

**TOWNSHIP OF MAHWAH  
ORDINANCE NO. 1952**

**AN ORDINANCE PROVIDING CLARITY AS TO WHAT THE TOWNSHIP MEANS  
BY ANY REFERENCE TO "ORDINANCE 1294, AS AMENDED" OR SUCH SIMILAR  
LANGUAGE**

**WHEREAS** in 1986, COAH adopted regulations for Round 1 that gave municipalities credit for affordable units that were restricted for just 20 years and provided no mechanism for the municipality to extend the period of controls or capture any share of the increased value of the unit when the deed restrictions expired and when lower income households thereafter sold their units at fair market value ("FMV"); and

**WHEREAS**, by 1989, COAH recognized that affordable housing was "a precious resource" that needed to be protected and that monies could be captured when affordable units were sold at FMV following the restriction period which municipalities could use to reinvest in more affordable housing; and

**WHEREAS**, accordingly, in 1989, to protect this precious resource and create a source of revenue to facilitate the ability of municipalities to provide more affordable housing, COAH adopted regulations that the New Jersey Housing Mortgage and Finance Agency ("HMFA") subsequently incorporated in substance into what came to be known as the Uniform Housing Affordability Controls ("UHAC") regulations; and

**WHEREAS**, pursuant to COAH's 1989 regulations, municipalities could (1) buy the unit at the restricted price and resell with a deed restriction; or (2) capture 95 percent of the differential between fair market value and the maximum restricted affordable price of the unit (hereinafter "differential") at the first non-exempt sale following the restriction period; or (3) prohibit the Seller's right to exercise the repayment option, thereby extending the controls on the unit and forcing the owner to sell to another low or moderate income household at the restricted price, as the case may be; and

**WHEREAS**, on September 10, 1998, the Township of Mahwah adopted Ordinance 1294 to empower Mahwah Township to (1) buy the unit at the restricted price and resell with a deed restriction; or (2) capture 95 percent of the differential at the first non-exempt sale following the restriction period; or (3) prohibit the Seller's right to exercise the repayment option, thereby extending the controls on the unit and forcing the owner to sell to another low or moderate income household at the restricted price, as the case may be; and

**WHEREAS**, on September 25, 1997, the Township of Mahwah petitioned COAH for Round 2 Substantive Certification, and submitted a draft of an affordable housing ordinance, updating Mahwah's existing ordinance to conform as much as possible with COAH regulations; and

**WHEREAS**, COAH staff issued a Compliance Report, dated June 12, 1998, which (a) found that the draft ordinance incorporated provisions addressing the requirements outlined in

N.J.A.C. 5:93-9 for affordable housing programs, and (b) recommended that COAH certify the Township's Housing Element and Fair Share Plan based, in part, on Mahwah's adoption of the draft ordinance with the changes it recommended ; and

**WHEREAS**, on July 1, 1998, COAH accepted the recommendations of its staff, as set forth in the Compliance Report, and certified Mahwah's Housing Element and Fair Share Plan, which included the draft ordinance; and

**WHEREAS**, on September 10, 1998, Mahwah adopted the draft ordinance with the recommended changes, thereby complying with the requirements of substantive certification; and

**WHEREAS**, many deeds conveying affordable units after September 10, 1998 included language requiring developers to comply with "**Ordinance 1294 as may be amended**" or other similar language; and

**WHEREAS**, in 2001, the HMFA adopted regulations and in 2004, the HMFA amended those regulations to establish the UHAC standards, which largely embodied the regulations COAH adopted in 1989; and

**WHEREAS**, HMFA's UHAC regulations, like COAH's 1989 regulations, empowered municipalities to extend controls on affordable units or capture 95 percent of the differential; and

**WHEREAS**, on June 27, 2019, the Township of Mahwah adopted Ordinance 1871, which details how the Township would handle the pricing, bedroom distribution, affirmative marketing and the other requirements for affordable housing units; and

**WHEREAS**, unlike Ordinance 1294, which provides the detailed roadmap as to how a municipality can implement the 95/5 protocols, Ordinance 1871 requires that the controls on ownership units (Section 24-13.12) and rental units (Section 24-13.17) be in accordance with UHAC standards and remain in place for at least 30 years, and until Mahwah takes action to release the unit from such requirements. See Section 24-13.12, control periods for ownership units, referring to UHAC sections N.J.A.C. 5:80-26.5 and 5:80-26.1; see also Section 24-13.17, controls on rental units, referencing UHAC sections N.J.A.C. 5:80-26.11 and N.J.A.C. 5:80-26.1; see also Section 24-13.19, "Tenant Income Eligibility"; see also Section 24-13.21, "Establishment of Administrative Agent position" for other references to UHAC provisions; and

**WHEREAS**, on June 27, 2019, the Township of Mahwah adopted Ordinance 1872 which, in accordance with COAH standards, provides standards for the imposition, collection and expenditures of developer fees; and

**WHEREAS**, on June 30, 2020, the Court appointed Master in the case entitled In the Matter of the Application of the Township of Mahwah, a Municipal Corporation of the State of New Jersey, Docket No. BER-L-6281-15, recommended that the Court approve Ordinance 1871; and

**WHEREAS**, on December 18, 2020, the Court entered a Judgment of Compliance and Repose approving the Township’s Housing Element and Fair Share Plan including Ordinances 1871 and 1872; and

**WHEREAS**, on October 15, 2020, the Township adopted Ordinance 1916 codifying Ordinance 1871 and 1872; and

**WHEREAS**, on April 21, 2021, the Township furnished the Master with Ordinance 1916; and

**WHEREAS**, as a result of the foregoing, some might unreasonably question what Mahwah means when there is a reference to “Ordinance 1294 as may be amended”; and

**WHEREAS**, it is essential to eliminate any possible ambiguity as to what Mahwah intends when there is a reference to Ordinance 1294 as may be amended; and

**WHEREAS**, this ordinance is intended to provide that clarity.

**NOW, THEREFORE, BE IT ORDAINED**, by the Township Council of the Township of Mahwah, County of Bergen, State of New Jersey, as follows:

**Purpose:** The purpose of this ordinance is to eliminate any possible ambiguity as to what the Township of Mahwah means when there is a reference to Ordinance 1294 as may be amended or other such similar language;

**SECTION 1.** The Land Development Code, Chapter 24 “Zoning,” Subsection 24-8 “Affordable Housing,” is hereby amended and supplemented to include a new subchapter, Section 24-8.6, entitled “Ordinance 1294, as May Be Amended.” The new Section 24-8.6 shall contain the provisions set forth below.

Section a. For all Deeds which contain a reference to “Ordinance 1294” or “Ordinance 1294, as may be amended,” or similar language, the following provisions shall apply:

Section b. Definitions. The following terms, as used in this Section, shall have the following meanings:

**95/5 UNIT**

Shall mean a restricted ownership unit that is a part of a housing element that received substantive certification from COAH or a court of competent jurisdiction prior to October 1, 2001.

**FAIR MARKET VALUE**

Shall mean the unrestricted price of a low- or moderate-income housing unit if sold at a current real estate market rate.

**MAXIMUM RESTRICTED RESALE PRICE**

Shall mean a price calculated for the sale of an ownership unit by applying the allowable annual percentage increase corresponding with each calendar year since the Seller bought the house to the price the Seller paid for the unit at the time of purchase. No increase is permitted during the balance of the calendar year immediately after the sale.

**REPAYMENT OPTION**

Shall mean the option of a Seller of a low- or moderate-income unit to sell a unit at fair market value subject to compliance with the terms of a repayment clause.

**PRICE DIFFERENTIAL**

Shall mean the difference between the controlled unit sale price and the fair market value as determined at the date of a proposed contract of sale.

**Section c. Control Periods and Affordable Deed Restrictions.**

1. Low and moderate income sales units approved by the Planning Board prior to January 1, 1997 shall remain affordable to low and moderate income households for a period of not less than 25 years.
2. The purchaser of all low and moderate income units shall include a deed-restriction and mortgage lien on all such units that shall include an option to permit the Township to purchase the unit at the maximum allowable restricted sales price at the time of the first non-exempt sale after the controls on affordability has expired and an option permitting the Township to recapture 95 percent of the price differential at the time of the first non-exempt fair market value sale.
3. The deed restriction, including the repayment clause, and the mortgage lien shall have priority over all mortgages on the property except for a first mortgage placed on the property by the mortgagee prior to the expiration of resale controls.
4. The failure of the Buyer or Seller to execute and record the appropriate mortgage lien and deed restriction, as well as the failure of the Buyer or Seller to provide the Township with a copy of these documents, shall not change the right of the Township, at its exclusive election, (i) to extend the deed restriction on the affordable unit; (ii) to buy the unit at the maximum restricted price; or (iii) to allow the owner of the unit to sell the unit at fair market value following the expiration of the deed restriction and to capture 95 percent of the price differential so those monies can be used for affordable housing.

**Section d. Option to Buy Units**

1. Each 95/5 unit shall be subject to an option permitting purchase of the unit at the maximum allowable restricted sales price at the time of the first non-exempt sale after the controls on affordability have expired, as determined by the Administrative Agent. The option to buy shall be available to the Township, the DCA, the HMFA, or a qualified non-profit entity as defined in this section.
2. The owner of a 95/5 unit shall notify the Township's administrative agent by certified mail of any intent to sell the unit 90 days prior to entering into an agreement for the first non-exempt sale after the period of controls on affordability have expired.
3. Upon receipt of such notice, the option to buy the unit at the maximum allowable

restricted sales price or any mutually agreed upon sales price that does not exceed the maximum allowable restricted sales price shall be available for 90 days. The administrative agent shall notify the municipality, the DCA, and the HMFA, that the unit is for sale. The municipality shall have the right of first refusal to purchase the unit. If the municipality exercises this option, it may enter into a contract of sale. If the municipality fails to exercise this option within 90 days, the first of the other entities giving notice to the seller of its intent to purchase during the 90-day period shall be entitled to purchase the unit. If the option to purchase the unit at the maximum allowable restricted sales price is not exercised by one of the above entities by a written offer to purchase the housing unit within 90 days of receipt of the intent to sell, the owner may exercise the Seller Options on 95/5 Units, as set forth in Section g below. If the owner does not sell the unit within one year of the date of the delivery of notice of intent to sell, the option to buy the unit shall be restored and the owner shall be required to submit a new notice of intent to sell to the Township's administrative agent 90 days prior to any future proposed date of sale.

4. Any option to buy a housing unit at the maximum allowable restricted sales price shall be exercised by certified mail and shall be deemed exercised upon mailing.

#### Section e. Township Option on 95/5 units

If the Township elects to purchase a 95/5 unit pursuant to N.J.A.C. 5:93-9.4, it may:

1. Convey or rent the unit to a low-or moderate-income purchaser or tenant at a price or rent not to exceed the maximum allowable restricted sales price or rent for low or moderate income households as the case may be. The Township shall impose a deed restriction on such unit in accordance with Appendix A of the UHAC regulations or an alternative form approved by a court of competent jurisdiction; or
2. If the unit is a moderate-income unit, then the Township may elect to convey the unit at fair market value and deposit the proceeds from the sale into the Township's affordable housing trust fund, to be expended according to a court-approved Spending Plan.

#### Section f. State and Nonprofit option on 95/5 units

1. When the DCA or the HMFA elects to purchase a 95/5 unit pursuant to this section, it may:
  - (a). Convey or rent the 95/5 unit to a low-or moderate-income purchaser or tenant at a price or rent not to exceed the allowable restricted sales price or rental; or
  - (b). Convey the unit at fair market value and utilize the price differential to subsidize the construction, rehabilitation or maintenance of low-and moderate-income housing within the appropriate housing region.

2. Non-profit entities that have been designated by COAH or a court of competent jurisdiction as having the right to purchase 95/5 units subsequent to the period of controls on affordability shall be eligible to purchase low-or moderate-income units for the sole purpose of conveying or renting the housing unit to a low-or moderate-income purchaser or tenant at a price or rent not to exceed the allowable restricted sales price or rental. Low-income units shall be made available to low-income purchasers or tenants and the housing unit shall be regulated by the deed restriction and lien in accordance with Appendix B of the UHAC regulations. The term of the controls on affordability remain in place for an appropriate period of not less than 30 years.

Section g. Seller Options on 95/5 units

1. Upon the expiration of the period of affordability controls on a 95/5 unit, an eligible seller who has provided the requisite notice of an intent to sell may proceed with the sale if no eligible entity, as outlined in sections e through f above, exercises its option to purchase within 90 days of the notice.
2. Subject to N.J.A.C. 5:93-9.9, the seller may elect to:
  - (a) Sell to a certified household at a price not to exceed the maximum permitted restricted sales price, provided that the unit is appropriately deed restricted for at least 30 years. If the sale will be to a qualified low-or-moderate-income household, the administrative agent shall certify the income qualifications of the purchase of the purchaser and shall ensure that the housing unit is regulated by the necessary deed restriction and lien.
  - (b) Exercise the repayment option and sell to any purchaser at fair market value, provided that 95 percent of the price differential between the maximum resale price and fair market value is paid to the administrative agent, as an instrument of the Township, at closing, and:
    - (1) The seller of the low or moderate income household shall provide the administrative agent any contract of sale and the administrative agent shall examine the contract of sale containing a repayment option to determine if the proposed sales price bears a reasonable relationship to the housing unit's fair market value. The administrative agent shall not approve any contract of sale where there is a determination that the sales prices does not bear a reasonable relationship to fair market value. The administrative agent shall make a determination within 20 days of receipt of the contract of sale and shall calculate the repayment option payment.
    - (2) The administrative agent shall adopt an appeal procedure by which a seller may submit written documentation requesting the administrative agent to recompute the repayment obligation if the seller believes an error has been made, or to reconsider a determination that a sales price does not bear a reasonable relationship to fair market value. A repayment obligation determination made as a result of an owner's appeal shall be a final determination of the administrative agent appealable under N.J.A.C. 5:80-26.18.
    - (3) The repayment shall occur at the date of closing and transfer of title for the first

non-exempt transaction after the expiration of controls on affordability.

- (4) The administrative agent shall deposit all repayment proceeds into the Township's affordable housing trust fund.

Section h. Township Rejection of Repayment Option on 95/5 units

1. The Township shall have the right to determine that the most desirable means of promoting an adequate supply of low-and moderate-income housing is to prohibit the exercise of the repayment option and maintain controls on lower income housing units sold within the municipality beyond the period of the controls on affordability. Such determination shall be made by resolution of the Township's Governing Body and shall be effective immediately upon adoption of the Resolution. The Resolution shall specify the time period for which the repayment option shall not be applicable. During such period, no seller in the Township may utilize the repayment option permitted in this section of the ordinance.
2. Prior to exercising this option, the Township shall:
  - (a) Provide public notice in the official newspaper of the Township and a newspaper of general circulation;
  - (b) Notify the administrative agent of the Governing Body's intended action.
3. The administrative agent shall ensure that the deed restriction on all affected housing units reflects the extended period of controls.

**SECTION 2.** Inconsistencies: In the event of any inconsistencies between this ordinance and other ordinances of the Township with respect to what Mahwah means by Ordinance 1294 as may be amended or other such similar language, this ordinance controls.

**SECTION 3.** If any section, paragraph, subsection, clause or provision of this ordinance shall be declared invalid by a court of competent jurisdiction, such decision shall not affect the validity of this ordinance as a whole or any part thereof.

**SECTION 4.** This ordinance may be renumbered for the purposes of codification.

**SECTION 5.** This ordinance shall take effect twenty (20) days following final passage, approval, and publication as required by law.