

## BOROUGH OF MILLTOWN

## ORDINANCE 19-1480

AN ORDINANCE OF THE BOROUGH COUNCIL OF THE BOROUGH OF MILLTOWN  
AMENDING BOROUGH CODE CHAPTER 34 "COMPREHENSIVE DEVELOPMENT"

BE IT ORDAINED, by the governing body of the Borough of Milltown, County of Middlesex, State of New Jersey, as follows

Section 1. The Borough Code of the Borough of Milltown is hereby amended and supplemented so as to amend Chapter 34, entitled "Comprehensive Development" so as to repeal Section 34-18.A "Development Fees" in its entirety and replace with Section 34-18.A "Development Fees" which shall read in its entirety as follows:

**34-18A DEVELOPMENT FEES.****34-18A.1 Intent 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 (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. COAH was authorized by P.L.2008, c.46 section 8 (C. 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 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.
- c. In Re: Adoption of N.J.A.C. 5:96 and 5:97 by the New 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 1, 2025 are under the Court's jurisdiction and are subject to approval by the Court.
- d. This ordinance establishes standards for the collection, maintenance, and expenditure of development fees pursuant to COAH's regulations and in accordance P.L.2008, c.46, Sections 8 and 32-38 (N.J.S.A. 52:27D-329.2 and N.J.S.A. 40:55D-8.1 through 40:55D-8.7, respectively). Fees collected pursuant to this ordinance shall be used for the sole purpose of providing low-income and moderate-income housing. This ordinance shall be interpreted within the framework of COAH's rules on development fees, codified at N.J.A.C. 5:93-8.

**34-18A.2 Basic Requirements.**

- a. This section shall not be effective until approved by the Superior Court pursuant to N.J.A.C. 5:93-8.
- b. Milltown shall not spend development fees until the Court has approved a plan for spending such fees in conformance with N.J.A.C. 5:93-8.

**34-18A.3 Definitions.** The following terms, as used in this ordinance, shall have the following meanings:

- a. **Affordable Housing Development** shall mean a development that is inclusionary development, a municipal construction project or a one hundred (100%) percent affordable development. This shall include any project that contains very-low, low-, moderate-income units on or off-site.
- b. **COAH or the Council** shall mean the New Jersey Council on Affordable Housing established under the Fair Housing Act or any successor agency.

- c. **Development Fee** shall mean money paid by a developer for the improvement of property as permitted in N.J.A.C. 5:93-8.
- d. **Developer** shall mean 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.
- e. **Equalized Assessed Value** shall mean 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).
- f. **Green Building Strategies** shall mean 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.

#### 34-18A.4 Residential Development Fees.

- a. Imposed Fees.
  1. Within all Zoning Districts and Redevelopment Areas, residential developers, except for developers of the types of development specifically exempted below, shall pay a fee of one and one-half (1.5%) percent of the equalized assessed value for residential development provided 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 six (6%) percent 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 (4) units to be constructed on a site that was zoned for two (2) units, the fees could equal one and a half (1.5%) percent of the equalized assessed value on the first two (2) units; and the specified higher percentage up to six (6%) percent of the equalized assessed value for the two (2) additional units, provided zoning on the site has not changed 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, 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.
  2. Developments that have received preliminary or final site plan approval or are subject to an executed redevelopment or development agreement (including master redeveloper agreement) 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 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. Homes replaced as a result of a natural disaster (such as fire or flood) shall be exempt from the payment of a development fee.

**34-18A.5 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 two and one-half (2.5%) percent of the equalized assessed value of the land and improvements, for all new nonresidential construction on an unimproved lot or lots.
  2. Nonresidential developers, except for developers of the types of development specifically exempted, shall 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 nonresidential purposes.
  3. Development fees shall be imposed and collected when an existing structure is demolished and replaced. The development fee of two and one-half (2.5%) percent shall be calculated on the difference between the equalized assessed value of the pre-existing 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.
- 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 two and one-half (2.5%) percent development fee, unless otherwise exempted below.
  2. The two and one-half (2.5%) percent fee shall not apply to an increase in equalized assessed value resulting from alterations, change 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 Nonresidential 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 the basis for the exemption no longer applies, and shall make the payment of the nonresidential development fee, in that event, within three (3) 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 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 forty-five (45) days of the termination of the property tax exemption. Unpaid nonresidential development fees under these circumstances may be enforceable by Milltown as a lien against the real property of the owner.

**34-18A.6 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. 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.
- c. 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.
- d. 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-RDI.

- e. 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 which is subject to a development fee.
- f. 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.
- g. Should Milltown 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).
- h. The developer shall pay fifty (50%) percent of the calculated development fee amount prior to the issuance of the first building permit for the subject property; and fifty (50%) percent of the calculated development fee amount prior to the municipal issuance of a final Certificate of Occupancy for the subject property.
- 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 Milltown. 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, 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.
  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 forty-five (45) days of receipt of the challenge, collected fees shall be placed in an interest bearing escrow account by the Borough of Milltown. 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, 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.

#### **34-18A.7 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 fees collected from 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;
  2. Developer contributed funds to make ten (10%) percent 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 Milltown's affordable housing program.

#### **34-18A.8 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 Milltown'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 and specified in the approved spending plan.

- b. Funds shall not be expended to reimburse Milltown for past housing activities.
- c. At least thirty (30%) percent of all development fees collected and interest earned shall be used to provide affordability assistance to low-income and moderate-income households in affordable units included in the municipal Fair Share Plan. One-third (1/3) of the affordability assistance portion of development fees collected shall be used to provide affordability assistance to those households earning thirty (30%) percent 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 homeowners association or condominium fees and special assessments, and assistance with emergency repairs.
  2. Affordability assistance to households earning thirty (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 thirty (30%) percent or less of median income.
  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. Milltown 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.
- e. No more than twenty (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 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 (20%) percent 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 COAH's monitoring requirements. 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.

**34-18A.9 Monitoring.** On or about June 30 of each year through 2025, Milltown shall provide annual reporting of trust fund activity to the New Jersey Department of Community Affairs ("DCA"), COAH, or Local Government Services ("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 DCA, COAH, or LGS. 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 Milltown's housing program, as well as to the expenditure of revenues and implementation of the plan approved by the Court.

**34-18A.10 Ongoing Collection of Fees.** The ability for Milltown to impose, collect and expend development fees shall expire with its Court-issued Judgment of Compliance unless Milltown has filed an adopted Housing Element and Fair Share Plan with the Court, has petitioned for substantive certification, and has received the Court's approval of its development fee ordinance. If Milltown 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 (C.52:27D-320). Milltown 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 and Repose, nor shall Milltown retroactively impose a development fee on such a development. Milltown shall not expend development fees after the expiration of its Judgment of Compliance and Repose.

SECTION 2. All ordinances or parts of ordinances inconsistent herewith are hereby repealed.

SECTION 3. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

SECTION 4. This ordinance shall take effect after second reading and publication as required by law.

<b>Motion/ Second</b>	<b>Roll Call</b>	<b>Aye</b>	<b>Nay</b>	<b>Abstain</b>	<b>Absent</b>	Adopted on First Reading Dated: September 23, 2019
	Council President Dixon	X				 Gabriella Siboni, RMC Borough Clerk
	Councilman Farkas	X				
	Councilwoman Kerber				X	
Motion	Councilman Ligotti	X				
Second	Councilwoman Mehr	X				
	Councilman Revolinsky	X				

<b>Motion/ Second</b>	<b>Roll Call</b>	<b>Aye</b>	<b>Nay</b>	<b>Abstain</b>	<b>Absent</b>	Adopted on Second Reading Dated: October 15, 2019
	Council President Dixon	X				 Gabriella Siboni, RMC Borough Clerk
	Councilman Farkas	X				
Second	Councilwoman Kerber	X				
Motion	Councilman Ligotti	X				
	Councilwoman Mehr	X				
	Councilman Revolinsky	X				

Approval by the Mayor on this day of 15<sup>th</sup> day of October, 2019

  
 Eric A. Steeber, Mayor