

ORDINANCE NO. 18-16-1528

**AN ORDINANCE TO AMEND CHAPTER 275 ARTICLE XXX:
DEVELOPMENT FEES FOR AFFORDABLE HOUSING**

BE IT ORDAINED by the Borough Council of the Borough of Cresskill, County of Bergen, State of New Jersey, that the following amendments and revisions are made to the Revised General Ordinances of the Borough of Cresskill, Chapter 275-126 and 275-127 entitled “Zoning Ordinance of the Borough of Cresskill”.

BE IT ORDAINED THAT Section 275-126, and 275-127 are hereby deleted in their entirety and replaced with the following:

NEW PROVISIONS

ARTICLE XXX: Development Fees for Affordable Housing

Section 275-126: Statutory and Case Law Guidelines

- 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 (the Act), N.J.S.A. 52:27d-301 et seq., and the State Constitution, subject to the Council on Affordable Housing’s (COAH’s) adoption of rules.
- B. Pursuant to P.L. 2008, c. 46 Section 8 (N.J.S.A. 52:27D-329.2) and the Statewide Non-Residential Development Fee Act (N.J.S.A. 40:55D-8.1 through 40:55D-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 are under the jurisdiction of the Council or court of competent jurisdiction and have a COAH or Court approved spending plan may retain fees collected from nonresidential developments.
- C. This article establishes standards for the collection, maintenance, and expenditures of development fees pursuant to P.L. 2008, c. 46, Sections 8 and 32 through 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 article shall be used for the sole purpose of providing low-and moderate-income housing in accordance with a Court-approved Spending Plan.
- D. This article shall not be effective until approved by the Court. Cresskill shall not spend development fees until the Court has approved a plan for spending such fees.

Section 275-126.1 **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 one-hundred-percent affordable development.

COAH or 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 permitted in N.J.A.C. 5:97-8.3.

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).

GREEN BUILDING STRATEGIES- 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 275-126.2 Residential development fees.

A. Imposed fees.

- (1) Within the zoning districts allowing residential development, residential developers, except for developers of the types of development specifically exempted below, shall pay a fee of 1½% of the equalized assessed value for residential development, provided that no increased density is permitted.
- (2) When an increase in residential density pursuant to N.J.S.A. 40:55D-70d(5) (known as a “d” variance) has been permitted, developers may be required to pay a development fee of 6% of the equalized assessed value for each additional unit that may be realized. However, if the zoning of 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.
- (3) Example: If an approval allows four units to be constructed on a site that was zoned for two units, the fees could equal 1½% of the equalized value on the first two units: and the specified higher percentage up to 6% of the equalized assessed value for the two additional units. Provided that the zoning on the

site has not changes during the two-year period preceding the filing of such a variance application.

- B. Eligible exactions, ineligible exactions and exemptions for residential development.
- (1) Affordable housing developments and developments where the developer has made a payment in lieu of on-site construction of affordable units shall be exempt from development fees.
 - (2) Developments that have received preliminary or final site plan approval prior to the adoption of a municipal development fee ordinance 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.
 - (3) Development fees shall be imposed and collect 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) Development fees shall not be imposed and collected on single-family residential structures.

Section 275-126.3 Nonresidential development fees.

A. Imposed fees.

- (1) Within all zoning districts, nonresidential developers, except for developers of the types of development specifically exempted, shall pay a fee equal to 2½% of the equalized assessed value of land and improvements for all new nonresidential construction on an improved lot or lots.
- (2) Nonresidential developers, except for developers of the types of development specifically exempted, shall also pay a fee equal to 2½% of the increase in equalized assessed value resulting from any additions to existing structures to be used for nonresidential purposes.
- (3) Development fees shall be imposed and collected when an existing structure is demolished and replaced. The development fee of 2½% 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 of 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.

B. Eligible exactions, ineligible exactions and exemptions for nonresidential development.

- (1) The nonresidential portion of a mixed-use inclusionary or market-rate development shall be subject to the development fee of 2½% unless otherwise exempted below.

- (2) The fee of 2½% shall not apply to an increase in equalized assessed value resulting from alterations, changes in use within existing footprint, reconstruction, renovations and repairs.
- (3) 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 Non-Residential Development Certification/Exemption Form. Any exemption claimed by a developer shall be substantiated by that developer.
- (4) 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.
- (5) 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 Cresskill as a lien against the real property of the owner.
- (6) Developers of municipal buildings and houses of worship shall be exempt from paying a development fee.

Section 275-126.4 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 nonresidential 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 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.
- 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 that notice, the municipal 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 notifies the local assessor of any and all requests for the scheduling of a final inspection on property which is subject to a development fee.

- F. 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.
- G. Should the Borough of Cresskill 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).
- H. Fifty percent 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 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.
- I. 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 escrow account by the Borough of Cresskill. Appeals from a determination of the Board of Taxation may be made to the tax court in accordance with the provisions of the State Tax Uniform Procedure Law, N.J.S.A. 54:48-1 et seq., within 90 days after the date of such determination. Interest earned on amounts escrowed shall be credited to the prevailing party.

Section 275-126.5 Affordable Housing Trust Fund.

- A. There is hereby created a separate, interest-bearing housing trust fund to be maintained by the Chief Financial Officer for the purpose of depositing development fee collected 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 at all times be identifiable by source and amount:
 - (1) Payments in lieu of on-site construction of affordable units;
 - (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 Cresskill's affordable housing program. In the event of a failure by the Borough of Cresskill 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 judgement of compliance or a revocation of the judgement 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 expenditures 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 practical, be utilized for affordable housing programs within the Borough of Cresskill, or, if not practical, 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 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.

- C. All interest accrued in the Housing Trust Fund shall only be used on eligible affordable housing activities approved by the Court.

Section 275-126.6 Use of Funds.

- A. 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 Borough of Cresskill'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 by the Court and specified in the approved Spending Plan.
- B. Funds shall not be expended to reimburse the Borough of Cresskill for past housing activities.
- C. At least 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 affordable assistance portion of development fees collected shall be used to provide affordability assistance to those households earning 30% or less of median income by region.

- (1) Affordability assistance programs may include down payment assistance, security deposit assistance, low-interest loans, rental assistance, assistance with homeowner's association or condominium fees and special assessments, and assistance with emergency repairs.
 - (2) Affordability assistance to households earning less than 30% of median income by region 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 use of development fees in this manner may entitle the Borough of Cresskill to bonus credits pursuant to N.J.A.C. 5:97-3.7.
 - (3) Payments in lieu of constructing affordable units on site and funds from the sale of units with extinguishing controls shall be exempt from the affordability assistance requirement.
- D. The Borough of Cresskill 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. 5:96-18.
- 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, a Housing Element and Fair Share Plan, and /or an affirmative marketing program. In the case of a rehabilitation program, no more than 20% of the revenues collected from development fees shall be expended for such administrative expenses. Administrative funds may be used for income qualification of households, monitoring the turnover of sale and rental units, and compliance with monitoring requirements. Legal or other fees related to litigation opposing affordable housing sites or objecting to COAH regulations and/or actions are not eligible use of the Affordable Housing Trust Fund.

Section 275-126.7 Monitoring.

The Borough of Cresskill 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 provide 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 amount 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 housing units on site (if permitted by Ordinance or by agreement with Cresskill), funds from the sale of units with

extinguishing 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 Cresskill'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 275-126.8 Ongoing collection of fees.

The ability for the Borough of Cresskill to impose, collect and expend development fees shall expire with its repose period covered by its Judgement of Compliance unless Cresskill has 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 approved 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. If the Borough of Cresskill fails to renew its ability to impose and collect development fees prior to the expiration of its Judgement of Compliance, it may be subject to forfeiture of any or all funds remaining within its municipal 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 (N.J.S.A. 52:27D0320). The Borough of Cresskill shall not impose a residential development on a development that receives preliminary or final site plan approval after the expiration of its Judgement of Compliance, nor shall Cresskill retroactively impose a development fee on such a development. The Borough of Cresskill shall not expend development fees after the expiration of its Judgement of Compliance.

All Ordinances of the Borough of Cresskill which are inconsistent with the provisions of this Ordinance are hereby repealed to the extent of such inconsistency.

SECTION II

All Ordinances of the Borough of Cresskill which are inconsistent with the provisions of this Ordinance are hereby repealed to the extent of such inconsistency.

SECTION III

If any 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.

SECTION IV

This Ordinance shall take effect immediately upon final passage, approval and publication as required by law.

