

ORDINANCE NO. RO-35-05

**AN ORDINANCE AMENDING THE LAND USE ORDINANCE
OF THE TOWNSHIP OF WASHINGTON TO FACILITATE THE PROVISION OF
AFFORDABLE HOUSING IN THE THIRD HOUSING CYCLE IN CONNECTION
WITH RESIDENTIAL AND NONRESIDENTIAL DEVELOPMENT**

WHEREAS, the New Jersey Supreme Court and New Jersey Legislature have recognized in *So. Burl. Co. NAACP v. Mount Laurel* 92 N.J. 158 (1983) (“Mount Laurel II”) and the Fair Housing Act, N.J.S.A. 52:27D-301 et seq. (“FHA”) that New Jersey municipalities have responsibilities concerning the need to provide affordable housing for low and moderate income households; and

WHEREAS, the Legislature conferred upon the New Jersey Council on Affordable Housing (“COAH”) “primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in this State” (N.J.S.A. 52:27D-304(a)); and

WHEREAS, in *Mount Laurel II*, the New Jersey Supreme Court ruled that municipalities had the power to address the *Mount Laurel* responsibilities the Court had created through “inclusionary devices” and rejected the notion “that inclusionary measures amount to a taking without compensation” (see *Mount Laurel II* at 271); and

WHEREAS, in *Mount Laurel II*, the Supreme Court also stated, “Zoning does not require that land be used for maximum profitability and, on occasion, the goals may require something less” (see *Mount Laurel II* at 274 n. 34); and

WHEREAS, in the case entitled *Holmdel Builders Association v. Township of Holmdel*, 121 N.J. 550, 582 (1990), the Supreme Court referred to its *Mount Laurel II* decision and emphasized that, in designing inclusionary ordinances, “no density bonuses, compensatory benefits, or subsidies were specifically required;” and

WHEREAS, in view of the principles established by the Supreme Court in these landmark decisions, COAH recently adopted substantive regulations that authorized municipalities to impose a set aside, without any density bonuses or other compensatory benefits, pursuant to which municipalities could require residential developers to construct one affordable residential unit for every eight market residential units the developer constructed (N.J.A.C. 5:94-4.4(a)); and

WHEREAS, COAH specifically stated that “a municipality may adopt a zoning ordinance requiring a maximum of one for every eight market-rate residential units be affordable to low and moderate income households, as long as the zoning has not allowed an increase in density to accommodate affordable housing” (36 N.J.R. 5775); and

WHEREAS, similarly, COAH has also authorized municipalities to require nonresidential developers to produce affordable housing without any enhancement or compensatory offsetting benefit based upon a formula that would require the production of one affordable residential unit for every 25 jobs projected to be created by the non-residential development (N.J.A.C. 5:94-4.4(a)); and

WHEREAS, the Township of Washington wishes to ensure that, as developers build residential and nonresidential projects, they provide affordable housing consistent with COAH’s regulations and policies described above—policies soundly rooted in Supreme Court precedent; and

WHEREAS, implementation of these policies will ensure that as the Township of Washington grows with housing affordable to the middle and upper class, it will also grow with housing affordable to lower income households and that as nonresidential development occurs, it will also provide housing affordable for lower income workers (see Mount Laurel II at 211);

NOW, THEREFORE, BE IT ORDAINED by the Township Committee of the Township of Washington, County of Morris, and State of New Jersey that the Code of the Township of Washington is hereby amended as follows:

SECTION 1. Chapter 111, Land Use Procedures, Article VI, *Definitions*, §111-46, Terms defined, is hereby amended by amending the definition of “Development” to read as follows:

“DEVELOPMENT – means the division of a parcel of land into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any use or change in the use of any building or other structure, or of any mining, excavation or landfill, and any use or change in the use of any building or other structure, or land or extension of use of land, for which permission may be required pursuant to N.J.S.A. 40:55D-1 et seq.”

SECTION 2. Chapter 111, Land Use Procedures, Article VI, *Definitions*, §111-46, Terms defined, is hereby amended and supplemented by the addition and insertion in correct alphabetical order of the following definitions, to read as follows:

“AFFORDABLE – Having a sales price or rent within the means of a low- or moderate-income household as defined in N.J.A.C. 5:93-7.4, or for housing developed in accordance with the third-round rules of the New Jersey Council on Affordable Housing, as defined by N.J.A.C. 5:94-7.

DWELLING UNITS, MARKET-RATE – Housing units not restricted to low- and moderate-income households that may sell at any price determined by a willing seller and a willing buyer. “

SECTION 3. Chapter 217, Zoning, is hereby amended and supplemented by the addition of a new Article XIV, entitled “Requirements for Developments Increasing the Township’s Growth Share Obligation for Affordable Housing”, to read as follows:

**“ARTICLE XIV
Requirements for Developments Increasing the Township’s
Growth Share Obligation for Affordable Housing**

Every development which increases the number of affordable housing units that must be addressed by the Township’s housing element and fair share plan is subject to this ordinance

§217-144. Legislative intent. The legislative intent and recitals set forth in the preamble to Ordinance No. RO-35-05 (adopting this section) are hereby adopted and incorporated by reference herein as if set forth herein at length.

§217-145. Applicability. The provisions of this section shall apply to the following developments, subject to the exemptions in §217-146.

- A. Any development which results in a net increase in the number of market-rate dwelling units in the Township.

- B. Any development which results in a net increase in the gross floor area of any nonresidential building in the Township of the following use groups, as defined by the International Building Code (IBC) (which has been incorporated by reference into the Uniform Construction Code (UCC)):

Use Group Description*

B	Office buildings. Places where business transactions of all kinds occur. Includes banks, corporate offices, government offices, professional offices, car showrooms and outpatient clinics.
M	Mercantile uses. Buildings used to display and sell products. Includes retail stores, strip malls, shops and gas stations.
F	Factories where people make, process, or assemble products. Includes automobile manufacturers, electric power plants, foundries, and incinerators. F use group includes F1 and F2.
S	Storage uses. Includes warehouses, parking garages, lumberyards, and aircraft hangers. S group includes S1 and S2.
H	High Hazard manufacturing, processing, generation and storage uses. H group includes H1, H2, H3, H4 and H5.
A1	Assembly uses including concert halls and TV studios.
A2	Assembly uses including casinos, night clubs, restaurants and taverns.
A3	Assembly uses including libraries, lecture halls, arcades, galleries, bowling alleys, funeral parlors, gymnasiums and museums but excluding houses of worship
A4	Assembly uses including arenas, skating rinks and pools.
E	Schools K – 12.
I	Institutional uses such as hospitals, nursing homes, assisted living facilities and jails. I group includes I1, I2, I3 and I4.
R1	Hotels and motels.

*Note: The descriptions in the above table are not intended to be exhaustive, and additional uses are or may be included within the use group; in all cases, the IBC definitions control. The inclusion of any use in the above table is not to be construed to mean that such use is permitted in the Township or in any particular zoning district; such use shall only be permitted in accordance with the balance of the provisions in the Land Use Ordinance.

§217-146. Exemptions. Notwithstanding the provisions of §217-145 above, the following developments shall be exempt from the provisions of this section:

- A. Market-rate dwelling units within developments that provide affordable housing units in accordance with the housing element of the Township Master Plan and the Township's fair share plan regulations, in accordance with either the first- or second-round rules of the Council on Affordable Housing and in accordance with the applicable affordable housing requirements of the respective zone districts; provided, however, that such exemption shall only apply to the number of market-rate dwelling

units in the development that do not exceed a ratio of four market-rate units for every one affordable unit in the development.

- B. Developments of Federal, state, county and municipal governments, but not including developments of school districts
- C. Developments that received all required approvals from the Planning Board and/or Board of Adjustment, as applicable, prior to the effective date of this ordinance.

§217-147. Developer's obligation. Prior to, or as a condition precedent to the grant of any approval of a development application by the Planning Board, Board of Adjustment, Zoning Officer or Construction Official, as applicable, the developer shall be required to comply with the requirements of this section and to enter into an agreement with the Township Committee, in order to address the effect of the development upon the Township's affordable housing obligation, in accordance with the following requirements:

A. Residential development.

- 1. A net increase (new construction less demolition) of every eight (8) market-rate dwelling units, or fraction thereof, shall increase the obligation of the Township by one (1) affordable housing unit, or fraction thereof.
- 2. For every unit increase, or fraction thereof, in the Township's affordable housing obligation resulting from the development, the developer shall be required to increase the number of affordable housing units in the Township by an equal number, as set forth in Paragraphs 3 and 4 below.
- 3. For every whole unit of increase in the Township's obligation, one affordable unit shall be developed on the site or tract being developed, in accordance with the applicable zoning regulations.
- 4. For every fractional unit of increase in the Township's obligation, the developer shall have the option to:
 - a) develop an affordable unit on the site or tract being developed or at another location in the Township in accordance with the applicable zoning regulations, and to claim a credit for any resulting fractional surplus, and/or,
 - b) pay a fee to the Township in accordance with §217-149.
- 5. None of the foregoing shall be construed as increasing the permitted density above that which the zoning regulations would otherwise permit for the development.

B. Nonresidential development.

- 1. A net increase due to development, as defined in this Chapter, of every twenty-five (25) estimated jobs, or fraction thereof, shall increase the obligation of the Township by one (1) affordable housing unit, or fraction thereof. The number of estimated jobs shall be based on the gross floor area in square feet of new buildings or additions to existing buildings, less the gross floor area of any building to be demolished on the site, and on the use group of the development, in accordance with the following table:

Use Group	Description	Sq. Ft. of Gross Floor Area Generating Obligation of One Affordable Unit	Jobs Per 1,000 Square Feet
B	Office buildings. Places where business transactions of all kinds occur. Includes banks, corporate offices, government offices, professional offices, car showrooms and outpatient clinics.	8,333	3
M	Mercantile uses. Buildings used to display and sell products. Includes retail stores, strip malls, shops and gas stations.	25,000	1
F	Factories where people make, process, or assemble products. Includes automobile manufacturers, electric power plants, foundries, and incinerators. F use group includes F1 and F2.	12,500	2
S	Storage uses. Includes warehouses, parking garages, lumberyards, and aircraft hangers. S group includes S1 and S2.	125,000	0.2
H	High Hazard manufacturing, processing, generation and storage uses. H group includes H1, H2, H3, H4 and H5.	25,000	1
A1	Assembly uses including concert halls and TV studios.	12,500	2
A2	Assembly uses including casinos, night clubs, restaurants and taverns.	8,333	3
A3	Assembly uses including libraries, lecture halls, arcades, galleries, bowling alleys, funeral parlors, gymnasiums and museums but excluding houses of worship.	8,333	3
A4	Assembly uses including arenas, skating rinks and pools.	8,333	3
A5	Assembly uses including bleachers, grandstands, amusement park structures and stadiums.	Exclude	Exclude
E	Schools K – 12.	25,000	1
I	Institutional uses such as hospitals, nursing homes, assisted living facilities and jails. I group includes I1, I2, I3 and I4.	12,500	2

R1	Hotels and motels.	31,250	0.8
U	Miscellaneous uses. Fences, tanks, barns, agricultural buildings, sheds, greenhouses, etc.	Exclude	Exclude

2. For every unit increase, or fraction thereof, in the Township's affordable housing obligation resulting from the development, the developer shall be required to increase the number of affordable housing units in the Township by an equal number, as set forth in Paragraph 3 below.
3. For every unit increase, or fraction thereof, in the Township's affordable housing obligation resulting from the development, the developer shall have the option to:
 - (a) develop an affordable unit at another location in the Township, in accordance with the applicable zoning regulations, and/or,
 - (b) pay a fee to the Township in accordance with §217-149. In the case of a fractional unit obligation, the developer shall have the option to develop an affordable unit at another location in the Township, in accordance with the applicable zoning regulations, and to claim a credit for any resulting fractional surplus, or to pay a fee to the Township in accordance with §217-149.
4. None of the foregoing shall be construed as increasing the permitted floor area ratio or density above that which the regulations for the zone district would otherwise permit for the development.

§217-148. Requirements for affordable housing units. All affordable housing units shall be subject to the requirements of this Chapter that apply to comparable market-rate housing units of the same type in the same zone district. In addition, affordable housing units provided pursuant to this section shall be subject to the requirements set forth in Article VIII of this Chapter and the following:

- A. All affordable units to be created shall be eligible for credit against the Township's affordable housing obligations and to that end shall comply with all applicable regulations of the New Jersey Council on Affordable Housing. No age-restricted affordable units and/or affordable sales units may be credited in excess of the number of such units permitted to be credited within the Township by such regulations.
- B. The developer, in cooperation with the Township Committee, shall:
 1. Demonstrate capacity to administer the units in accordance with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26.
 2. Demonstrate that the units will have a low/moderate income split in accordance with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26. For example, in each affordable development, at least 50 percent of the restricted units within each bedroom distribution shall be low-income units and the remainder may be moderate-income units. Where an odd number of affordable units are required to be provided, a majority of the units shall be low-income units.

3. Demonstrate that the rents or sale prices of affordable units shall be established in accordance with N.J.A.C. 5:94-7 and with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26. For example:
 - (a) The maximum rent for affordable units within each affordable development shall be affordable to households earning no more than 60 percent of median income. The average rent for low- and moderate-income units shall be affordable to households earning no more than 52 percent of median income. The developers and/or municipal sponsors of restricted rental units shall establish at least one rent for each bedroom type for both low-income and moderate-income units, provided that at least 10 percent of all low- and moderate-income units shall be affordable to households earning no more than 35 percent of median income.
 - (b) The maximum sales price of restricted ownership units within each affordable development shall be affordable to households earning no more than 70 percent of median income. Each affordable development must achieve an affordability average of 55 percent for restricted ownership units. In achieving this affordability average, moderate-income ownership units must be available for at least three different prices for each bedroom type, and low-income ownership units must be available for at least two different prices for each bedroom type, insofar as is possible given the number of affordable units in the development.
4. Demonstrate that the units will be affirmatively marketed in accordance with N.J.A.C. 5:94-7 and with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26;
5. Demonstrate that the units will have the appropriate controls on affordability in accordance with N.J.A.C. 5:94-7 and with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26; and
6. Demonstrate that the units will have the appropriate bedroom distributions in accordance with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26.
 - (a) Affordable developments that are not age-restricted shall be structured in conjunction with realistic market demands such that:
 - (i) The combined number of efficiency and one-bedroom units is no greater than 20 percent of the total low- and moderate-income units;
 - (ii) At least 30 percent of all low- and moderate-income units are two bedroom units;
 - (iii) At least 20 percent of all low- and moderate-income units are three bedroom units; and
 - (iv) The remainder, if any, may be allocated at the discretion of the developer.
 - (v) Where there are an insufficient number of affordable units provided to meet the above bedroom distribution, the first unit shall be a two-

bedroom unit, the second unit shall be a three-bedroom unit and the third unit shall be a one-bedroom unit.

- (b) Age-restricted low- and moderate-income units may utilize a modified bedroom distribution. At a minimum, the number of bedrooms shall equal the number of age-restricted low- and moderate-income units within the affordable development. The standard may be met by creating all one-bedroom units or by creating a two-bedroom unit for each efficiency unit.
7. Comply with all other applicable requirements of the substantive rules of the New Jersey Council on Affordable Housing, N.J.A.C. 5:94, and the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26.

§217-149. Payments in lieu of developing affordable housing. When approved by the Planning Board, Zoning Board or Township Committee, in the case of permit applications not before a board, a developer may make a payment to the Township in lieu of developing affordable housing units under the following conditions:

- A. The amount of payments in lieu of constructing affordable units shall be negotiated between the applicable authority and the developer. The amount of the payment shall be based upon the cost to the Township to create, or subsidize the creation of the same number, or fraction thereof, of affordable housing units within the Township as the increased obligation resulting from the development, using any of the methods permitted by the New Jersey Council on Affordable Housing (COAH) as set forth in Paragraph 2 below. Both hard and soft costs shall be included in the calculation. The applicable authority shall require the preparation of a pro-forma to confirm that the payment is accurate and based upon realistic costs within the Township to create such affordable units, and the applicable authority may submit such pro-forma for review by a third party retained by the applicable authority.
- B. Payments in lieu of constructing affordable units on site shall only be used to fund eligible affordable housing activities within the Township, in accordance with COAH's substantive rules at N.J.A.C. 5:94-4.5, 4.6 and 4.8 through 4.15, provided that such activities are eligible for credit against the Township's affordable housing obligation, comply with all applicable requirements of COAH's substantive rules, and comply with the zoning regulations of the Township.
- C. Payments in lieu of constructing affordable units shall be deposited in a separate interest-bearing housing trust fund or deposited in the Housing Trust fund established pursuant to Chapter 111, Article VII and shall at all times be identifiable from development fees. No funds shall be spent by the Township until and unless COAH has approved a spending plan for such funds. The Finance Officer shall maintain a record of the amount deposited in the account, plus interest, and shall make such record available for public inspection upon request.
- D. In the event that a developer makes such a payment, but then does not proceed to develop the project that resulted in the affordable housing obligation, the developer may request a refund of the payment. Such request shall be made in writing to the Township Committee. If approved, the Township shall refund such fee, plus any interest in the account resulting from the payment, less any administrative expenses required to administer the account. Any refund issued by the Township shall be construed as a failure of the applicant to satisfy a condition precedent to the development approval and shall therefore terminate any and all rights to such

development. The developer may reinstate such rights by making a new payment, with the amount of such payment to be renegotiated as set forth in §217-149.A. The foregoing shall not be construed to extend or otherwise alter any rights to proceed with the development as established by the New Jersey Municipal Land Use Law, the rules of the New Jersey Council on Affordable Housing or other applicable law.”

SECTION 4. All ordinances or parts of ordinances in conflict or inconsistent with any part of this ordinance are hereby repealed to the extent that they are in such conflict or inconsistent.

SECTION 5. This ordinance may be renumbered for codification purposes.

SECTION 6. This ordinance shall take effect after passage and publication as soon as practicable and in the manner provided by law.

SECTION 7. In the event that any section, part or provision of this ordinance shall be held to be unenforceable or invalid by any court, such holding shall not affect the validity of this ordinance as a whole, or any part thereof, other than the part so held unenforceable or invalid.

ATTEST:

**TOWNSHIP OF WASHINGTON
COUNTY OF MORRIS
STATE OF NEW JERSEY**

Dianne S. Gallets, Township Clerk

Kenneth W. Short, Mayor

CERTIFICATION

I, Dianne S. Gallets, Clerk of the Township of Washington, do hereby certify the following to be a true copy of an Ordinance adopted by the Township on _____, 2005.

Dianne S. Gallets, Township Clerk

Date