

ORDINANCE #2024-02 – First Reading

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**AN ORDINANCE OF THE BOROUGH OF ALLENHURST TO CREATE
CHAPTER 21 ENTITLED “AFFORDABLE HOUSING
DEVELOPMENT FEES” AS REQUIRED BY THE SETTLEMENTS
WITH FAIR SHARE HOUSING CENTER AND POWER STATION AT
ALLENHURST, LLC**

Offered By: Deputy Mayor McLoughlin

Seconded By: Comm. Cumiskey

WHEREAS, the Borough of Allenhurst (“Borough”) in the County of Monmouth and State of New Jersey, in furtherance of its settlement agreements with Fair Share Housing Center (“FSHC”) and Power Station at Allenhurst, LLC and to comply with the Order of Fairness and Preliminary Compliance entered by the Superior Court of New Jersey on July 31, 2023, must supplement and revise portions of its existing Borough Code, and;

WHEREAS, the Borough has sought, to the best of its ability as a built out municipality with a lack of available vacant land, to meet the intent and spirit of the Affordable Housing process by drafting an affordable housing plan, participating in the court led settlement process, and reviewing its existing land use ordinances, and;

WHEREAS, the FSHC settlement agreement and Order of Fairness and Preliminary Compliance require the Borough to enact a number of ordinances including a Development Fee Ordinance, an Affordable Housing Ordinance, a Mandatory Set Aside Ordinance, an Overlay Zone Ordinance and a Redevelopment Plan Amendment all in accordance with the Borough's Third Round Housing Element and Fair Share Plan, consistent with the terms of the Settlement Agreement reached with Fair Share Housing Center regarding compliance with the Borough's affordable housing obligations.

NOW THEREFORE, BE IT ORDAINED by the Governing Body of the Borough of Allenhurst that the Borough Code of the Borough of Allenhurst, be and is hereby amended, revised and supplemented to create the following Affordable Housing Development Fees ordinance:

SECTION I. The Borough Code of the Borough of Allenhurst be and is hereby supplemented to create Chapter 21 entitled "Affordable Housing Development Fees" as follows:

21-1 Affordable Housing Development Fees, 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. 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 is 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 non-residential development.

- c. In In Re: Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey 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 section 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. Fees collected pursuant to this section shall be used for the sole purpose of providing very low-, low and moderate income housing. This section shall be interpreted within the framework of COAH's rules on development fees, codified at N.J.A.C. 5:97-8.

21-2 Definitions. As used in this Chapter 21 of the Borough Code of the Borough of Allenhurst, the following terms shall have the following meanings:

- a. **"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 development.
- b. **"COAH"** or the **"Council"** means the New Jersey Council on Affordable Housing established under the Fair Housing Act.
- c. **"Development fee"** means 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 the NJ Statewide Non-Residential Development Fee Act, P.L. 2008, c. 46 (N.J.S.A. 40:55D-8.1 et seq.), regulated by applicable COAH regulations.
- d. **"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.
- e. **"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).
- f. **"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.

21-3 Basic Requirements.

- a. This chapter shall not be effective until approved by the Court.
- b. The Borough of Allenhurst shall not spend development fees until the Court has approved a Spending Plan.

21-4 Residential Development Fees:

- a. Imposed Fees
 - 1. Within all zoning districts, residential developers, except for developers of the types of development specifically exempted below, shall pay a fee of on one and

one half percent (1.5%) 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 shall be required to pay a development fee of six percent (6%) 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.
- 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 if permitted by ordinance 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. 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 an existing structure undergoes a change to a more intense use, is demolished and replaced, or when the square footage is increased by the creation of a new bedroom. The development fee shall be calculated on the increase in the equalized assessed value of the improved structure.
 5. Nonprofit organizations which have received tax exempt status pursuant to section 501(c)(3) of the Internal Revenue Code, providing current evidence of that status is submitted to the municipal clerk, together with a certification that services of the organization are provided at reduced rates to those who establish an inability to pay existing charges, shall be exempted from paying a development fee.
 6. Federal, state, county and local governments shall be exempted from paying a development fee.

21-5 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 percent (2.5%) 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 percent (2.5%) 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 percent (2.5%) development fee, unless otherwise exempted below.
 2. The two and one half percent (2.5%) 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. Non-residential developments shall be exempt from the payment of non-residential development fees in accordance with the exemptions required pursuant to P.L.2008, c.46, as specified in the Form NRDF "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 non-residential development exempted from the non-residential 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 non-residential development fee, in that event, within three years after that event or after the issuance of the final certificate of occupancy of the non-residential 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 non-residential development fees under these circumstances may be enforceable by Allenhurst as a lien against the real property of the owner.

21-6 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 or Zoning Officer 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 NRDF "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 NRDF 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 NRDF. The

Tax assessor shall verify exemptions and prepare estimated and final assessments as per the instructions provided in Form NRDF.

- 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 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.
- 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 of 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 Allenhurst 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 (C.40:55D 8.6).
- h. One hundred percent (100%) of the development fee shall be collected at the issuance of the 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 Allenhurst. 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 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 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 forty five (45) days of receipt of the challenge, collected fees shall be placed in an interest bearing escrow account by Allenhurst. 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 ninety (90) days after the date of such determination. Interest earned on amounts escrowed shall be credited to the prevailing party.

21-7 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 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 if permitted by ordinance;
 2. developer contributed funds to make ten percent (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 Allenhurst's affordable housing program.
- c. In the event of a failure by Allenhurst 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 Allenhurst, or, if not practicable, then within the County or the Housing Region.
- d. 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.
- e. All interest accrued in the affordable housing trust fund shall only be used on eligible affordable housing activities approved by the Superior Court.

21-8 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 Superior Court to address Allenhurst'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 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, or any other activity as permitted pursuant to N.J.A.C. 5:97-8.7 through 8.9 and specified in the approved spending plan.

- b. Funds shall not be expended to reimburse Allenhurst 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 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 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 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.
 - 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. Allenhurst 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 twenty percent (20%) of all revenues collected from development fees and interest, 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 percent (20%) of the revenues collected from development fees and interest 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 the court's monitoring requirements. Legal or other fees related to litigation opposing affordable housing sites or objecting to COAH's regulations and/or action are not eligible uses of the affordable housing trust fund.

21-9 Monitoring

- a. On June 30, 2024, and June 30, 2025, Allenhurst shall provide annual reporting of trust fund activity to the New Jersey Department of Community Affairs ("DCA"), COAH, 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 COAH, the Special Master or FSHC. 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 Allenhurst's housing program, as well as the expenditure of revenues and implementation of the plan approved by the Court.

21-10 Ongoing collection of fees

- a. The ability for Allenhurst to impose, collect and expend development fees shall expire with its Judgment of Compliance and Repose. If Allenhurst 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). Allenhurst 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 Allenhurst retroactively impose a development fee on such a development. Allenhurst shall not expend development fees after the expiration of its Judgment of Compliance and Repose.

SECTION II.: REPEALER. The remainder of all other sections and subsections of the aforementioned ordinances not specifically amended by this Ordinance shall remain in full force and effect.

SECTION III.: INCONSISTENT ORDINANCES. All other Ordinances or parts thereof inconsistent with the provisions of this Ordinance are hereby repealed as to such inconsistency.

SECTION IV.: SEVERABILITY. If any section, paragraph, subdivision, clause, or provision of this Ordinance shall be adjudged invalid, such adjudication shall apply only to the section, paragraph, subdivision, clause, or provision so adjudged and the remainder of this Ordinance shall be deemed valid and effective.

SECTION V.: EFFECTIVE DATE. This Ordinance shall take effect upon its passage and publication according to law.


VOTE: Comm. McLoughlin-AYE; Mayor McLaughlin-AYE

APPROVED: January 9, 2024

ADOPTED: February 13, 2024

CERTIFICATION

I, Donna M. Campagna, Borough Clerk/Administrator, do hereby certify this to be a true and exact copy of an Ordinance adopted by the Board of Commissioners of the Borough of Allenhurst, County of Monmouth, State of New Jersey, at a meeting held on February 13, 2024.



Donna M. Campagna, RMC
Borough Clerk/Administrator