

**BOROUGH OF ELMWOOD PARK  
BERGEN COUNTY, NEW JERSEY  
RESOLUTION R-350-23**

**RESOLUTION BY: COUNCILWOMAN PELLEGRINE  
SECONDED BY: COUNCILWOMAN SHERIDAN**

**INTRODUCE ORDINANCE #23-30  
SECOND READING**

**WHEREAS**, a public notice has been given by the Borough Clerk that an ordinance entitled:

**ORDINANCE ADDING SECTION 37-2, ET SEQ., “MANDATORY DEVELOPMENT FEE” TO CHAPTER 37 “AFFORDABLE HOUSING” OF THE MUNICIPAL CODE OF THE BOROUGH OF ELMWOOD PARK**

was introduced and passed at a meeting held on Thursday, August 17, 2023 and that further consideration of this ordinance would be taken up at this meeting; and

**WHEREAS**, all persons interested in said ordinance were given an opportunity to be heard concerning the same;

**NOW, THEREFORE, BE IT RESOLVED**, by the Mayor and Council of the Borough of Elmwood Park, that an ordinance entitled:

**ORDINANCE ADDING SECTION 37-2, ET SEQ., “MANDATORY DEVELOPMENT FEE” TO CHAPTER 37 “AFFORDABLE HOUSING” OF THE MUNICIPAL CODE OF THE BOROUGH OF ELMWOOD PARK**

pass on final reading.

APPROVED: September 21, 2023

\_\_\_\_\_  
Robert Colletti, Mayor

ATTEST: \_\_\_\_\_

Shanee Morris, CMR  
Acting Borough Clerk

Record of Council Vote on Passage

	AYE	NAY	Abstain	Absent		AYE	NAY	Abstain	Absent
Dennis	X				Pellegrine	X			
Fasolo				X	Sheridan	X			
Golabek	X				Balistreri				X

This resolution was approved by the Mayor and Council of the Borough of Elmwood Park at a regular scheduled meeting held on the 21<sup>st</sup> day of September 2023. Signed and sealed before me.

\_\_\_\_\_  
Shanee Morris, CMR  
Acting Borough Clerk

\_\_\_\_\_  
Dated

**BOROUGH OF ELMWOOD PARK  
BERGEN COUNTY, NEW JERSEY  
ORDINANCE NO.: 23-30**

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**ORDINANCE ADDING SECTION 37-2, ET SEQ., “MANDATORY DEVELOPMENT FEE” TO CHAPTER 37 “AFFORDABLE HOUSING” OF THE MUNICIPAL CODE OF THE BOROUGH OF ELMWOOD PARK.**

**§37-2 MANDATORY DEVELOPMENT FEE**

**§37-2.1 Purpose**

This article 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 (N.J.S.A. 52:27D-329.2), the Statewide Non-Residential Development Fee Act (N.J.S.A. 40:55D-8.1 through 8.7), and the Borough's 2018 Settlement Agreement with Fair Share Housing Center (BER-L-6375-15). Fees collected pursuant to this article shall be used for the purpose of providing very-low, low- and moderate-income housing in accordance with a Court-approved spending plan.

**§37-2.2 Basic Requirements**

- a. This chapter shall not be effective until approved by Superior Court.
- b. The Borough of Elmwood Park shall not spend development fees until the Court has approved a plan for spending such fees (spending plan).

**§37-2.3 Definitions**

The following terms when used in this Ordinance shall have the meaning given in this Section.

“Affordable Housing Development” shall mean a development included in the Housing Element and Fair Share Plan, and includes, but is not limited to, an inclusionary development, a municipally-sponsored construction project or a 100% affordable housing development.

“COAH or the Council” shall mean the New Jersey Council on Affordable Housing established under the Fair Housing Act, or any successor agency charged with the administration of the Act.

“Court” shall mean the Superior Court of New Jersey, Law Division, Bergen County.

“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.

“Development Fee” shall mean money paid by a developer for the improvement of property as authorized by Holmdel Builder's Association v. Holmdel Borough, 121 N.J. 550 (1990) and the Fair Housing Act of 1985, N.J.S.A. 52:27d-301, et seq., and regulated by applicable COAH Rules.

“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 (N.J.S.A. 54:1-35a through c).

“Green Building Strategies” shall mean 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.

**§37-2.4 Residential Development Fees**

- a. Imposed Fees.

1. Within all districts, residential developers, except for developers of the types of development specifically exempted below, shall pay a fee of 1.5% of the equalized assessed value for residential development, provided no increased density is permitted.
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 6% 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. Example: If an approval allows four units to be constructed on a site that was zoned for two units, the fees could equal 1.5% of the equalized assessed value on the first two units; and 6% 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.

b. Eligible extractions, including extractions for residential developments.

1. Affordable housing developments 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 Elmwood Park, 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 the Borough's initial 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 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. Owner-occupied residential structures demolished and replaced as a result of a fire, flood, or natural disaster shall be exempt from paying a development fee.
4. Development fees shall be imposed and collected when there is an addition to an existing structure, or when an existing structure undergoes a change to a more intense use or is demolished and replaced. The development fee shall be calculated on the increase in the equalized assessed value of the improved structure.
5. No fee shall be charged pursuant to this section for any addition or improvement to an existing residential structure, so long as such addition or improvement does not increase the equalized assessed value of the existing structure, as of the date thereof, by more than fifty percent (50%).
6. Not-for-profit developers shall be exempt.

**§37-2.5. Non-Residential Development Fees**

a. Imposed Fees.

1. Within all zoning districts, non-residential 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 non-residential construction on an unimproved lot or lots.
2. Non-residential developers, except for developers of the types of development specifically exempted, 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 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 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 the two and a half (2.5) percent development fee, unless otherwise exempted below.
  2. The 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 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.
  4. A developer of a nonresidential development exempted from the nonresidential 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 nonresidential development fee, in that event, within three years after that event or after the issuance of the final certificate of occupancy for 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 Elmwood Park as a lien against the real property of the owner.

**§37-2.6. Collection procedures**

- a. Upon the granting of a preliminary, final or other applicable approval for a development, the applicable approving authority or entity shall notify or 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 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 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 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 Elmwood Park 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 time of 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 the issuance of the certificate of occupancy. No certificate of occupancy shall be issued to the developer until all remaining developer fees have been paid in full.
- 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 Millburn Township. 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 Elmwood Park Borough. 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.

**§37-2.7. 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 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 shall at all times be identifiable by source and amount:
  - 1. Payments in lieu of on-site construction of affordable units collected in accordance with §37-1.4.e;
  - 2. Developer-contributed funds to make 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. Recaptured funds;
  6. Proceeds from the sale of affordable units; and
  7. Any other funds collected in connection with the Borough of Elmwood Park's affordable housing program.
- c. In the event of a failure by the Borough of Elmwood Park 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 Elmwood Park, or, if not practicable, then within the County.
1. 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 noncompliant condition(s), and upon a finding of continuing and deliberate noncompliance, 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. All interest accrued in the Affordable Housing Trust Fund shall only be used to fund eligible affordable housing activities approved by the Court.

**§37-2.8. Use of Funds**

- a. The expenditure of all funds shall conform to a spending plan approved by the Superior Court. Funds deposited in the Affordable Housing Trust Fund may be used for any activity approved by the Court to address Elmwood Park Borough'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 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; and/or any other activity permitted by the Court and specified in the approved spending plan.
- b. Funds shall not be expended to reimburse Elmwood Park Borough for past housing activities.
- c. At least 30% of all development fees collected and interest earned on such fees shall be used to provide affordability assistance to very low-, 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% or less of the median income for Housing Region 1, in which Elmwood Park 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% 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% 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 and funds from the sale of units with extinguished controls shall be exempt from the affordability assistance requirement.
- d. Elmwood Park Borough 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% 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, no more than 20 percent of the revenues collected from development fees shall be expended for such administrative expenses.
  2. Administrative funds may be used for income qualification of households, monitoring the turnover of sale and rental units, and compliance with the 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.

#### **§37-2.9. Monitoring**

- a. The Borough of Elmwood Park shall provide annual reporting of Affordable Housing Trust Fund activity to the New Jersey Department of Community Affairs, COAH or Local Government Services or other entity designated by the State of New Jersey, and Fair Share Housing Center, as well as posting it to the municipal website, using forms developed for this purpose by the New Jersey Department of Community Affairs, COAH or Local Government Services, or any other forms endorsed by the Special Master and Fair Share Housing Center

#### **§37-2.10. Ongoing collection of fees**

- a. The ability of Elmwood Park Borough to impose, collect and expend development fees shall be permitted through the expiration of the repose period covered by its judgment of compliance and shall continue thereafter so long as Elmwood Park Borough 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 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 Elmwood Park fails to renew its ability to impose and collect development fees after the expiration of its judgment of compliance and repose, 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 (N.J.S.A. 52:27D-320).
- c. After the expiration of the judgment of compliance and repose, if the Borough does not pursue or obtain continued authorization, Elmwood Park Borough shall not impose a residential development fee on a development that receives preliminary or final site plan approval, retroactively impose a development fee on such a development, or expend any of its collected development fees.

ATTEST: \_\_\_\_\_

Shanee Morris, CMR  
Acting Borough Clerk

APPROVED: \_\_\_\_\_

Robert Colletti, Mayor

Introduced: August 17, 2023

Adopted: September 21, 2023