Fee Ordinance", is hereby deleted in its entirety and replaced as follows:

### **ARTICLE XV AFFORDABLE HOUSING DEVELOPMENT FEES**

#### **Section 107-95 Findings And Purpose**

A. 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).

B. Pursuant to P.L. 2008, c. 46, Section 8 (C. 52:27D-329.2) and the Statewide Non-Residential Development Fee Act (C. 40:55D-8.1 through 8.7), COAH 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 and expend fees collected from both residential and non-residential development.

C. 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 low- and moderate-income housing in accordance with a Court-approved Spending Plan.

#### **Section 107-96 Basic Requirements**

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

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

#### **Section 107-97 Definitions**

The following terms, as used in this Ordinance, 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 percent affordable housing development.

"COAH" or the "Council" means the New Jersey Council on Affordable Housing established under the Fair Housing Act.

"Development fee" means money paid by a developer for the improvement of property as permitted by applicable COAH regulations.

“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.

“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.

## **Section 107-98 Residential Development Fees**

### **A. Imposition of Fees**

1) Within the Borough of North Caldwell, all residential developers, except for developers of the types of developments specifically exempted below and developers of developments that include affordable housing, shall pay a fee of one and a half percent (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.

2) When an increase in residential density is 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 six percent (6%) percent 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 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.

### **B. Eligible Exactions, Ineligible Exactions and Exemptions for Residential Developments**

1) Affordable housing developments, developments where the developer is providing for the construction of affordable units elsewhere in the municipality, and/or 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 North Caldwell, shall be exempt from the payment of development fees.

2) Developments that have received preliminary or final site plan approval prior to the adoption of North Caldwell’s first adopted Development Fee Ordinance shall be exempt from the payment of development fees, unless the developer seeks a substantial change in the original approval. Where site plan approval is not applicable, the issuance of a 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 building permit is issued. A “substantial change” is defined as follows:

- (a) Seven (7) feet in building height;
- (b) An increase of a minimum one percentage point in floor area ratio;
- (c) An increase of a minimum of two (2) percentage points in impervious coverage;
- (d) A decrease of a minimum of three (3) proposed parking spaces;
- (f) Any change in residential density;
- (g) Any change in use;
- (h) Any new variances pursuant to N.J.S.A. 40-55D-7(c) or (d);

- (i) Any such change enumerated above shall not alter the percentage of low or moderate income housing in an approved project, if applicable;
- (j) Any new design exceptions pursuant to N.J.S.A. 40:55D-51.

3) Development fees shall be imposed and collected when an existing structure undergoes a change to a more intense use, is demolished and replaced, or is expanded, if the expansion is not otherwise exempt from the development fee requirement. The development fee shall be calculated on the increase in the equalized assessed value of the improved structure.

4) Developers who expand, enlarge or improve existing single family or two (2) family residences are exempt from paying development fees.

5) Homes demolished and replaced as a result of a natural disaster (such as a fire or flood) shall be exempt from the payment of a development fee.

### **Section 107-99 Non-Residential Development Fees**

#### **A. Imposition of Fees**

1) Within all zoning districts, non-residential developers, except for developers of the types of developments specifically exempted below, shall pay a fee equal to two and one-half (2.5) percent of the equalized assessed value of the land and improvements, for all new non-residential construction on an unimproved lot or lots.

2) Within all zoning districts, non-residential developers, except for developers of the types of developments specifically exempted below, shall also pay a fee equal to two and one-half (2.5) percent of the increase in equalized assessed value resulting from any additions to existing structures to be used for non-residential purposes.

3) Development fees shall be imposed and collected when an existing structure is demolished and replaced. The development fee of two and a half percent (2.5%) shall be calculated on the difference between the equalized assessed value of the pre-existing land and improvements and the equalized assessed value of the newly improved structure, i.e. land and improvements, and such calculation shall be made at the time a 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.

#### **B. Eligible Exactions, Ineligible Exactions and Exemptions for Non-residential Development**

1) The non-residential portion of a mixed-use inclusionary or market rate development shall be subject to a two and a half percent (2.5%) development fee, unless otherwise exempted below.

2) The two and a half percent (2.5%) development fee shall not apply to an increase in equalized assessed value resulting from alterations, change in use within the existing footprint, reconstruction, renovations and repairs.

3) Developers of the following specific uses shall be exempt from development fees: not-for-profit uses; Federal, State and Municipal government uses; churches and other places of worship; and public schools.

4) Non-residential developments shall be exempt from the payment of non-residential development fees in accordance with the exemptions required pursuant to the Statewide Non-Residential Development Fee Act (N.J.S.A. 40:55D-8.1 through 8.7), as specified in Form N-RDF "State of New Jersey Non-Residential Development Certification/Exemption". Any exemption claimed by a developer shall be substantiated by that developer.

5) A developer of a non-residential development exempted from the non-residential development fee pursuant to the Statewide Non-Residential Development Fee Act shall be subject to the fee at such time as the basis for the exemption no longer applies, and shall make the payment of the non-

residential development fee, in that event, within three years after that event or after the issuance of the final Certificate of Occupancy for the non-residential development, whichever is later.

6) 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 North Caldwell as a lien against the real property of the owner.

### **Section 107-100 Collection Procedures**

A. Upon the granting of a preliminary, final or other applicable approval for a development, the applicable approving authority shall direct its staff to notify the Construction Official responsible for the issuance of a building permit.

B. For non-residential developments only, the developer shall also be provided with a copy of Form N-RDF "State of New Jersey Non-Residential Development Certification/ Exemption" to be completed as per the instructions provided. The developer of a non-residential development shall complete Form N-RDF as per the instructions provided. The Construction Official shall verify the information submitted by the non-residential developer as per the instructions provided in the Form N-RDF. The Tax Assessor shall verify exemptions and prepare estimated and final assessments as per the instructions provided in Form N-RDF.

C. The Construction Official responsible for the issuance of a building permit shall notify the local Tax Assessor of the issuance of the first building permit for a development which is subject to a development fee.

D. Within 90 days of receipt of such notification, the Borough Tax Assessor, based on the plans filed, shall provide an estimate of the equalized assessed value of the development.

E. The Construction Official responsible for the issuance of a final Certificate of Occupancy shall notify the Borough Tax Assessor of any and all requests for the scheduling of a final inspection on a property which is subject to a development fee.

F. 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 associated with the development; calculate the development fee; and thereafter notify the developer of the amount of the fee.

G. Should the Borough of North Caldwell 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).

H. Fifty percent (50%) 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 time of issuance of the Certificate of Occupancy. The developer shall be responsible for paying the difference between the fee calculated at the time of issuance of the building permit and that determined at the time of issuance of the Certificate of Occupancy. For nonresidential development the entire development fee must be collected prior to the issuance of a certificate of occupancy.

#### **I. Appeal of Development Fees**

1) A developer may challenge residential development fees imposed by filing a challenge with the County Board of Taxation. Such a challenge must be made within 45 days from the issuance of the Certificate of Occupancy. Pending a review and determination by the Board, collected fees shall be placed in an interest bearing escrow account by the Borough of North Caldwell. Appeals from a determination of the Board may be made to the tax court in accordance with the provisions of the State Tax Uniform Procedure Law, R.S. 54:48-1, *et seq.*, within 90 days after the date of such determination. Interest earned on amounts escrowed shall be credited to the prevailing party.

2) A developer may challenge non-residential development fees imposed by filing a challenge with the Director of the Division of Taxation. Pending a review and determination by the Director, which shall be made within 45 days of receipt of the challenge, collected fees shall be placed

in an interest bearing escrow account by the Borough of North Caldwell. Appeals from a determination of the Director may be made to the tax court in accordance with the provisions of the State Tax Uniform Procedure Law, R.S.54:48-1, *et seq.*, within 90 days after the date of such determination. Interest earned on amounts escrowed shall be credited to the prevailing party.

### **Section 107-101 Affordable Housing Trust Fund**

A. There is hereby created a separate, interest-bearing Affordable Housing Trust Fund to be maintained by the Chief Financial Officer of the Borough of North Caldwell for the purpose of depositing development fees collected from residential and non-residential 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 affordable units or of a fraction of an affordable unit, where permitted by Ordinance or by Agreement with the Borough of North Caldwell;
- 2) Funds contributed by developers to make ten percent (10%) of the adaptable entrances in a townhouse or other multistory attached dwelling unit 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 North Caldwell's affordable housing program.

C. In the event of a failure by the Borough of North Caldwell 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 the expenditure of funds on activities not approved by the Court; or for other good cause demonstrating the unapproved use(s) of funds, the Court may authorize the State of New Jersey, Department of Community Affairs, 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 North Caldwell, or, if not practicable, then within the County or the Housing Region.

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

D. Interest accrued in the Affordable Housing Trust Fund shall only be used to fund eligible affordable housing activities approved by the Court.

### **Section 107-102 Use of Funds**

A. The expenditure of all funds shall conform to a Spending Plan approved by the Court. Funds deposited in the Affordable Housing Trust Fund may be used for any activity approved by the Court to address the Borough of North Caldwell'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; housing rehabilitation; new construction of affordable housing units and related costs; accessory apartments; a market to

affordable program; Regional Housing Partnership programs; conversion of existing non-residential 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; and/or any other activity permitted by the Court and specified in the approved Spending Plan.

B. Funds shall not be expended to reimburse the Borough of North Caldwell for past housing activities.

C. At least 30 percent of all development fees collected and interest earned on such fees 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 30 percent or less of the median income for Housing Region 2, in which North Caldwell 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 percent or less of median income may include buying down the cost of low or moderate income units in the municipal Fair Share Plan to make them affordable to households earning 30 percent 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 housing units on site, if permitted by Ordinance or by Agreement with the Borough of North Caldwell, and funds from the sale of units with extinguished controls shall be exempt from the affordability assistance requirement.

D. The Borough of North Caldwell 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.

E. No more than 20 percent of all revenues collected from development fees may be expended on administration, including, but not limited to, salaries and benefits for municipal employees or consultants' 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 a rehabilitation program.

1) In the case of a rehabilitation program, the administrative costs of the rehabilitation program shall be included as part of the 20 percent of collected development fees that may be expended on administration.

2) 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. 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.

### **Section 107-103      Monitoring**

The Borough of North Caldwell shall provide annual reporting of Affordable Housing Trust Fund activity to the State of New Jersey, Department of Community Affairs, Council on Affordable Housing or Local Government Services or other entity designated by the State of New Jersey, with a copy provided to Fair Share Housing Center and posted on the municipal website, using forms developed for this purpose by the New Jersey Department of Community Affairs, Council on Affordable Housing or Local Government Services. The reporting shall include an accounting of all Affordable Housing Trust Fund activity, including the sources and 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 Borough owned affordable housing units, repayments from affordable housing program loans, and any other funds collected in connection with North Caldwell's affordable housing programs, as well as an accounting of the expenditures of revenues and implementation of the Spending Plan approved by the Court.

#### **Section 107-104 Ongoing Collection of Fees**

A. The ability for the Borough of North Caldwell 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 North Caldwell 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 North Caldwell 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 North Caldwell 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 North Caldwell retroactively impose a development fee on such a development. The Borough of North Caldwell also shall not expend any of its collected development fees after the expiration of its Judgment of Compliance.

#### **Sections 107-105 to 107-106 Purposefully Left Blank**

**Section 2.** If any article, section, subsection, sentence, clause or phrase of this Ordinance is, for any reason, held to be unconstitutional or invalid, such decision shall not affect the remaining portions of this Ordinance and they shall remain in full force and effect.

**Section 3.** In the event of any inconsistencies between the provisions of this Ordinance and any prior ordinance of the Borough of North Caldwell, the provisions hereof shall be determined to govern. All other parts, portions and provisions of the Revised General Ordinances of the Borough of North Caldwell are hereby ratified and confirmed, except where inconsistent with the terms hereof.

**Section 4.** The Borough Clerk is directed to give notice at least ten days prior to a hearing on the adoption of this ordinance to the Essex County Planning Board and to all other persons entitled thereto pursuant to N.J.S.A. 40:55D-15, and N.J.S.A. 40:55D-63 (if required).

**Section 5.** After introduction, the Borough Clerk is hereby directed to submit a copy of the within Ordinance to the Planning Board of the Borough of North Caldwell for its review in accordance with N.J.S.A. 40:55D-26 and N.J.S.A. 40:55D-64.

**Section 6.** This Ordinance shall take effect immediately upon (1) adoption; (2) approval by the Mayor pursuant to N.J.S.A. 40:69A-149.7; (3) publication in accordance with the laws of the State of New Jersey; and (4) filing of the final form of adopted ordinance by the Clerk with (a) the Essex County Planning Board pursuant to N.J.S.A. 40:55D-16, and (b) the Borough Tax Assessor as required by N.J.S.A. 40:49-2.1.

**INTRODUCED: July 16, 2019**

Moved By: Councilman Raymond  
Seconded By: Council President Santomauro

COUNCIL MEMBER	YES	NO	ABSTAIN	ABSENT	COUNCIL MEMBER	YES	NO	ABSTAIN	ABSENT
ASTORINO				X	RAYMOND	X			
CHIAIA	X				REES	X			
KESSLER	X				SANTOMAURO	X			

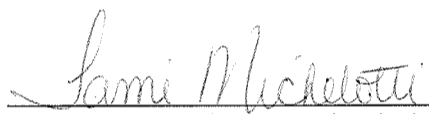
**PUBLIC HEARING: August 13, 2019**

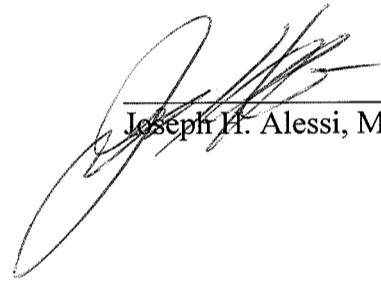
**ADOPTED: August 13, 2019**

Moved By: Councilman Raymond  
Seconded By: Councilman Chiaia

COUNCIL MEMBER	YES	NO	ABSTAIN	ABSENT	COUNCIL MEMBER	YES	NO	ABSTAIN	ABSENT
ASTORINO				X	RAYMOND	X			
CHIAIA	X				REES	X			
KESSLER				X	SANTOMAURO	X			

**ATTEST:**

  
Tami Michelotti, Borough Clerk

  
Joseph H. Alessi, Mayor