

# Newark Residential Developers: New Affordable Housing Requirement May Cost You

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## Redevelopment Alert

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Developers of new residential projects in Newark may need to factor in affordable housing following the Newark City Council's recent adoption of a zoning ordinance requiring most future residential development projects involving new construction of more than 30 dwelling units or substantial rehabilitation of more than 40 dwelling units, to set aside 20% of dwelling units to be affordable to, and reserved for, lower-income households. These zoning requirements were implemented after a series of decisions by the New Jersey Supreme Court articulated the constitutional Mount Laurel affordable housing obligation of New Jersey municipalities to exercise zoning power. This obligation is commonly referred to as the COAH Obligation, named after the Council on Affordable Housing, an administrative agency created to reduce judicial setting of affordable housing requirements. The Newark ordinance, adopted on October 4, 2017, amended the Newark Zoning and Land Use Regulations to add a new chapter titled "Inclusionary Zoning for Affordable Housing."

For those developments within the applicable threshold of new construction of more than 30 dwelling units or substantial rehabilitation of more than 40 dwelling units, the ordinance provides that such developments are subject to the 20% set-aside requirement if:

1. the Board of Adjustment grants variance relief for the principal use, permitted density (dwelling units per acre) or a building height increase of more than 10 feet or 10%;
2. the Planning Board grants any variance relief;
3. the development is pursuant to a redevelopment plan adopted or amended to increase the permitted residential floor area ratio, density or height after the effective date of the ordinance (January 1, 2018, except as noted below);
4. the development occurs on property owned by the city of Newark and sold pursuant to a redevelopment agreement; or
5. the development is in an MX-3 Zone (a new zone applicable to an area near Penn Station).

Residential development projects subject to this requirement must set aside or reserve 20% of the dwelling units for occupancy by income-eligible, low- and moderate-income households at affordable rents or purchase prices that are usually significantly lower than unrestricted free-market rents and sales prices. The 20% set-aside of affordable housing units further requires affordability of 10% of the units for household incomes less than

80% of median income, 5% of the units for household incomes less than 60% of median income, and 5% of the units for household incomes less than 40% of median income. These median income figures are further adjusted based on household size, and the required affordable units must comply with an allocation of unit sizes based on number of bedrooms. In short, detailed calculations are necessary to determine eligibility for occupancy and permissible sales prices or rents for the mix of required affordable units.

The ordinance tracks requirements embodied in the Uniform Housing Affordability Controls (UHAC) adopted by the New Jersey Mortgage and Housing Finance Agency as set forth in N.J.A.C. 5:80-26.1 *et seq.*, including deed restrictions containing affordability controls for a period of 30 years and a right of first refusal on expiration of the control period. These detailed requirements make up much of the 33-page ordinance.

In lieu of providing affordable units, a developer may provide a cash payment if such payment is approved by the Newark Director of Planning, Zoning and Sustainability. The required payment amounts are calculated as \$50,000 per unit required to be affordable to household income under 40% of median, \$20,000 per unit required to be affordable to household income under 60% of median, and \$15,000 per unit required to be affordable to household income under 80% of median. Based on the income-eligibility allocation, the average payment is \$25,000 for each of the required 20% set-aside units.

The ordinance sets a general effective date of January 1, 2018. A development that receives a new foundation permit prior to that date is exempt. There is a deferred effective date of January 1, 2019, for (1) a development substantially rehabilitating 40 or more units or (2) a development not requesting tax abatement from the city of Newark.

The affordable housing set-aside requirement could have a significant impact on the profitability of residential development. Project planners should consider whether they can avoid having the ordinance apply to their projects by staying under the minimum size threshold or by avoiding variances or density changes that would trigger this requirement under the categories described above. Alternatively, the cost of compliance must be factored into the development pro forma.