

(b) No municipality in this category may spend development fees unless the Council has approved a plan for spending such fees and granted substantive certification. Municipalities shall submit these plans when they petition for substantive certification. Municipalities that have petitioned for substantive certification prior to the effective date of this rule shall submit plans for spending development fees prior to receiving substantive certification.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93-8.8 Development fee ordinance review

(a) The Council shall not review a development fee ordinance unless the municipality has submitted:

1. A copy of an adopted housing element that complies with the Municipal Land Use Law, N.J.S.A. 40:55D et seq.;
2. A copy of the proposed ordinance designed to collect development fees;
3. A description of any changes to the municipal zoning ordinance during the previous two years;
4. A request in the form of a resolution by the governing body for the Council to review the development fee ordinance;
5. A copy of the compliance plan, implementation ordinances information regarding the period of time encompassed by the judgment of repose and a request for review by the court if the municipality has received a court ordered judgment of repose. The court shall indicate if the Council is to monitor the development fees;
6. A description of the types of developments that will be subject to fees;
7. A description of the amount and nature of the fees imposed;
8. A statement regarding the use of density bonuses or other devices to counterbalance development fees; and
9. If development fees have been collected prior to December 13, 1990 and the municipality wishes to retain some or all of these fees, the following information must be submitted to the Council within 90 days of the effective date of this rule:
 - i. A copy of the ordinance pursuant to which the fees were collected; and the proposed ordinance, if any, designed to reimpose some or all of these fees;
 - ii. A request in the form of a resolution by the governing body for the Council to review the development fee ordinance used to collect the fees;
 - iii. The name of each developer that paid a development fee;
 - iv. The amount paid by each developer and the formula for the amount collected;

v. The equalized assessed value of each development at the time of collection;

vi. An accounting of all money collected and identification of the municipal account that houses all development fees;

vii. If any money collected through a development fee ordinance has been spent, an accounting of the expenditure; and

viii. Any other information the Council may require.

(b) Municipalities that collected fees prior to December 13, 1990, shall be able to retain such revenues or reimpose such fees to the extent that the fees collected by the municipality do not exceed the amount permitted by this chapter. Municipalities interested in retaining development fees collected prior to December 13, 1990 shall also conform to the procedures outlined in N.J.A.C. 5:91-15, Procedures for retaining development fees.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93-8.9 Content of plans to spend development fees

Plans to spend development fees shall consist of the information required in N.J.A.C. 5:93-5.1(c).

5:93-8.10 Development fees; residential

(a) Residential development fees shall be a maximum of one-half of one percent of the equalized assessed value for residential development, provided no increased density is permitted.

(b) In zones that permit increased residential development, the municipality may impose a development fee of up to six percent of the equalized assessed value for each additional unit that may be realized.

Example: if a rezoning allowed two extra units to be constructed, the fees could equal one-half of one percent of equalized assessed value on the first unit and six percent of equalized assessed value on the two incremental units.

(c) Municipalities may allow developers of sites zoned for inclusionary development to pay a fee in lieu of building low and moderate income units, provided the Council determines the municipal housing element and fair share plan provides a realistic opportunity for addressing the municipal fair share obligation. The fee may equal the cost of subsidizing the low and moderate income units that are replaced by the development fee. For example, an inclusionary development may include a 20 percent set-aside, no set-aside and a fee that is the equivalent of a 20 percent set-aside or a combination of a fee and set-aside that is the equivalent of a 20 percent set-aside.

(d) Municipalities may collect fees exceeding those permitted in this section, provided they enter into agreements with developers that offer a financial incentive for paying higher fees. The financial incentive may be in the form of a tax abatement. No agreement may provide for a voluntary developer fee without also providing for a comparable offsetting incentive. All agreements are subject to Council approval.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

Case Notes

In settlement of *Mount Laurel* litigation, developer's agreement to pay municipality \$800,000 into municipalities *Mount Laurel* trust fund after extensive negotiations under supervision of court-appointed master was not unlawful. *East/West Venture v. Borough of Fort Lee*, 286 N.J.Super. 311, 669 A.2d 260 (A.D.1996).

5:93-8.11 Development fees; non-residential

(a) Non-residential development fees shall be a maximum of one percent of the equalized assessed value for non-residential development.

(b) Municipalities may collect fees exceeding those permitted in this section provided they enter into agreements with developers that offer a financial incentive for paying higher fees. Such agreements may include, but are not limited to, a tax abatement, increased commercial/industrial square footage, increased commercial/industrial lot coverage and/or increased commercial/industrial impervious coverage in return for an increased fee. The fee negotiated must bear a reasonable relationship to the additional commercial/industrial consideration to be received. All agreements are subject to Council approval.

5:93-8.12 Eligible exactions, ineligible exactions and exemptions

(a) Except as provided for in N.J.A.C. 5:93-8.10, inclusionary developments shall be exempt from development fees. All other forms of new construction may be subject to development fees.

(b) Development fees may be imposed and collected when an existing structure is expanded or undergoes a more intense use. The development fee that may be imposed and collected shall be calculated on the increase in the equalized assessed value of the improved structure.

(c) Municipalities shall not reduce densities from pre-existing levels and then require developers to pay development fees in exchange for an increased density.

(d) Developments that have received preliminary or final approval prior to the imposition of a municipal development fee shall be exempt from development fees unless the developer seeks a major change in the approval. Municipalities that collected development fees prior to December 13, 1990 may not retain any fees imposed subsequent to granting preliminary or final development approval, unless the developer seeks a major change in the approval.

(e) Municipalities may exempt specific types of development from fees or may impose lower fees for specific types of development, provided each classification of development is addressed consistently. For example, all retail development may be exempt from fees.

(f) Municipalities may exempt specific areas of the municipality from the imposition of fees or reduce fees in order to promote development in specific areas of the municipality.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

Case Notes

Development fees ordinance not enforced in arbitrary manner against developers who agreed as condition of use variance to either construct affordable housing or pay development fee under subsequently enacted ordinance. *Southport Development Group, Inc. v. Township of Wall*, 295 N.J.Super. 421, 685 A.2d 84 (L.1996).

5:93-8.13 Collection of fees

Municipalities may collect up to 50 percent of the fee on any specific development at the time of issuance of the building permit. The remaining portion may be collected at the issuance of the certificate of occupancy.

5:93-8.14 Contested fees

Imposed and collected development fees that are challenged shall be placed in an interest bearing escrow account by the municipality. If all or a portion of the contested fees are returned to the developer, the accrued interest on the returned amount shall also be returned.

New Rule, R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93-8.15 Housing trust fund

All development fees shall be deposited in a separate interest bearing housing trust fund. In establishing the housing trust fund, the municipality shall provide whatever express written authorization that may be required by the bank to permit the Council to direct the disbursement of development fees pursuant to N.J.A.C. 5:93-8.17 and 8.18.

Recodified from 5:93-8.14 by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93-8.16 Use of money

(a) A municipality may use revenues collected from development fees for any activity approved by the Council for addressing the municipal fair share. Such activities include, but are not limited to: rehabilitation, new construction, regional contribution agreements, purchase of land for low and moderate income housing, improvement of land to be used for low and moderate income housing, extensions and/or improvements of roads and infrastructure to low and moderate income housing sites, assistance designed to render units to be more affordable and administration of the implementation of the housing element. Municipalities are encouraged to use development fee revenues to attract other funds such as, but not limited to, available public subsidies and funds from private lending institutions.

SUBCHAPTER 18. DEVELOPMENT FEES

Law Review and Journal Commentaries

COAH Rules Permit Retroactive Fee Ordinances, Thomas F. Carroll, III, 135 N.J.L.J. No. 7, 56 (1993).

5:92-18.1 Purpose

(a) The New Jersey Supreme Court, in *Holmdel Builder's Ass'n v. Holmdel Township*, 121 N.J. 550 (1990) (issued December 13, 1990), determined that mandatory development fees are both statutorily and constitutionally permissible. The Court further anticipated that the Council would promulgate appropriate development fee rules specifying, among other things, the standards for these development fees. The purpose of this subchapter is to provide such guidance.

(b) Except as otherwise provided to these rules, a municipality may only collect and spend development fees through participation in the Council's substantive certification process or through a comprehensive review designed to achieve a judgment of repose. The exceptions to this rule are set forth in N.J.A.C. 5:92-18.3 through 18.6 inclusive. These exceptions are permitted because some communities have already received substantive certification; others have achieved a judgment of repose; and still others are litigating exclusionary zoning cases. Some of these municipalities have already collected fees. The Council has created a process for these municipalities to collect and/or retain fees. However, in the future, the ability to collect and spend development fees shall be limited to municipalities that petition for substantive certification. Urban aid municipalities are also considered a special case. These municipalities have historically housed a disproportionate share of New Jersey's poor and, as a result, may have exceedingly high fair share obligations that would be extremely difficult to address in a six year period. Therefore, the Council will allow these municipalities to collect fees outside of substantive certification provided the municipality adheres to the rules in this subchapter. The rules that follow provide basic requirements for collecting and spending development fees. They then provide additional requirements for municipalities in various categories.

(c) While the rules that follow shall govern those municipalities that petition for substantive certification and urban aid cities, the Council will review development fee ordinances and plans to spend money upon the request of the court with jurisdiction in an exclusionary zoning lawsuit.

5:92-18.2 Basic requirements

(a) Except as set forth in N.J.A.C. 5:92-18.3 through 18.6 inclusive, the Council shall not review or approve any development fee ordinance unless the municipality has petitioned for substantive certification.

(b) No municipality shall collect development fees unless the municipality has adopted a housing element and the Council has approved its development fee ordinance.

(c) No municipality shall spend development fees unless the Council has approved a plan for spending such fees. With the exception provided for in N.J.A.C. 5:92-18.3, municipalities that have not received substantive certification shall not spend development fees until they have received substantive certification.

5:92-18.3 Urban aid municipalities

Municipalities that qualify for state aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D-178 et seq.) shall not collect or spend development fees without conforming to the requirements set forth in N.J.A.C. 5:92-18.2. Council approval of the municipal development fee ordinance shall allow the municipality to collect development fees for a period specified by the Council not to exceed six years, commencing with the Council's approval of the development fee ordinance. Notwithstanding any other provision of this Chapter, these municipalities shall have one year from the Council's approval of their development fee ordinance to submit a plan for spending development fees. These municipalities may collect and spend development fees without petitioning for substantive certification.

5:92-18.4 Municipalities that collected fees and received certification

(a) This rule deals with the category of municipalities that have collected development fees prior to December 13, 1990 and have received substantive certification. These municipalities may petition the Council to review and approve an ordinance regarding development fees collected prior to December 13, 1990. The Council may approve such ordinance, provided it conforms to the procedures in N.J.A.C. 5:92-18.8, Development fee ordinance review and N.J.A.C. 5:91-15, Procedures for retaining development fees.

(b) The municipalities in this category shall not resume collecting development fees or spend development fees without conforming to N.J.A.C. 5:92-18.2.

(c) Notwithstanding any other provision of this chapter, the municipalities in this category shall submit plans to spend the development fees (regardless of when these fees were collected) prior to the expiration of their substantive certification periods.

5:92-18.5 Municipalities that collected fees and are proceeding toward certification

(a) This rule deals with the category of municipalities that have collected development fees prior to December 13, 1990 and have petitioned for substantive certification. These municipalities may petition the Council to review and approve an ordinance regarding development fees collected

prior to December 13, 1990. The Council may approve such ordinance provided they conform to the procedures in N.J.A.C. 5:92-18.8, Development fee ordinance review, and N.J.A.C. 5:91-15, Procedures for retaining development fees.

(b) The municipalities in this category shall not resume collecting development fees or spend development fees without conforming to N.J.A.C. 5:92-18.2.

(c) Notwithstanding any other provision of this chapter, municipalities in this category shall submit plans to spend the development fees and receive approval of these plans prior to receiving substantive certification.

5:92-18.6 Municipalities that have not collected fees that have received substantive certification, or are proceeding toward substantive certification

(a) This rule deals with municipalities that have not collected development fees and that have received substantive certification or are proceeding toward substantive certification. Municipalities in this category shall not collect fees until they have adopted a housing element and received the Council's approval of its development fee ordinance. No municipality in this category shall spend development fees unless the Council has approved a plan for spending such fees.

(b) Municipalities that have not received substantive certification shall submit plans for spending the development fees and receive approval for these plans prior to receiving substantive certification.

(c) Notwithstanding any provision of this chapter, municipalities in this category that have received substantive certification shall submit plans for spending the development fees prior to the expiration of the substantive certification period or period of repose.

5:92-18.7 Other municipalities that have not collected fees

(a) Except as provided for in N.J.A.C. 5:92-18.3 through 18.6 inclusive, municipalities that have not collected fees shall not collect fees until they have adopted a housing element, petitioned for substantive certification and received the Council's approval of its development fee ordinance.

(b) No municipality in this category may spend development fees unless the Council has approved a plan for spending such fees and granted substantive certification. Municipalities shall submit these plans when they petition for substantive certification. Municipalities that have petitioned for substantive certification prior to January 21, 1992 shall submit plans for spending development fees prior to receiving substantive certification.

5:92-18.8 Development fee ordinance review

(a) The Council shall not review a development fee ordinance unless the municipality has submitted:

1. A copy of an adopted housing element that complies with the Municipal Land Use Law, N.J.S.A. 40:55D et seq.;
2. A copy of the proposed ordinance designed to collect development fees;
3. A description of any changes to the municipal zoning ordinance during the previous two years;
4. A request in the form of a resolution by the governing body for the Council to review the development fee ordinance;
5. If the municipality has received a court ordered judgment of repose, a copy of the compliance plan, implementation ordinances and information regarding the period of time encompassed by the judgment of repose;
6. A description of the types of developments that will be subject to fees;
7. A description of the amount and nature of the fees imposed;
8. A statement regarding the use of density bonuses or other devices to counterbalance development fees; and
9. If development fees have been collected prior to December 13, 1990 and the municipality wishes to retain some or all of these fees, the following information must be submitted to the Council by April 20, 1992:
 - i. A copy of the ordinance pursuant to which the fees were collected; and the proposed ordinance, if any, designed to reimpose some or all of these fees;
 - ii. A request in the form of a resolution by the governing body for the Council to review the development fee ordinance used to collect the fees;
 - iii. The name of each developer that paid a development fee;
 - iv. The amount paid by each developer and the formula for the amount collected;
 - v. The equalized assessed value of each development at the time of collection;
 - vi. An accounting of all money collected and identification of the municipal account that houses all development fees;
 - vii. If any money collected through a development fee ordinance has been spent, an accounting of the expenditure; and
 - viii. Any other information the Council may require.