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August 21, 2023

VIA E-COURTS

Hon. Christine A. Farrington, J.S.C.
Superior Court of New Jersey
Bergen County Courthouse
10 Main Street, 4th Floor
Hackensack, New Jersey 07601

Re: *In the Matter of the Application of the City of Englewood*
Docket No.: BER-L-4069-19

Dear Judge Farrington:

This firm represents Englewood One Community Corp. and the following residents of the City of Englewood: Horace H. Ragbir, Sam Lee, Amy Bulluck, David Coleman, and Nina Nanai (together, the Interested Parties) with regard to the above captioned matter. Please accept this letter brief in objecting to the **Final Compliance Hearing currently scheduled for August 23, 2023 at 2:00 pm taking place and requesting that the hearing be adjourned to allow the Interested Parties and other impacted members of the public the opportunity to exercise their rights to object to the compliance measures** that the City of Englewood (City or Englewood) has undertaken to effectuate its settlement with the Fair Share Housing Center (FSHC). The Interested Parties urge the Court, **consistent with clear Appellate Division precedent**, to hold off on entering final judgment of compliance and repose until the necessary ordinances have been validly adopted and any challenges to those ordinances have been resolved, by way of actions in lieu or prerogative writs or otherwise, so as to ensure that all of the conditions of the settlement have been

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satisfied. *See, e.g., Livingston Builders, Inc. v. Twp. of Livingston*, 309 N.J. Super. 370 (App. Div. 1998) (“[f]inal approval of the entire settlement and the entry of a judgment of compliance and repose must wait until necessary ordinances have been validly adopted, any challenges to them have been disposed of”).

To be clear, as of the time of this submission, the mandatory zoning measures required by the settlement agreement have **not** been adopted by Englewood, and it is pure speculation that such zoning will be adopted prior to the time of the Final Compliance Hearing, never mind the timing of publication and when the Ordinance takes effect. If and when the Ordinance is formally passed, and when all challenges have been resolved such that a Final Compliance Hearing is appropriately rescheduled, the Interested Parties seek an opportunity to participate, submit formal comments, and be heard on whether the City achieved compliance.

Preliminary Statement

Englewood is an ethnically, racially and culturally diverse community. Englewood’s minority population is more than double the minority population of Bergen County. Twelve percent of the population is under the poverty level which is almost twice the poverty level of Bergen County.

The Planning Board adopted the 2014 Englewood Master Plan in conformance with the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-1 et. seq. in 2014.¹ The City engaged in

¹ A copy of the 2014 Master Plan can be found at <https://www.cityofenglewood.org/DocumentCenter/View/1545/Adopted-Master-Plan-2014-PDF#:~:text=Englewood's%202014%20Master%20Plan%20considers,engage%20Englewood%20residents%20and%20stakeholders.>

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a robust public process prior to adopting its Master Plan which included the establishment of two committees: The Municipal Advisory Committee (Mayor, City Manager, Engineer, Council and Planning Board members) and the Stakeholder Committee which included representatives from Englewood's business, civic, religious and community organizations with deep knowledge of Englewood and for their connections to people and institutions in the community. These committees conducted three public workshops from June 2012 through March 2013 with hundreds of participants. This robust public process resulted in the adoption of the Master Plan.

The Master Plan notes that the City is divided into four Wards, which represents a wide diversity in neighborhood building types from apartments in mixed use, urban settings to compact houses, to expansive homes. Protecting neighborhood character was a primary concern of the Master Plan participants including ensuring that multifamily homes do not dominate traditionally single-family neighborhoods and protecting against overcrowding schools. As a result, a guiding principal in the Master Plan is to "respect, maintain and enhance the character of all neighborhoods and make quality of life improvements within them."

This iterative public process resulting in the 2014 Master Plan, which is legally effective until 2024 was obliterated in one night when the City Council, without notice to the community and its stakeholders, adopted a settlement agreement with Fair Share Housing Center on November 1, 2022 that contractually obligated the City to adopt a multi-family high density overlay zoning ordinance over single family residential area in all four Wards; flood prone areas, and historic properties. Worse yet, the Planning Board and the City Council provided no planning explanation

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supporting the obliteration of the City's Master Plan other than to say "we had to it". Under these circumstances, the Interested Parties should be heard.

Statement of Facts and Procedural History

On or about May 30, 2019, Englewood filed a complaint seeking a declaration of its compliance with the Mount Laurel doctrine and the Fair Housing Act of 1985, N.J.S.A. 52:27D-301, et seq., in accordance with the Supreme Court's ruling in *In re Adoption of N.J.A.C.*

5:96 & 5:97 ex rel. New Jersey Council on Affordable Housing, 221 N.J. 1 (2015) (Mt. Laurel IV).

On June 21, 2019, the Honorable Christine A. Farrington, J.S.C., ordered immunity in favor of the City, preventing the filing of any builder's remedies until September 27, 2019.

A number of immunity orders were subsequently issued during the pendency of this proceeding, most recently on November 4, 2022 extending the temporary immunity to Englewood from the filing and serving of Mount Laurel and Builder remedy lawsuits until "[the date of the Fairness Hearing] [the Final Judgment of this Court] in this matter."

Englewood and FSHC ultimately agreed to settle the litigation and to present that settlement to the trial court for approval. The terms of the settlement were memorialized in a letter to the Court dated November 1, 2022. *See* 11.1.2022 Correspondence (Transaction ID: LCV20223835212) The Settlement Agreement purported to set forth Englewood's obligations regarding its compliance with its obligation to provide for its fair share of affordable housing from 1987-2025. Among other things, the settlement provided that Englewood would meet its unmet need obligation by placing overlay zoning throughout single family residential zone districts

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permitting inclusionary multifamily residential development and requiring 20% set-aside of affordable housing.

On November 1, 2022, the City unanimously passed Resolution #277-11-01-22 - A Resolution “Authorizing a Settlement Agreement with the Fair Share Housing Center.” On January 20, 2023, the Court entered an order approving the settlement following a fairness hearing as required by *Morris Cty. Fair Hous. Council v. Boonton Twp.*, 197 N.J. Super. 359, 367-69 (Law Div. 1984), *aff’d o.b.*, 209 N.J. Super. 108 (App. Div. 1986); *East/West Venture v. Borough of Fort Lee*, 286 N.J. Super. 311, 328-29 (App. Div. 1996). Neither the resolution nor a copy of the Settlement Agreement was provided to the public in advance of the Council meeting.

On March 10, 2023, a draft Housing Element & Fair Share Plan was prepared for Englewood, which intended to memorialize and incorporate into the City’s Master Plan the affordable housing strategy set forth the terms of the settlement agreement with FSCH as approved by the Court.² This Plan was not made available to the public until months later. The Housing Element and Fair Share Plan identified the manner in which the City’s fair share affordable housing obligation is to be addressed, included the Third Round housing obligation. Among other measures, the plan included the City creating overlay zones for affordable housing at the prescribed densities and requiring a 20% set-aside of affordable units.

Although the Housing Element and Fair Share Plan had been prepared more than a month earlier, it was not presented to the Planning Board until April 27, 2023, *the date of the meeting at*

² Englewood’s Fair Share Plan is available at https://www.cityofenglewood.org/DocumentCenter/View/3159/Englewood-Housing-Element_Final_Adopted_R_375928_2023_03_10

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which the Board was informed it had to vote to approve the plan. During the April 27, 2023 Planning Board meeting, the Board was presented with the Housing Element and Fair Share Plan and a presentation put on by Planner John P. Szabo, Jr. of Burgis Associates. The Board minutes indicate that the Board “had many questions and concerns, from both Board Members and members of the public, as to the Housing Element and Fair Share Process.” The minutes further noted that the plan resulted from the settlement of the litigation between Englewood and the FSHC, “which the Planning Board was not a part of nor participated in.” Most significantly, in moving to approve the Housing Element and Fair Share Plan, the Vice Chairman “noted for the record of his outrage as to the manner in which this process has been handled” because the Planning Board has just been informed of the settlement agreement and the plan at this meeting.³ Planning Board Chairman echoed the same frustration at during the memorialization of the plan on August 8, 2023 explicitly putting on record that the Planning Board received no notice or information until the night it was asked to vote on the plan, even though it had been in the works for months.

Eight months after the date of the Settlement Agreement, on June 27, 2023, Ordinance 23-22, is introduced for its first reading - “An ordinance to amend and supplement chapter 250, titled “Land Use” creating affordable housing overlay zones.”⁴ Among other things, the Ordinance amended the establishment of districts in Article IX, §250-54 of the City Code to add three new

³ The minutes of the April 27, 2023 Planning Board Meeting are available at <file:///F:/PSWH%20Attorneys/Byalik/Englewood%20-%20Planning%20board%20minutes%20April%2027.pdf>

⁴ The ordinance can be found at <https://www.cityofenglewood.org/DocumentCenter/View/3153/23-22-Affordable-Housing-Overlay-Zones-Ordinance>

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Affordable Housing Overlay Zones (AHOs). It further amended the Zoning Map to add those Affordable Housing Overlay Zones and proceeded to list various properties by block and lot number and which new overlay zone it belonged to. It provides, in relevant part, that “within the AHO Districts multifamily and single-family attached townhouse residential development shall be permitted” subject to the conditions in the Ordinance, and that “any residential development within the AHO zones shall be required to provide a minimum of 20% of the total number of units on-site to be constructed as affordable to low- and moderate-income eligible families.” The Ordinance proceeded to list various restrictions, limitations, and specifications of any development. The map provided was illegible for public to read or understand.

A copy of the Ordinance was published in the Record on July 13, 2023 and the public hearing on the Ordinance was scheduled before the City Council on August 8, 2023. The Ordinance was referred to the Planning Board in accordance with N.J.S.A. 40:55D-64 to determine consistency with the Master Plan of the City, and on August 3, 2023, the Planning Board found that Ordinance No. 23-22 is inconsistent with the Master Plan. But that did not stop the City from proceeding with its plan to adopt the Ordinance.

On August 8, 2023, the undersigned firm hand delivered and emailed a letter to the Mayor and City Council asking that Ordinance 23-22 (creating affordable housing overlay zones), Resolutions 267-08-08-23 (Reasons for Adoption of Ordinance 23-2022 in face of Master Plan inconsistency) and 268-08-23 (Endorsing Hosing Element and Fair Share Plan) be rejected at the Council meeting set for the same night – be rejected, explaining that it would implement a fatally flawed affordable housing Settlement Agreement. The letter explained that the process to approve

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and implement the Settlement Agreement has major procedural deficiencies in that it fundamentally excluded public participation,⁵ that the City was forcing the overlay zoning ordinance on its residents regardless of their view, and that the Planning Board members were not given the Housing Element and Fair Share Plan until the evening it was instructed it had to adopt the plan. It further explained that the proposed Ordinance is substantively defective, one of its major flaws allowing multi-family dwellings from 15-50 units per acre to be built adjacent to single family homes in contravention to statutory and judicial precedent requiring affordances housing sites to be “suitable” and “not bad planning.” The letter further advised that Englewood One Community has retained a professional planner, Peter G. Steck, to present expert testimony at the Council meeting and attached Mr. Steck’s report dated August 8, 2023 detailing at length the procedural and substantive deficiencies with the proposed ordinance. A copy of the August 8, 2023 Letter and Mr. Steck’s report are attached hereto as Exhibit A and B.

The meeting that took place on August 8, 2023 was nothing short of a disaster. The Council Chamber was filled beyond capacity and the hallways were packed with people seeking to gain entry into the meeting. Many members of the public were shut out and could not even enter the building. *See* Exhibit C. Those who were able to attend expressed frustration and apprehensions

⁵ The City Council provided minimum notices and kept the public in the dark about the developments for months. Nothing was provided to the public by Council until late June when the first reading of the Ordinance took place. It took multiple attempts, by way of OPRA requests, to even get the City to produce the November 1, 2022 resolution and attachments concerning the settlement. Neither the resolution nor the settlement was publicly posted. During the August 8, 2023 Council meeting, *see* fn. 5 *infra*, multiple residents were complaining about the lack of notice and transparency.

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about the overlay zones' potential implications.⁶ Residents shared serious concerns about additional infrastructure being built in flood hazard zones or already densely populated areas that already experience problems with traffic, parking, and safety. Residents expressed outrage and the lack of transparency and fairness in government, and how the Ordinance was rushed and agreed to behind closed doors. Residents complained that they had no notice of the settlement and in some instances no advanced notice of the Fairness Hearing in which they could have participated; many were unable to submit comments to the Court in time simply because they were kept in the dark about the process.

Despite the public outrage of the residents in attendance (as some were shut out)⁷ and a prior finding of inconsistency with the Master Plan, the Council Meeting culminated in a vote on the overlay zones, which passed 4-1. Although the Planning Board previously had determined that Ordinance No. 23-22 is inconsistent with the Master Plan, despite that inconsistency, the City Council sought to adopt the Ordinance anyway, and passed Resolution #267-08-08-23 purporting to set forth the “reasons” for doing so.⁸ Those “reasons” consisted of nothing more than reiterating the City’s attempt to comply with the settlement and advances its position in the Litigation that it

⁶ The full video of the meeting is available at <https://www.youtube.com/watch?v=KaGuoJLaENo>

⁷ Given the enormous public interest in the subject matter, the abnormally high attendance at this Council Meeting, and that the Municipal Courtroom (where Council Meetings take place in Englewood) would be too small to accommodate the expected crowd, was anticipated. The governing body was urged in advance to postpone the meeting and reschedule it to a later time, and have it take place at the Bergen County Performing Arts Center, so as to permit all interested members of the public to attend the meeting and participate. The Council rejected this recommendation, and as a foreseeable result, many members of the public were excluded from the meeting in violation of the Open Public Meetings Act.

⁸ Contrary to routine practice, the Ordinance was adopted before the resolution.

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is entitled to a Judgment of Compliance and Repose confirming satisfaction of its affordable housing obligation and that the Ordinance consistent with the Settlement Agreement.⁹ In other words, the Resolution provides *no explanation* for how or why the AHOs were selected, nor any analysis concerning the impact of this re-zoning, which is admittedly inconsistent with the Master Plan. Following approval of the Ordinance by the City Council, it was vetoed by the Mayor. The Mayor's statement of objections in rejecting the proposed Ordinance is illuminating and echoes the Interested Parties' position. It is attached as Exhibit D for the Court's reference and is reproduced below:

⁹ Even though it was adopted over one month ago, an "adopted" version of Resolution #267-08-08-23 is not available on Englewood's website or elsewhere on the internet. A "unadopted" copy of Resolution #267-08-08-23 can be found among the meeting agenda materials at chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.cityofenglewood.org/AgendaCenter/ViewFile/Agenda/_08082023-1703.

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Englewood

MICHAEL WILDES Mayor, City Hall

P.O. Box 228 • Englewood, N.J. 07631 • (201) 871-6666

August 11, 2023

City of Englewood
2-10 N. Van Brunt Street
Englewood, NJ 07631

Attention: Yancy Wazirmas, City Clerk

RE: Veto of Ordinance 23-22

Dear Ms. Wazirmas:

In connection with Ordinance 23-22 which the Council passed on August 8, 2023, I offer the following.

Veto Message

Pursuant to the Charter of the City of Englewood, New Jersey, adopted on August 30, 1978, and N.J.S.A. 40:69A-41, Approval or Veto of Ordinances, I hereby veto Ordinance 23-22.

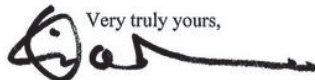
Statement of Objections

I am vetoing this Ordinance 23-22 largely for the reason expressed in the Englewood Planning Board's Resolution dated August 3, 2023 finding that the Ordinance is inconsistent with the Master Plan in failing to properly respect our residential zoning, failing to incorporate the Planning Board's suggested re-development study areas, and for an opaque process that has diminished public support for the governing process and our noble / historic efforts to continue to provide low and moderate income housing.

The Planning Board was clear that the Ordinance did not respect the character of our residential neighborhoods; specifically concerns for buffers; lighting; density; height and even permitting chain link fencing: all deemed to be incompatible with the integrity of our residential zones.

While the Planning Board adopted the City Planner's Revised Third Round Housing Element and Fair Share Plan, the City Council's implementing Ordinance 23-22 fails to preserve our goal of maintaining neighborhood character, fails to target development to blighted areas of the City, and was conducted in a fashion that has alienated our citizenry.

Finally, the City should litigate and push further on our robust inventory of low income/moderate income housing that we have historically provided, as a unique exemplar of equity in providing housing for our citizens.

Very truly yours,

MICHAEL WILDES,
MAYOR

CITY OF ENGLEWOOD, NJ
ENGINEERING OFFICE
2023 AUG 11 A 9:19

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There is now a Special Council meeting scheduled for August 22, 2023, the purpose of which is to discuss and take action on the Mayor's Veto of Ordinance No. 23-22.¹⁰ If the Council overrides the Mayor's veto and the Ordinance passes, it would be at the stroke of midnight before the Final Compliance Hearing that is set to take place on August 23, 2023 before this Court, with no opportunity to challenge the Ordinance prior to when this Court would be asked to enter a final judgment of Englewood's compliance with the Settlement Agreement.

LEGAL ARGUMENT

1. Englewood One and the Residents should be permitted to participate in the Final Compliance Hearing

The Interested Parties here are Englewood One Community and five residents of the City of Englewood. Englewood One Community is an independent not-for-profit organization to residents of Englewood to connect and share information about City government and the community. Englewood One Community helps residents access information and participate in the workings of City government. The organization's mission is to operate as a news platform that opens the doors of City government by informing, educating and promoting active participation around the important decisions by city officials that impact the residents' daily lives. Englewood One Community and the residents of Englewood have a vested interest in ensuring that the action taken by the City to comply with the settlement it reached with the FSHC is rational, carried out

¹⁰ The Council meeting has been noticed as a remote meeting to be held telephonically and virtually by Zoom. This is an illegal meeting as remote meetings are no longer authorized under applicable law.

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in a manner that is consistent with its Master Plan, is the least intrusive means to accomplish the objective, and serves the best interests of the City and its residents.

Having been shut out of the process in the past until July 11, 2023,¹¹ the Interested Parties seek an opportunity to have meaningful participation in the Final Compliance Hearing so they can present their concerns about the measures to implement the settlement. Ordinarily, as a matter of practice and procedure, final compliance hearings anticipate public participation and invite the public to submit written comments and to attend the hearing to present their position. *See, e.g.,* Millburn Township Compliance Hearing Notice, available at <https://twp.millburn.nj.us/DocumentCenter/View/9598/Millburn---Notice-re-Compliance-Hearing-22823-affordable-housing-FSH?bidId=> (permitting interested parties to file written comments on, or objections to, the Township's Affordable Housing Plan, including expert reports, studies, and other data, and allowing objectors to call witnesses during the compliance hearing); Borough of Raritan Compliance Hearing Notice, available at <https://www.raritanboro.org/News/View/1354/notice-of-compliance-hearing> (permitting any interested person to appear and be heard at Compliance Hearing and have an opportunity to present their position, including filing of public comments prior to the hearing); Hopewell Township Compliance Hearing Notice, available at <https://www.hopewelltp.org/DocumentCenter/View/2447/Compliance-Hearing-Notice?bidId=> (providing for interested persons to appear and be heard at the Hearing to address the Township's

¹¹ It was only after that date that the City began to publicly post any documents on its website. The public had no opportunity to comment prior to that time.

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Third Round Housing Element and Fair Share Plan and offer any comments or objections and to submit such objections in advance of the hearing). Numerous courts follow the same procedure in permitting public comments and participation in the final compliance hearing. This Court's order scheduling the Final Compliance Hearing does not appear to contemplate public participation at the hearing or advanced submission of comments, other than an invitation to persons who participated in the initial Fairness hearing. As such, by way of this submission, the Interested Parties seek to participate at the hearing when such hearing is held, but, as a preliminary matter, ask this Court to postpone the compliance hearing for the reasons set forth below.

2. The Court should adjourn the Compliance Hearing until such time that Englewood formally adopts all of the requisite measures contemplated by the Settlement Agreement and until any challenges to City's actions are resolved.

The law is clear that a Court should not hold a final compliance hearing and enter final judgment until there is a resolution of "all issues relevant to the settlement and to the municipality's fair share obligation." *E./W. Venture v. Borough of Fort Lee*, 286 N.J. Super. 311, 328, 669 A.2d 260, 268 (App. Div. 1996) (emphasis in original). The Appellate Division's decision in *E./W. Venture* explained the process in these types of litigations. It noted that a court may approve a settlement of *Mount Laurel* litigation after a "fairness" hearing to the extent the judge is satisfied that the settlement adequately protects the interests of lower-income persons but "[a]pproval, of course, is conditioned upon compliance with the procedural safeguards defined in Morris County." *Id.* at 328. Upon a finding that the agreement is "fair," the Court should remand for appropriate amendments to the master plan and zoning ordinance necessary to implement the agreement. *Id.* at 328.

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Significantly, the Appellate Division cautioned, “[i]f the municipal action is challenged in a separate prerogative writs action, the judge should consolidate that action with the pending proceeding and **hear and decide the challenge prior to entry of a final judgment of compliance.**” *Id.* at 329 (emphasis added). Part of that process requires the judge to “decide whether **passage of the master plan amendment and ordinance,** aside from the affordable housing issues raised in the prior fairness hearing, **constitutes a valid exercise of the township's zoning power and is otherwise procedurally and constitutionally valid.**” *Id.* (emphasis added). And resolution of “**all issues** relevant to the settlement and to the municipality's fair share obligation” must be, according to the Appellate Division, “resolved in a single proceeding.” *Id.* (emphasis added).

The Appellate Division again reiterated these principles in *Livingston Builders, Inc. v. Twp. of Livingston*, 309 N.J. Super. 370 (App. Div. 1998) when it held that a fairness hearing was not the proper forum to adjudicate zoning and planning issues implicated by the settlement and noted that challenges to the zoning and planning measures “will be necessary to finalize the settlement.” The Appellate Division stated that any person who objects to the zoning and planning measures “will have the opportunity to assert these arguments before the appropriate body considering adoption of the measure objected to and, if necessary, in an action in lieu of prerogative writs.” *Id.* at 383. The Court made clear that that “**[f]inal approval of the entire settlement and the entry of a judgment of compliance and repose must wait until necessary ordinances have been validly adopted, any challenges to them have been disposed of,** and all of the other conditions enumerated in the [Court’s prior] order have been satisfied.” *Id.*; see also, e.g., *Nuckel v. Borough of Little Ferry*, No. A-0672-13T1, 2014 WL 7906847, at *4 (N.J. Super. Ct. App. Div. Feb. 24,

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2015) (taking note of the “the admonition” in *East/West Venture* that “final judgment should ordinarily await conclusion of all related *Mt. Laurel* challenges to a municipality's zoning ordinance” but agreeing to review the appeal anyway, cautioning however, that it “did not mean that the other actions were properly prosecuted in separate lawsuits”).

The case law makes clear that the Court should not engage in an inquiry concerning the City’s compliance measures until all applicable ordinances have been enacted and all challenges to those ordinances have been resolved. As of the date of the filing of this application, Ordinance 23-22, creating affordable housing overlay zones, has not even been formally adopted. The Ordinance was initially approved by the City Council on August 8, 2023; but was vetoed by the Mayor on August 11, 2023 and will require a supermajority vote of the City Council to override the Mayor’s veto. *See* Charter of the City of Englewood,¹² § 4.8 (“No ordinance shall take effect without the mayor's approval...unless the council, upon reconsideration thereof, on or after the third day following its return by the mayor, shall by a vote of two-thirds of the full membership of the council, resolve to override the mayor's veto”). A Special Council meeting scheduled for August 22, 2023, the day before the Final Compliance Hearing is scheduled before this Court, in an attempt to override the Mayor’s Veto. And even if the veto is overridden at the August 22, 2023 meeting – which is a big “if” – The ordinance would not even be effective prior to the August 23, 2023 Final Compliance Hearing. *See* N.J.S.A. 40:69A-181 (“No ordinance other than the local budget ordinance shall take effect less than twenty days after its final passage . . . ”).

¹² The Charter is available at <https://www.cityofenglewood.org/DocumentCenter/View/483/Cityof-Englewood-Charter-PDF>

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At this point, it is unclear whether the Ordinance necessary to implement the City's obligations under the settlement will even be enacted prior to the Final Compliance Hearing. More importantly, even if the Ordinance passes, it undoubtedly will be challenged given the turnout at the Council Meeting with the raft of angry residents speaking out against its enactment. Certainly, the Interested Parties will file an action in lieu of prerogative writs if the ordinance passes.

As explained in the Memorandum of Community Planning Consultant Peter G. Steck (attached as Exhibit B hereto), there are procedural deficiencies in the implementation of the Ordinance and substantive problems, including, most significantly "a fatal lack of rationale as to why certain areas of the City were selected for rezoning by overlays" all of which renders the adoption of the Ordinance arbitrary, capricious and unreasonable. Moreover and significantly, the Planning Board admittedly had not reviewed or even seen the Housing Element & Fair Share Plan until the evening of the hearing at which the Board was asked to vote after being advised they had to approve it, and therefore did not have any meaningful opportunity to review and discover its defects.

As Mr. Steck notes, procedurally, it is questionable whether the City gave proper notice of the Ordinance to all the affected property owners. Because Ordinance 23-22 constitutes a rezoning of certain properties in the City, Section 40:55D-62.1 of the Municipal Land Use Law (MLUL) [N.J.S.A. 40:55D-1 et seq.] imposes an obligation that notice to be sent by regular and certified mail to affected property owners within the reclassified areas and within 200 feet of the reclassified areas including properties in adjacent municipalities as well as the clerks of the adjacent municipalities. It is unclear whether such notice in conformity with the MLUL was sent prior to

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August 8, 2023 public hearing, as residents expressed outrage that were unaware of the meeting and were not notified of same. As Mr. Steck further notes, the public notice here was deficient because it only identified the rezoned areas by tax map lot and block and not “by street names, common names or other identifiable landmarks, and by reference to lot and block numbers” as required by N.J.S.A. 40:55D-62.1. *See, e.g., Carbone v. Borough of N. Haledon*, No. A-3744-11T3, 2013 WL 5416897, at *5 (N.J. Super. Ct. App. Div. Sept. 30, 2013) (“the ordinance in this case created an entirely new zone with newly-described uses. We think the property description that included only lot and block numbers was inadequate”); *Nuckel v. Little Ferry Planning Bd.*, 208 N.J. 95, 101 (2011) (planning and zoning determinations must be viewed with an understanding that municipalities must act “in strict conformity” with the MLUL).

Among other substantive defects, the most notable as noted by Mr. Steck’s memorandum is that the Housing Element & Fair Share Plan provides no rationale for the location of the proposed overlay zones. Noting that to create 640 affordable units in the overlay zones, a total of 3,200 new dwelling units must be developed. [Affordance housing accounting for 20% of the total units], conspicuously absent is any analysis of why certain areas that were recommended for rezoning, particularly where those areas include flood zones, already densely populated areas, or areas containing single family homes.¹³

Some of the overlay zones being recommended are those in known flood zones, yet the Plan lacks any analysis of the impact that additional building will have. The August 4, 2023

¹³ OPRA requests have been served on the City for planning studies but to date, none have been provided.

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memorandum on the City’s website from the City Manager to the Council and Mayor states that if there is development in flood zones “the drainage must be improved to meet the current (2023) standards” which are much more exacting than the standards that existed (*if* they even existed) when those properties were originally built.¹⁴ Yet there is no analysis or actual explanation as to what such additional drainage improvements would look like or cost or the impact that additional building in those areas would have. Numerous residents that spoke at the August 8th hearing expressed serious concern about building in known flood hazard zones. Englewood is especially prone to flooding; any major rainfall brings about flooding in parts of the City. Tropical storms have been documented to cause substantial damage. During Tropical Storm Ida flooding, some properties were severely affected, with cars floating on top of other parked cars. Some of those areas is where the overlay zones are proposed. Indeed, nearly thirty percent of the proposed lots are in the FEMA Flood Hazard Zone. Attached as Exhibit E is the Fair Share Housing Overlay Zones Flood Analysis prepared by Peter R. Jansen, a local resident, which compiles data on Englewood’s flood zones and cross-references them against where the proposed lots would be built. The conclusions speak for themselves.¹⁵

The overlay zones are also being proposed in areas containing single family homes. The concern is that if developers buy several single family homes, they will build multi-unit affordance

¹⁴ The memo is available at <chrome-extension://efaidnbmnnnibpcajpcgiclfefindmkaj/https://www.cityofenglewood.org/DocumentCenter/View/3232/Questions-regarding-Overlay-Zone-08042023>

¹⁵ The NJDEP has recently increased the elevation at which habitable floors can be built by two feet which in effect also expands the acreage that is subject to flooding. NJDEP also requires a safe access path to residential units during the design flood event. See [NJDEP| Inland Flood Protection Rule | Home](#).

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housing in the midst of those single family lots. The visual examples in Mr. Steck’s memorandum illustrates the absurdity of designating those zones for affordable housing. *See* Ex. B, at p. 7. The provision of multi-family dwellings from 15-50 units per acre as proposed adjacent to single family homes is “bad planning” and not “suitable” in contravention to statutory and decisional precedent. *See* S. Burlington County *NAACP v. Mt. Laurel*, 92, N.J. 158 221-22 (1983) (Mt. Laurel II) (Declaring the “provision of affordable housing does not require bad planning”); *see also* N.J.A.C. 5:93-5 (requiring the proposed affordable housing sites to be “suitable”, i.e., adjacent to compatible land uses).

The Plan further proposes rezoning areas containing historic landmarks and other noteworthy and important structures, such as the City of Englewood Public Library, St. Paul’s Episcopal Church, or the Englewood Field Club, which was founded in 1887 and is indicated by the N.J.D.E.P. as eligible for designation as an historic site on the National Register of Historic Places. The proposed overlay zone for those sites would accommodate over 400 dwelling units despite the historic eligibility of such sites. Without information from the City about why those zones were selected, it is impossible to judge efficacy and reasonableness of the proposed overlay zones that, on their face, are unreasonable and a hearing should be held to assess those issues. *See, e.g., Sartoga v. Borough of W. Paterson*, 346 N.J. Super. 569, 579–80 (App. Div. 2002) (“if a party challenging the validity of a zoning ordinance presents evidence that could support a finding that the ordinance violates the principles of sound zoning embodied in the MLUL, an evidentiary hearing must be held to afford both the party challenging the ordinance and the municipality an opportunity to present expert testimony relevant to a determination of its validity.”); *Manalapan*

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Realty, L.P. v. Township Comm. of Township of Manalapan, 140 N.J. 366, 380 (1995) (a presumption of validity attaches to a zoning ordinance may be overcome “if an opponent of the ordinance establishes the ordinance is ‘clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute.’”).

An overwhelming number of residents oppose these measures, which was evident in the August 8, 2023 Council Meeting. Indeed, the venue selected could not accommodate the crowd that sought to participate at the hearing and residents were shut out from the meeting in violation of the Open Public Meetings Act. *See* N.J.S.A. 10:4-7 (“The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and ***to witness in full detail*** all phases of the deliberation, policy formulation, and decision making of public bodies[.]”) (emphasis added); N.J.S.A. 10:4-12 (Except as otherwise provided by law “all meetings of public bodies shall be open to the public at all times.”) A larger venue was suggested for the meeting, such as the BergenPAC, which could have accommodated all of the residents in attendance, but was rejected.

Those that were permitted to speak (and given a maximum of three minutes to voice their position) all spoke out against the overlay zones. As one resident, Catherine Savva stated, “Giving developers the opportunity to gentrify our neighborhoods will kick us out. Giving developers an opportunity to develop in flood zones will wash us out. Giving opportunity to buy our city treasures like the library will rob children of the eclectic culture that makes this city special... You [the City] talks of affordable housing but threaten ours. Start thinking of what this town means to its people.” There was no response by the Council.

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There are numerous problems with the measures being proposed, both procedurally and substantively. If the ordinance passes – at the eleventh hour prior to the hearing – it will undoubtedly be challenged, by way of a Prerogative Writs action or otherwise. Aside from clear precedent, as discussed above, as matter of practicality and common sense, the Court should hold off having the hearing and await the resolution of challenges to the Ordinance before entering final judgment in this case. If, however, the hearing proceeds, the Interested Parties respectfully seek an opportunity to participate and provide the Court with reasons to reject the proposed measures.

CONCLUSION

For the foregoing reasons, the Interested Parties respectfully request that the Court adjourn the Final Compliance Hearing, and permit them to participate when that hearing takes place.

Pashman Stein Walder Hayden, P.C.

/s/ Andrew Bayer

ANDREW BAYER

EXHIBIT A

Andrew Bayer

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Direct: 732.405.3686



August 8, 2023

VIA EMAIL

Mayor and City Council
City of Englewood
2-10 North Van Brunt Street
Englewood, NJ 07631
Attn: Yancy Wazirmas, City Clerk

Re: Ordinance 23-22 and Resolutions Implementing Fair Share Housing Settlement Agreement

Dear Ms. Wazirmas:

This firm represents Englewood One Community and we are writing to urge the City Council to reject Ordinance 23-22 (creating affordable housing overlay zones), Resolutions 267-08-08-23 (Reasons for Adoption of Ordinance 23-2022 in face of Master Plan inconsistency) and 268-08-23 (Endorsing Hosing Element and Fair Share Plan) at tonight's Council meeting, all of which implement a fatally flawed affordable housing Settlement Agreement with Fair Share Housing Center. If the Council approves these actions, the residential areas of the City will be forever altered because the overlay zoning mechanism being implemented to address the City's unmet need constitutes unsound bad planning in contravention of the *Mt. Laurel* doctrine.

The process to approve and implement the Settlement Agreement has fundamentally excluded public participation. This Council approved a Settlement Agreement with Fair Share Housing Center without providing the Settlement Agreement and approving Resolution in advance of the Council meeting to the public so that the residents could not begin to understand its devastating impact on already existing residential areas within the City. And, once the Settlement Agreement was approved, the City was contractually obligated to implement all of its requirements including the overlay zoning contained within Ordinance 23-22 and the Resolutions identified above. Stated differently, the City's failure to adequately inform the public of the substance of its pending settlement agreement with Fair Share Housing Center before the November 1, 2022 Council meeting meant the City Council intended to force the overlay zoning ordinance on its residents regardless of their view. For those who say "we had no choice", you are wrong. You had a choice and made the wrong one in approving the Settlement Agreement.

Another procedural defect is striking. Even though the City Planning Board is an instrumental component in implementing the Settlement Agreement with Fair Share Housing Center through the adoption of a Housing Element and Fair Share Plan, the Planning Board members did not view the report until the evening it was instructed it had to adopt the plan. Now that certainly is not good government.

On its merits, the Housing Element and Fair Share Plan which the Council is considering endorsing through Resolution 268-08-08-23, does not meet the requirements of the Municipal Land Use Law, N. J.S.A. 40:55D-1 et. seq. The most glaring defect is that it does not provide a rationale and analysis for the overlay zone areas. This defect is especially glaring because some

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of the overlay zones are in flood hazard area or encompass a site eligible to be placed on the historic register. And, perhaps most importantly, the proposed overlay zoning violates the New Jersey Supreme Court's decision in S. Burlington County NAACP v. Mt. Laurel, 92, N.J. 158 221-22 (1983) (Mt. Laurel II), which unequivocally states the "provision of affordable housing does not require bad planning". In this regard, it is well settled that sound municipal planning must adhere to the requirements at N.J.A.C. 5:93-5, which requires in part that the proposed affordable housing sites must be "suitable". A suitable site is one that is adjacent to compatible land uses. Here, the provision of multi-family dwellings from 15-50 units per acre adjacent to single family homes is bad planning. Just imagine an apartment building lodged between two single family lots. That could happen here in Englewood.

Englewood One Community has retained Peter G. Steck, a professional planner, to present expert testimony at tonight's Council meeting. I am attaching Mr. Steck's report dated August 8, 2023. Please distribute this report to the Mayor and Council members. In addition, we request a waiver of the three minute rule and permission to make a thirty minute presentation to the Governing Body. Given the stakes, we would hope the Council accommodates this request.

Very truly yours,
Pashman Stein Walder Hayden, P.C.

By: s/s Andrew Bayer
Andrew Bayer

AB:sc

cc: Frank Huttle, Esq.

EXHIBIT B

Peter G. Steck

Community Planning Consultant
80 Maplewood Avenue, Maplewood, New Jersey 07040-1252
(973) 762-6568
Steckplan@gmail.com

August 8, 2023

PLANNING MEMORANDUM

TO: Englewood One Community, Inc.
P. O. Box 8126
Englewood, New Jersey 07631

RE: Planning Evaluation of Proposed Ordinance 23-22
City of Englewood
Bergen County, New Jersey

INTRODUCTION

On August 8, 2023 the Englewood City Council is holding a public hearing to consider adopting Ordinance 23-22. This proposed Ordinance creates three types of affordable housing overlay zones intending to encourage new townhouse and multifamily development in established areas with a requirement that 20% of the new units be reserved for low and moderate income households. The proposed ordinance is described as the City's response to a court settlement with the Fair Share Housing Center and in response to a builder's remedy suit.

This Planning Memorandum reviews Ordinance 23-22 as well as relevant documents adopted by the Englewood Planning Board from both a procedural and substantive point of view. Also reviewed are August 4 and August 7, 2023 letters from the City Manager to the City Council and Mayor regarding "Questions regarding Overlay Zone" that are posted on the City's website.

Upon review, I conclude that there are procedural deficiencies that need to be addressed. There is also a fatal lack of rationale as to why certain areas of the City were selected for rezoning by overlays. This lack of a rational basis potentially renders the adoption of Ordinance 23-22 as a capricious, arbitrary and unreasonable action.

DESCRIPTION OF ORDINANCE 23-22

Proposed Ordinance 23-22 is titled AN ORDINANCE TO AMEND AND SUPPLEMENT CHAPTER 250, TITLED "LAND USE" CREATING AFFORDABLE HOUSING OVERLAY ZONES. It was introduced on June 27, 2023, published in reduced form, sent to the Englewood Planning Board for a "consistency review", and is scheduled at its second reading to be heard on August 8, 2023.

In general Ordinance 23-22 creates three new zoning districts called Affordable Housing Overlay Zone 1, Zone 2, and Zone 3. As overlay districts, the AHO-1, AHO-2, and AHO-3 Zones preserve the underlying conventional zoning but encourage the demolition of existing buildings and the assembly of lots garnering at least 22,000 square feet in area to develop new townhouse and multifamily buildings. Twenty percent of the new units are to be reserved as affordable housing with the remaining eighty percent of the units sold or rented at market rates. The incentives to encourage demolition and new construction include among other things a greater density, taller heights, and reduced setback standards.

PROCEDURAL REQUIREMENTS

The Municipal Land Use Law and other New Jersey State Statutes mandate that certain procedures be followed to assure that the public is informed about new zoning requirements. Newspaper publication requirements alert the citizenry (whether or not in the areas to be rezoned and regardless of being property owners or renters) of the proposed new zoning regulations so that they can participate in the public hearing or, in the case of property owners, can lodge a protest.

Emphasizing the importance of informing the public, the Municipal Land Use Law mandates that notices be sent by both regular mail and certified mail to property owners in the areas proposed to be rezoned as well as areas within 200 feet of the areas to be rezoned. The only exception to this notice requirement is in instances where a general reexamination report by the City's Planning Board recommends the rezoning. The Englewood Planning Board has not adopted a reexamination report that recommends the proposed overlay zones.

The Municipal Land Use Law also encourages that all new zoning be substantially consistent with the Land Use Plan and Housing Plan elements of the Planning Board's Master Plan. A master plan is intended to provide the rational basis for the new zoning so that upon adoption of an amending ordinance, a governing body need not explain the changes but only need to acknowledge that the new zoning has been determined to be substantially consistent with the land use and housing elements of the master plan.

PLANNING CONCLUSIONS

1. **The public notice is defective if not all affected property owners are given notice.**

Ordinance 23-22 constitutes a rezoning of certain properties in the City. Although it creates overlays that do not change the existing zoning, proposed Ordinance 23-22 permits by right townhouses and multifamily uses in areas that previously only allowed single-family detached homes. That constitutes a reclassification despite an August 4, 2023 response from the City Manager posted on the City's website that states otherwise.

5. Why is my property being rezoned?

Your property is not being rezoned. Your property retains its primary zone. Your property will have an additional zone that will provide you with the opportunity to use your property in the future for Affordable Housing if your property can meet the requirements established in the overlay zone.

According to Section 40:55D-62.1 of the Municipal Land Use Law [N.J.S.A. 40:55D-1 et seq.] notices are required to be sent by regular and by certified mail to affective property owners within the reclassified areas and within 200 feet of the reclassified areas including properties in adjacent municipalities as well as the clerks of the adjacent municipalities. Prior to commencement of the public hearing on August 8, 2023, the required affidavit by the Englewood City Clerk should be examined to verify the notices were sent to the required entities including certain property owners in the Borough of Tenafly as well as to the Tenafly Borough Clerk. A copy of Section 40:55D-62.1 of the Municipal Land Use Law is included as Attachment A.

2. The content of the published notice is deficient.

N.J.S.A. 40:55D-62.1 states that the public notice of a zoning reclassification should identify the rezoned areas “by street names, common names or other identifiable landmarks, and by reference to lot and block numbers....” Ordinance 23-22 only identifies the areas being rezoned by tax map lot and block numbers and ignores the identifiable landmarks required to be referenced in a public notice. This fatal defect is also the case with the public notice published on July 13, 2023 in The Record. See Attachment B. The truncated notice published in The Record is especially cryptic to a resident of Englewood who is a renter and did not directly receive the notice required of property owners.

3. The Planning Board did not have a fair opportunity to review the plan.

A planning board has the sole authority to prepare and adopt a master plan, and it has the authority to hire its own professionals to assist in this effort. In the case of a fair share plan, an additional step is endorsement by the governing body. Despite a settlement with the Fair Share Housing Council having been reached in November of 2022, the court having approved the settlement in January of 2023, and a draft Housing Element & Fair Share Plan being prepared on March 10, 2023, there is evidence that the members of the Englewood Planning Board saw the draft only on April 27, 2023, the day of the hearing and were told that they had to approve the plan that evening.

On its face, this scenario indicates that Planning Board members did not have a fair opportunity to review the draft Housing Element & Fair Share Plan prior to its public hearing and vote on April 27, 2023. Had the Planning Board participated in the preparation of the Housing Element & Fair Share Plan, it would have had an opportunity to discover its defects in content and lack of a rationale basis for location of the recommended overlay zones.

4. The Housing Element & Fair Share Plan is deficient in content.

The most recent Housing Element & Fair Share Plan was prepared Planner John Szabo, Jr. of Burgis Associates and was adopted by the Englewood Planning Board on April 27, 2023. In the introduction on page 1, the document lists what is alleged to be the essential components of a housing element as stated in the Fair Housing Act, N.J.S.A. 52:27D-310. However, the list of mandatory components is incomplete in that only six items are listed. The Fair Housing Act has been amended to include a seventh required component that analyzes multigenerational family continuity. (See N.J.S.A. 52:27D-310.g below.) The April 27, 2023 Housing Element & Fair Share Plan does not address this mandatory seventh component.

N.J.S.A. 52:27D-310 Essential components of municipality’s housing element.

....

g. An analysis of the extent to which municipal ordinances and other local factors advance or detract from the goal of preserving multigenerational family continuity as expressed in the recommendations of the Multigenerational Family Housing Continuity Commission, adopted pursuant to paragraph (1) of subsection f. of section 1 of P.O. 2021, c. 273. (C.52:27D-329.20).

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5. The Housing Element & Fair Share Plan makes no effort to quantify the amount of housing generated by the proposed rezoning.

Although missing one of the mandatory elements of a housing element, the recently adopted Housing Element & Fair Share Plan does have headings that purport to address six of the seven mandatory components required by the Fair Housing Act. However, in projecting the probable increase in multifamily housing over the next ten years owing to the proposed overlay zones, the 2023 Housing Element & Fair Share Plan states only the following on page 12: “Multifamily residential development, however, is anticipated to grow due to increased market demand for such units as properties are redeveloped for multifamily development and as a result of implementation of the City’s affordable housing plan.” To simply conclude that the proposed rezoning will produce more multifamily development than exists today should not qualify as a projection of new housing and does not address that requirement of determining the City’s capacity to accommodate the new multifamily housing.

Not only does the Housing Element and Fair Share Plan fail to project the development that will be fostered by the overlay zones (other than saying there will be more multifamily than exists today), but the posted April 7, 2023 memorandum to the Council by the City Manager states the following:

- **Virtually all the property subject to the overlay zones is already developed with housing and successful businesses. Therefore, almost all the property is currently unavailable for development for multi-family housing.**

6. The Housing Element & Fair Share Plan contains no rationale for the location of the proposed overlay zones.

After addressing the realistic development potential of 76 affordable units, the 2023 Housing Element & Fair Share Plan commits the City to creating overlay districts for the remaining housing need of 640 affordable units. The mechanism employed is inclusionary housing wherein for every five new dwelling units created, one or 20 percent is to be reserved for low or moderate income households. Hence, to create 640 affordable units in the overlay zones, a total of 3,200 new dwelling units must be developed. [20% x 3,200 units = 640 affordable units.] Maps are provided in the Appendix of the Plan showing the locations of the proposed overlay zones that cover approximately 131 acres.

Noticeably absent is any analysis of the areas being recommended for rezoning such as whether such areas flood or whether such areas already house families or individuals that have low or moderate incomes. Such information is important in judging the efficacy and reasonableness of the proposed overlay zones. For example, included in one of the overlay zones is the City of Englewood Public Library at 31 Engle Street which is unlikely to be redeveloped through market forces (unless the City Council already contemplates closing the facility.) Included in another overlay zone is the Englewood Field Club at 341 Engle Street which was founded in 1887 and is indicated by the N.J.D.E.P. as eligible for designation as an historic site on the National Register of Historic Places. The proposed overlay zone would accommodate 322 dwelling units despite the historic eligibility of the site and the presence of a stream and wetlands.

The entire analysis on page 26 of the 2023 Housing Element & Fair Share Plan for the location of the proposed overlay zones is reproduced below:

- a. The City will create overlay zones for affordable housing at the prescribed densities indicated in the following table and requiring a 20% set-aside of affordable units. A location map and listing of specific property's to be included within the overlay zones is appended to this document:

Table 25: Affordable Housing Overlay Zones

Site Id	Density per Acre
First Student Charter Bus (Block 2407, Lot 7; Block 2801 Lot 1)	35
Areas 1, 2, 3, 4, 6, 8, 10, 11, 12, 13, and 14 (CareOne)	15
Area 5	50
Area 7	35
Area 9	35

Additionally, the only indication in the 2023 Housing Element and Fair Share Plan of what housing density is being recommended for different areas is the labelling of areas by number: Area 1 through Area 14. The numerical area designation is found not in the main body of the Housing Element & Fair Share Plan but in the colored map in the Appendix (page 63 of the entire document) which is labelled "Existing Land Use Map With Voting Wards, Zoning & Affordable Housing Overlays." The area numbers for the different overlay zones are unreadable at a page scale of 8.5 inches by 11 inches.

Also noted is that the required inclusionary housing component of 20 percent for both rental and ownership units differs from the recommendation in the January 10, 2023 Report of the Special Master (Francis J. Banisch III, PP/AICP). The Special Master assigned by the court recommended a 20 percent set-aside associated with for-sale housing units and a 15 percent set-aside for rental units. Hence, the 2023 Plan recommends a greater burden on the developers of inclusionary rental housing than that recommended to the court by Special Master Banisch.

7. The Housing Element & Fair Share Plan encourages development in flood hazard areas.

The Appendix to the 2023 Housing Element & Fair Share Plan contains a Vacant Land Assessment Map showing the portions of the City of Englewood that are in flood hazard areas. However, nowhere in the 2023 Plan is there an analysis of how such areas subject to flooding in the 100 year event impact the proposed overlay zones. A cursory analysis reveals that some of the areas recommended are impacted during the 100 year flood event. Of interest is the August 4, 2023 memorandum on the City's website from the City Manager to the Council and Mayor which is reproduced in part below.

9. Is development in flood zones included?
Yes. Englewood is fully developed. The areas in flood zones are already developed. If there is redevelopment then the drainage must be improved to meet current (2023) standards, which were either non-existent or much more relaxed when the property was originally developed. The new standard became effective in July of 2023.

10. Has the City assessed its infrastructure and service needs for increased housing?
Yes. If Affordable Housing is developed in the Overlay Zone, the new development must conform to all of the overlay Zoning requirements as well as all state, county and municipal development regulations, including the strict DEP storm water regulations.

Although the City Manager indicates that encouraging development in flood hazard areas is not an issue, the New Jersey Department of Environmental Protection appears to think otherwise. Noteworthy is that NJDEP has recently increased the elevation at which habitable floors can be built by two feet which in effect also expands the acreage that is subject to flooding. NJDEP also requires a safe access path to residential units during the design flood event. The 2023 Housing Element & Fair Share Plan is silent as to how the new flood regulations affect the viability of the proposed overlay zones.

Aside from the common sense public health and safety considerations, it is noted that the vacant land analysis in the Appendix to the 2023 Plan excluded certain sites because they were subject to flooding under the prior Flood Hazard Area rule. By now stating that new development in the overlay zones can occur in Flood Hazard Areas, the vacant land analysis is rendered defective.

8. Substantial consistency with the Land Use Plan and Housing Plan is encouraged by the Municipal Land Use Law.

In N.J.S.A. 40:55D-26 and 62, the Municipal Land Use Law requires that amendments to a zoning ordinance be reviewed by the planning board as to consistency with both the land use plan element and the housing plan element of the master plan. It also specifies procedures to be followed where substantial inconsistencies have been identified. See Attachment D. Although Ordinance 23-22 is consistent with the recently adopted Housing Element and Fair Share Plan (albeit a defective plan), proposed Ordinance 23-22 is substantially inconsistent with the City's Master Plan Land Use Element last amended by the Planning Board on February 19, 2015. The City Council is mandated to indicate why it may be approving an ordinance that is substantially inconsistent with the Planning Board's Land Use Plan Element of the Master Plan. Presumably, this will be addressed at the August 8, 2023 public hearing of the Council.

9. In Mount Laurel II in 1983 the New Jersey Supreme Court opined that the State Constitution does not require bad planning.

The 2023 Housing Element and Fair Share Plan is intended to be the rational basis for the proposed overlay zones, but it is silent as to why certain properties were included in overlay zones or why other properties were excluded. The 2023 Plan also fails to predict how much new multifamily housing will be generated by the recommended overlay zones. It only states that there will be more multifamily housing than exists today but without any prediction of the number of new units. Despite the proposed overlay zones encompassing approximately 131 acres, the City Manager's August 7, 2023 correspondence states that "almost all the property is currently unavailable for development for multi-family housing."

This is bad planning. The New Jersey Supreme Court stated in its 1983 Mt. Laurel II ruling stated that the provision of affordable housing "does not require bad planning." To the contrary, locations for affordable housing must "depend on sound municipal planning considerations" and must be available, suitable, developable, and approvable.

Because Ordinance 23-22 is substantially inconsistent with Englewood's Land Use Plan Element of the Master Plan and because the 2023 Housing Element & Fair Share Plan is devoid of any explanation of how the proposed overlay zones were located, the proposed overlay zones are not based on sound planning. The Ordinance fosters haphazard development akin to illegal spot zoning. Moreover, without a rational planning basis, Ordinance 23-22 constitutes a capricious, arbitrary, and unreasonable legislative action by the City Council.

10. Visual examples of the areas being rezoned are informative.

The aerial photos from Google Earth Pro are included on the next two pages that illustrate the existing development pattern in selected areas being rezoned.





ATTACHMENT A

PORTION OF THE MUNICIPAL LAND USE LAW

40:55D-62.1. Notice of hearing on amendment to zoning ordinance. Notice of a hearing on an amendment to the zoning ordinance proposing a change to the classification or boundaries of a zoning district, exclusive of classification or boundary changes recommended in a periodic general reexamination of the master plan by the planning board pursuant to section 76 of P.L.1975, c.291 (C.40:55D-89), shall be given at least 10 days prior to the hearing by the municipal clerk to the owners of all real property as shown on the current tax duplicates, located, in the case of a classification change, within the district and within the State within 200 feet in all directions of the boundaries of the district, and located, in the case of a boundary change, in the State within 200 feet in all directions of the proposed new boundaries of the district which is the subject of the hearing.

In addition, the municipal clerk shall provide notice of a hearing on an amendment to the zoning ordinance proposing a change to the classification or boundaries of a zoning district, exclusive of classification or boundary changes recommended in a periodic general reexamination of the master plan, to the Office of Planning Advocacy, and to any military facility commander who has registered with the municipality pursuant to section 1 of P.L.2005, c.41 (C.40:55D-12.4), at least 10 days prior to the hearing, by personal service or certified mail.

A notice pursuant to this section shall state the date, time and place of the hearing, the nature of the matter to be considered and an identification of the affected zoning districts and proposed boundary changes, if any, by street names, common names or other identifiable landmarks, and by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office.

Notice shall be given to a property owner by: (1) serving a copy thereof on the property owner as shown on the said current tax duplicate, or his agent in charge of the property, or (2) mailing a copy thereof by certified mail and regular mail to the property owner at his address as shown on the said current tax duplicate.

Notice to a partnership owner may be made by service upon any partner. Notice to a corporate owner may be made by service upon its president, a vice president, secretary or other person authorized by appointment or by law to accept service on behalf of the corporation. Notice to a condominium association, horizontal property regime, community trust or homeowners' association, because of its ownership of common elements or areas located within 200 feet of the boundaries of the district which is the subject of the hearing, may be made in the same manner as to a corporation, in addition to notice to unit owners, co-owners, or homeowners on account of such common elements or areas.

The municipal clerk shall execute affidavits of proof of service of the notices required by this section, and shall keep the affidavits on file along with the proof of publication of the notice of the required public hearing on the proposed zoning ordinance change. Costs of the notice provision shall be the responsibility of the proponent of the amendment.

ATTACHMENT B**NOTICE PUBLISHED IN "THE RECORD" ON JULY 13, 2023**

Thursday, July 13, 2023

Notice Content

CITY OF ENGLEWOOD NOTICE OF ORDINANCE INTRODUCTION/PUBLIC HEARING ORDINACNE 23-22 AN ORDINANCE TO AMEND AND SUPPLEMENT CHAPTER 250, TITLED "LAND USE" CREATING AFFORDABLE HOUSING OVERLAY ZONES NOTICE IS HEREBY GIVEN that the above ordinance was introduced and passed on first reading at a Regular Meeting of the City Council of the City of Englewood on June 27, 2023 and that said ordinance will be further considered for final passage at a meeting of the City Council to be held at the Municipal Court Room, 73 S. Van Brunt Street, Englewood, Bergen County, New Jersey, on August 8, 2023 at 7:30 pm or as soon thereafter as the matter can be reached, at which time and place all persons who may be interested will be given an opportunity to be heard concerning said ordinance. A copy of the ordinance in full may be requested at no charge from the City Clerk's Office during regular business hours and can also be found on the City's website at www.cityofenglewood.org. The purpose of this Ordinance is to amend and supplement Chapter 250, Land Use, of the Code of the City of Englewood, to establish new affordable housing overlay zones for the following properties that will encourage the production of very-low, low-, and moderate-income housing units: Block Lot(s) Affordable Housing Overlay Designation (AHO) 305 15 through 25 AHO-1 507 1 through 12 and 24.1 AHO-1 701 18.1 AHO-1 702 1 through 5 AHO-1 704 15.01, 16, 17, 18 AHO-1 704 11 AHO-1 705 4 through 10 AHO-1 707 1 and 8 through 12 AHO-1 709 5.01, 5.02, 9, 10, 11, 12, 13.1, 13.2, 14 AHO-1 1, 2, 4, 5, 15, 16, 17, 18, 19, 20, 21.1, 710 22.1 AHO-1 805 7 through 17.1 AHO-1 806 24 through 28 AHO-1 809 1 through 21 AHO-1 810 2.1 through 5 AHO-2 903 2 through 10 AHO-1 904 1 through 5.1 AHO-1 905 2, 4, 5 AHO-2 910 3 through 6 AHO-1 913 1 through 16 AHO-2 1006 19 through 23 AHO-2 1101 34 and 35 AHO-2 1102 22 and 23 AHO-2 1103 10 through 16 AHO-2 1105 1 and 11 through 15 AHO-2 1203 2, 3.1, 4.1, 5, 8 AHO-2 1204 15 through 18 AHO-2 1207 4, 5, 6.2, 6.3, 9.1, 10, 11 AHO-2 1208 6, 8.1, 9 AHO-2 1209 1.1, 15.1, 16.1, 17.1 AHO-2 1210 15 through 20 AHO-1 1601 22 through 27 AHO-1 1602 13 and 14 AHO-1 1902 5.1,7,8 AHO-1 2303 6 through 30 AHO-3 2304 9 through 35 AHO-3 2310 2.2 through 7 AHO-1 2311 1.1 AHO-1 2405 1.2 and 1.3 AHO-1 2406 1.2 and 1.3 AHO-1 2407 2 AHO-1 7 and part of 7 including Block 2801, Lot 1 plus a portion of the right-of- way per 2017 Area In Need of 2407 Investigation Report AHO-2 2409 Part of 2 AHO-1 2802 12 through 19 AHO-1 2902 4 through 21 AHO-1 2903 1 through 22 AHO-1 2904 1 through 11, part of 12, part of 18 AHO-1 2905 1, 2, 16 through 30 AHO-1 3009 8 through 19 and part of 7 AHO-1 Yancy Wazirmas, RMC City Clerk The Record: 7/13/23 Fee:\$105.60 (81) 0005765417

ATTACHMENT C

PORTION OF THE FAIR HOUSING ACT, N.J.S.A. 52:27D-310

52: 27D-310 Essential components of municipality's housing element.

10. A municipality's housing element shall be designed to achieve the goal of access to affordable housing to meet present and prospective housing needs, with particular attention to low and moderate income housing, and shall contain at least:

a. An inventory of the municipality's housing stock by age, condition, purchase or rental value, occupancy characteristics, and type, including the number of units affordable to low and moderate income households and substandard housing capable of being rehabilitated, and in conducting this inventory the municipality shall have access, on a confidential basis for the sole purpose of conducting the inventory, to all necessary property tax assessment records and information in the assessor's office, including but not limited to the property record cards;

b. A projection of the municipality's housing stock, including the probable future construction of low and moderate income housing, for the next ten years, taking into account, but not necessarily limited to, construction permits issued, approvals of applications for development and probable residential development of lands;

c. An analysis of the municipality's demographic characteristics, including but not necessarily limited to, household size, income level and age;

d. An analysis of the existing and probable future employment characteristics of the municipality;

e. A determination of the municipality's present and prospective fair share for low and moderate income housing and its capacity to accommodate its present and prospective housing needs, including its fair share for low and moderate income housing;

f. A consideration of the lands that are most appropriate for construction of low and moderate income housing and of the existing structures most appropriate for conversion to, or rehabilitation for, low and moderate income housing, including a consideration of lands of developers who have expressed a commitment to provide low and moderate income housing; and

g. An analysis of the extent to which municipal ordinances and other local factors advance or detract from the goal of preserving multigenerational family continuity as expressed in the recommendations of the Multigenerational Family Housing Continuity Commission, adopted pursuant to paragraph (1) of subsection f. of section 1 of P.L.2021, c.273 (C.52:27D-329.20).

L.1985,c.222,s.10; amended 2001, c.435, s.2; 2021, c.273, s.2.

ATTACHMENT D

PORTIONS OF THE MUNICIPAL LAND USE LAW

40:55D-64. Referral to planning board. Prior to the hearing on adoption of a zoning ordinance, or any amendments thereto, the governing body shall refer any such proposed ordinance or amendment thereto to the planning board pursuant to subsection 17a. of this act [40:55D-26].

40:55D-26. Referral powers. a. Prior to the adoption of a development regulation, revision, or amendment thereto, the planning board shall make and transmit to the governing body, within 35 days after referral, a report including identification of any provisions in the proposed development regulation, revision or amendment which are inconsistent with the master plan and recommendations concerning these inconsistencies and any other matters as the board deems appropriate. The governing body, when considering the adoption of a development regulation, revision or amendment thereto, shall review the report of the planning board and may disapprove or change any recommendation by a vote of a majority of its full authorized membership and shall record in its minutes the reasons for not following such recommendation. Failure of the planning board to transmit its report within the 35-day period provided herein shall relieve the governing body from the requirements of this subsection in regard to the proposed development regulation, revision or amendment thereto referred to the planning board. Nothing in this section shall be construed as diminishing the application of the provisions of section 23 of P.L. 1975, c. 291 (C. 40:55D-32) to any official map or an amendment or revision thereto or of subsection a. of section 49 of P.L. 1975, c. 291 (C. 40:55D-62) to any zoning ordinance or any amendment or revision thereto.

b. The governing body may by ordinance provide for the reference of any matter or class of matters to the planning board before final action thereon by a municipal body or municipal officer having final authority thereon, except of any matter under the jurisdiction of the board of adjustment. Whenever the planning board shall have made a recommendation regarding a matter authorized by this act to another municipal body, such recommendation may be rejected only by a majority of the full authorized membership of such other body.

ARTICLE 8. ZONING.

40:55D-62. Power to zone. a. The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of a master plan, and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements; provided that the governing body may adopt a zoning ordinance or amendment or revision thereto which in whole or part is inconsistent with or not designed to effectuate the land use plan element and the housing plan element, but only by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes when adopting such a zoning ordinance; and provided further that, notwithstanding anything aforesaid, the governing body may adopt an interim zoning ordinance pursuant to subsection b. of section 77 of P.L.1975, c.291 (C.40:55D-90).

The zoning ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land. The regulations in the zoning ordinance shall be uniform throughout each district for each class or kind of buildings or other structure or uses of land, including planned unit development, planned unit residential development and cluster development, but the regulations in one district may differ from those in other districts.

EXHIBIT C







EXHIBIT D



Englewood

MICHAEL WILDES Mayor, City Hall

P.O. Box 228 • Englewood, N.J. 07631 • (201) 871-6666

August 11, 2023

City of Englewood
2-10 N. Van Brunt Street
Englewood, NJ 07631

Attention: Yancy Wazirmas, City Clerk

RE: Veto of Ordinance 23-22

Dear Ms. Wazirmas:

2023 AUG 11 A 9:09
CITY CLERK'S OFFICE
ENGLEWOOD, N.J.

In connection with Ordinance 23-22 which the Council passed on August 8, 2023, I offer the following.

Veto Message

Pursuant to the Charter of the City of Englewood, New Jersey, adopted on August 30, 1978, and N.J.S.A. 40:69A-41, Approval or Veto of Ordinances, I hereby veto Ordinance 23-22.

Statement of Objections

I am vetoing this Ordinance 23-22 largely for the reason expressed in the Englewood Planning Board's Resolution dated August 3, 2023 finding that the Ordinance is inconsistent with the Master Plan in failing to properly respect our residential zoning, failing to incorporate the Planning Board's suggested re-development study areas, and for an opaque process that has diminished public support for the governing process and our noble / historic efforts to continue to provide low and moderate income housing.

The Planning Board was clear that the Ordinance did not respect the character of our residential neighborhoods; specifically concerns for buffers; lighting; density; height and even permitting chain link fencing: all deemed to be incompatible with the integrity of our residential zones.

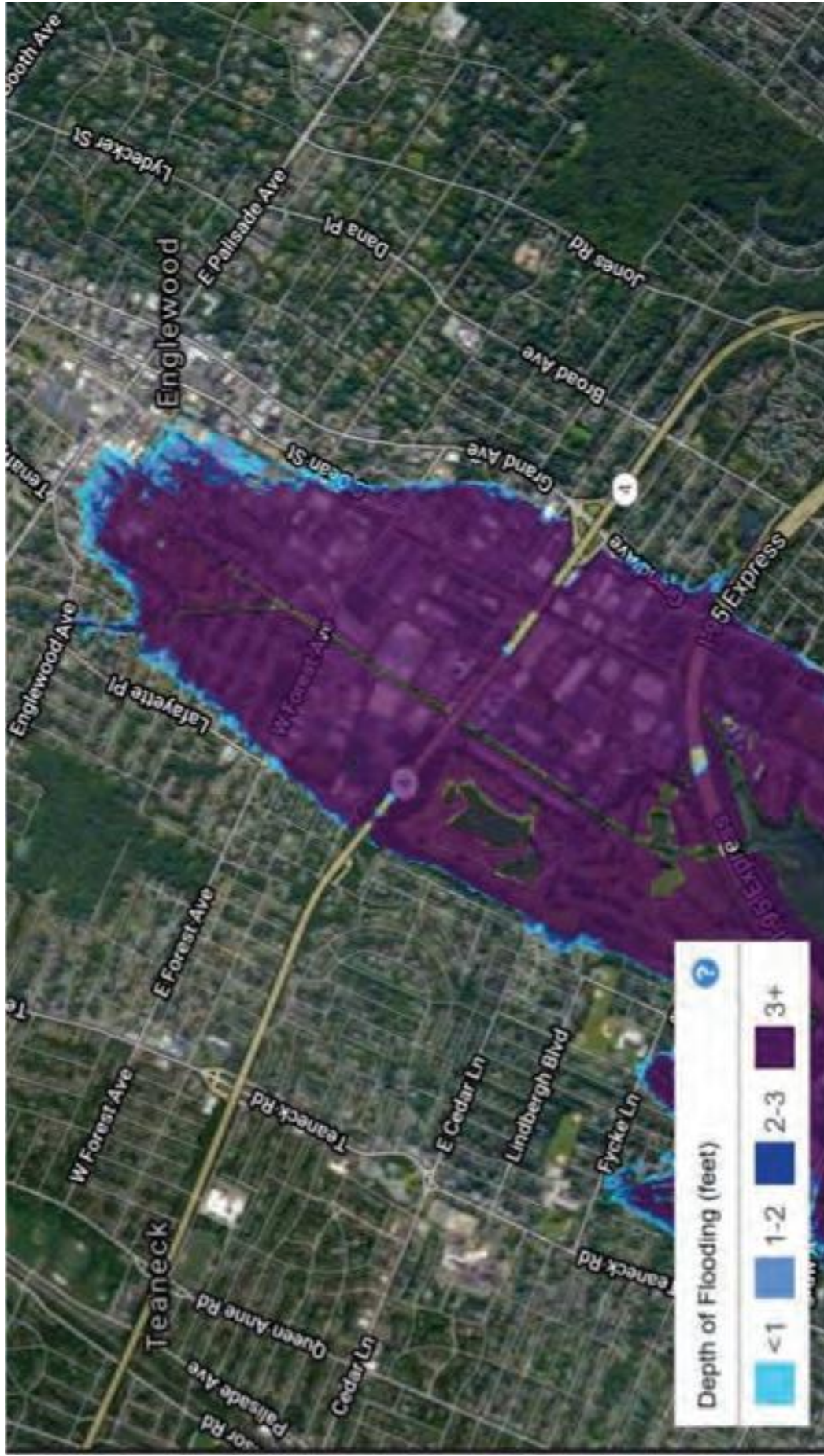
While the Planning Board adopted the City Planner's Revised Third Round Housing Element and Fair Share Plan, the City Council's implementing Ordinance 23-22 fails to preserve our goal of maintaining neighborhood character, fails to target development to blighted areas of the City, and was conducted in a fashion that has alienated our citizenry.

Finally, the City should litigate and push further on our robust inventory of low income/moderate income housing that we have historically provided, as a unique exemplar of equity in providing housing for our citizens.

Very truly yours,

MICHAEL WILDES,
MAYOR

EXHIBIT E

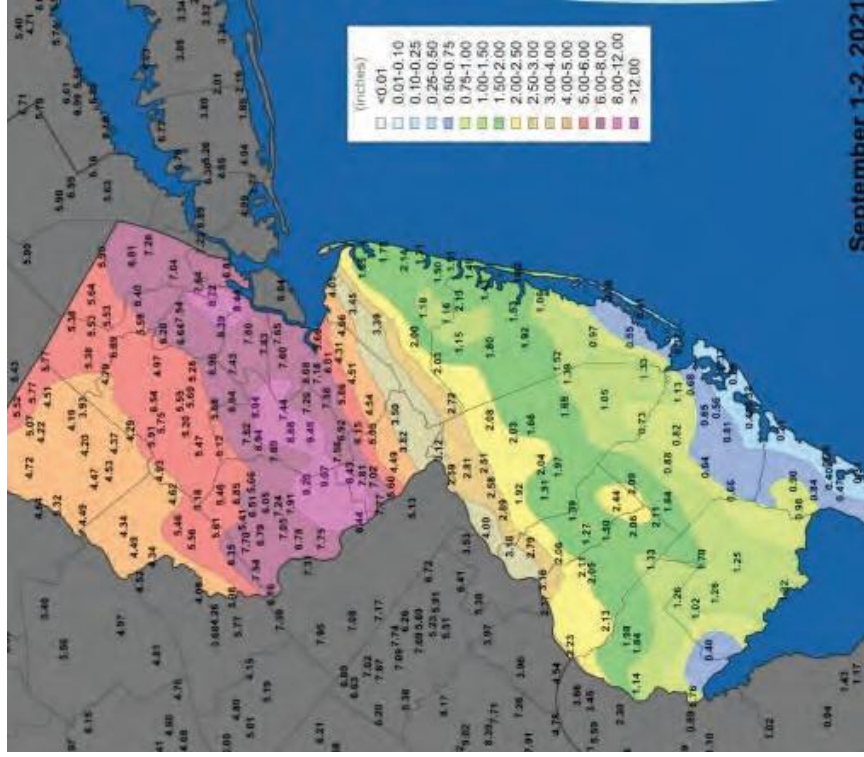


Englewood Fair Share Housing Overlay Zones Flood Analysis For Town Hall on 8-22-2023

Peter R. Jansen

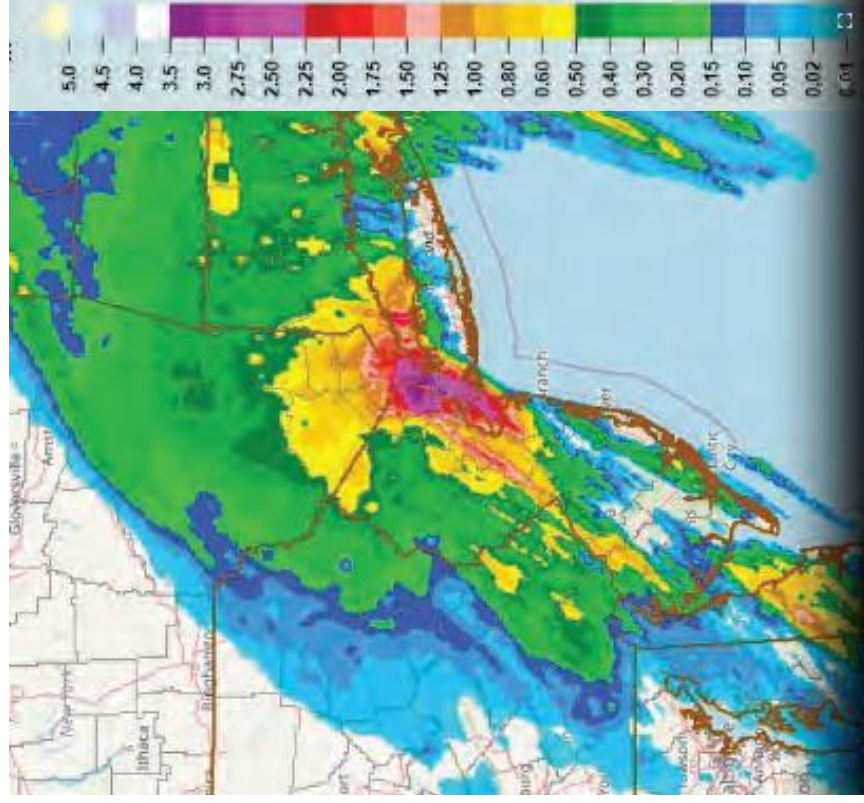
Why does Englewood Flood?

- Topology - natural basin
- High degree of development and impervious surfaces
- Unprecedented Rainfall



Ida Rainfall

Prepared by Peter R. Jansen, 8/22/2023



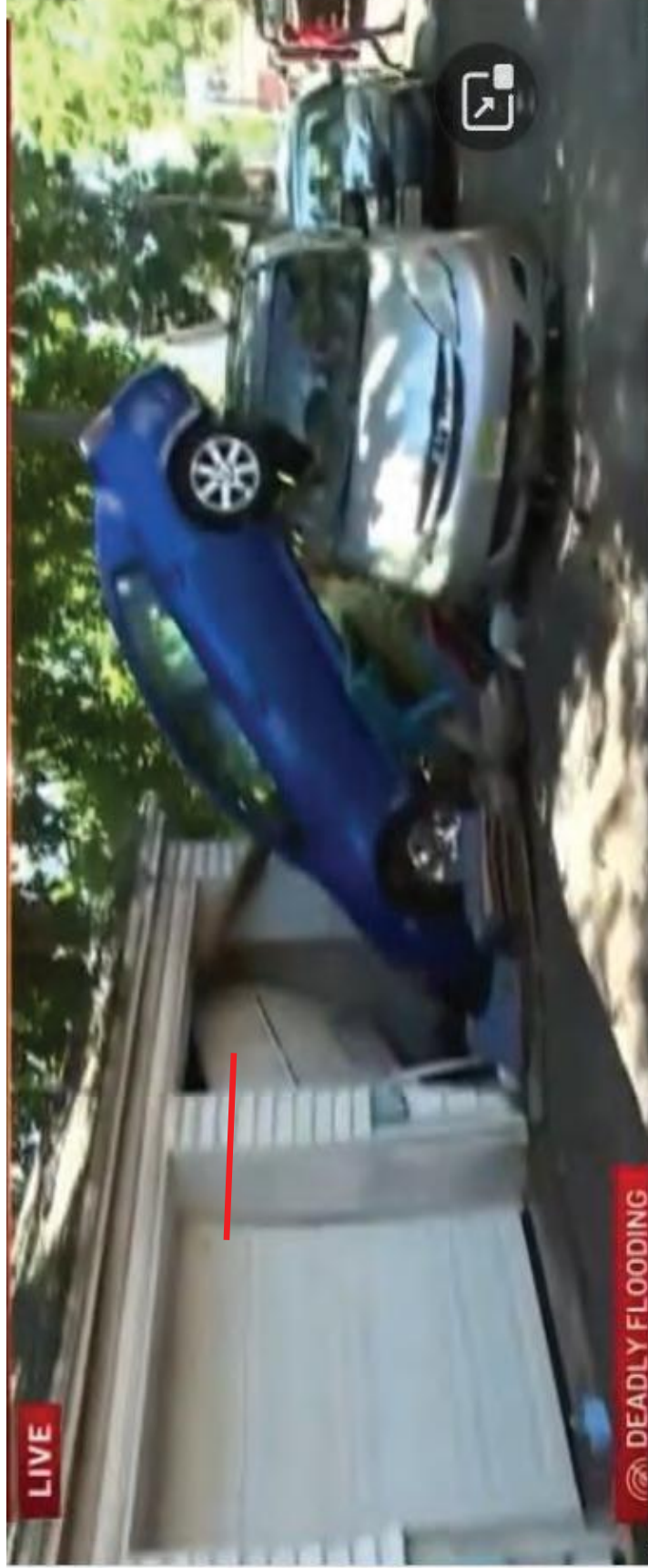
Ida Rainfall Rates (inches/hr)

Englewood Flooding from Tropical Storm Ida



Photo Credit: Horace Ragbir

Englewood Flooding from Tropical Storm Ida



Englewood Flooding from Tropical Storm Ida



Prepared by Peter R. Jansen, 8/22/2023

Englewood Flooding from Tropical Storm Ida



Prepared by Peter R. Jansen, 8/22/2023

Englewood Flooding from Tropical Storm Ida

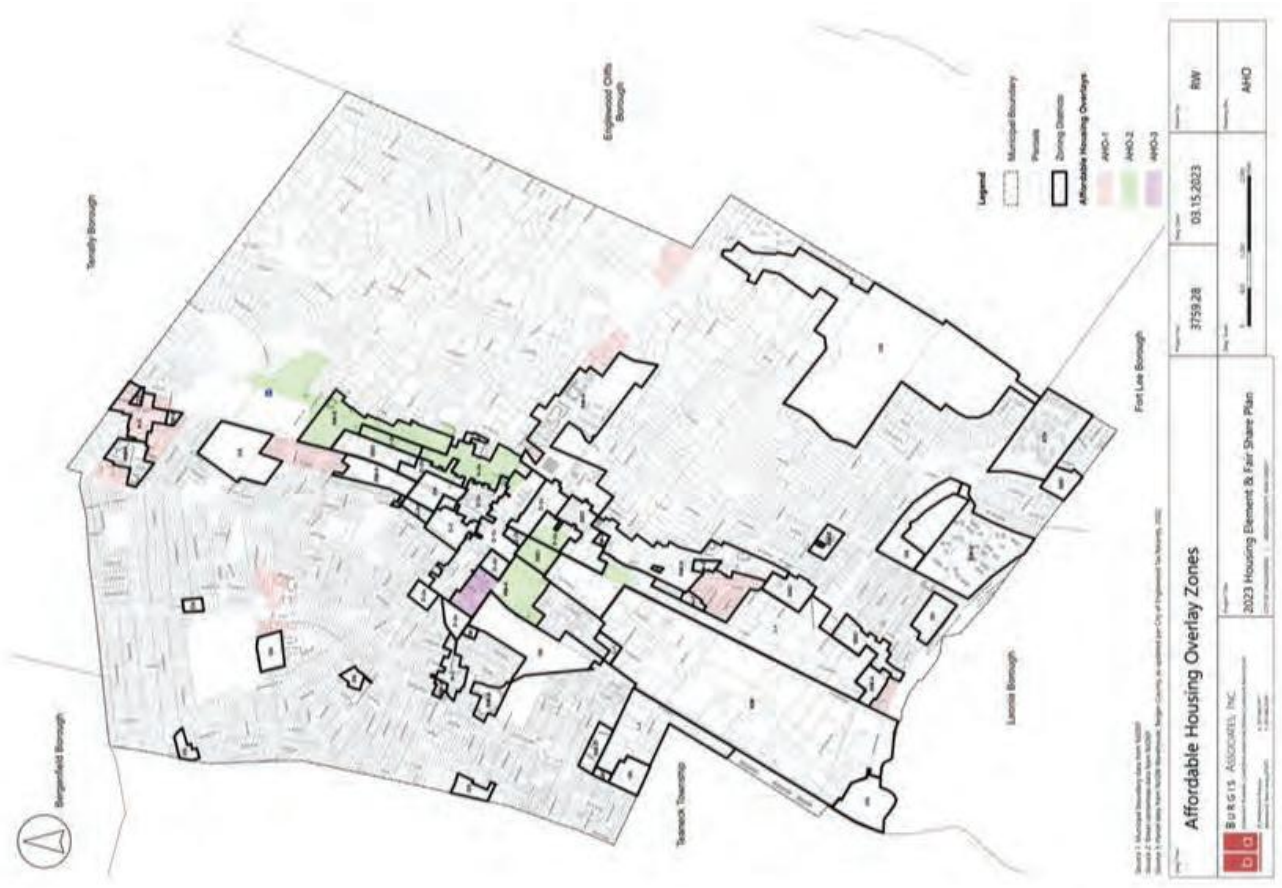


Prepared by Peter R. Jansen, 8/22/2023

Englewood Flooding from Tropical Storm Ida



Englewood Fair Share Housing Overlay Zones Map



Summary

- 15 Locations Identified, Approximately 132 Acres
- 100% utilization would yield 3500 units and 700 Affordable units

Notes

- 7 of the 15 locations have lots in the FEMA Flood Hazard Zone
- Flooding is considered in calculation of the RDP (Realistic Development Potential) but not for the Overlay Zones. Why???

Englewood FSH Overlay Zones Map & FEMA Flood Map



FEMA Flood Map

Englewood FSH Overlay Zones Map & FEMA Flood Map



Englewood Fair Share Housing Overlay – Lots in Flood Zone, pg 1

ID #	Block	Lots	Addresses	Floodzone
3	305 (306)	15 through 25	133-171 Glenbrook Pkwy; 260-252 Tryon	YES

FEMA Flood Zones

- 1% Annual Chance Flood Hazard
- Regulatory Floodway
- Special Floodway
- Area of Undetermined Flood Hazard
- 0.2% Annual Chance Flood Hazard
- Future Conditions 1% Annual Chance Flood Hazard
- Area with Reduced Risk Due to Levee
- Area with Risk Due to Levee

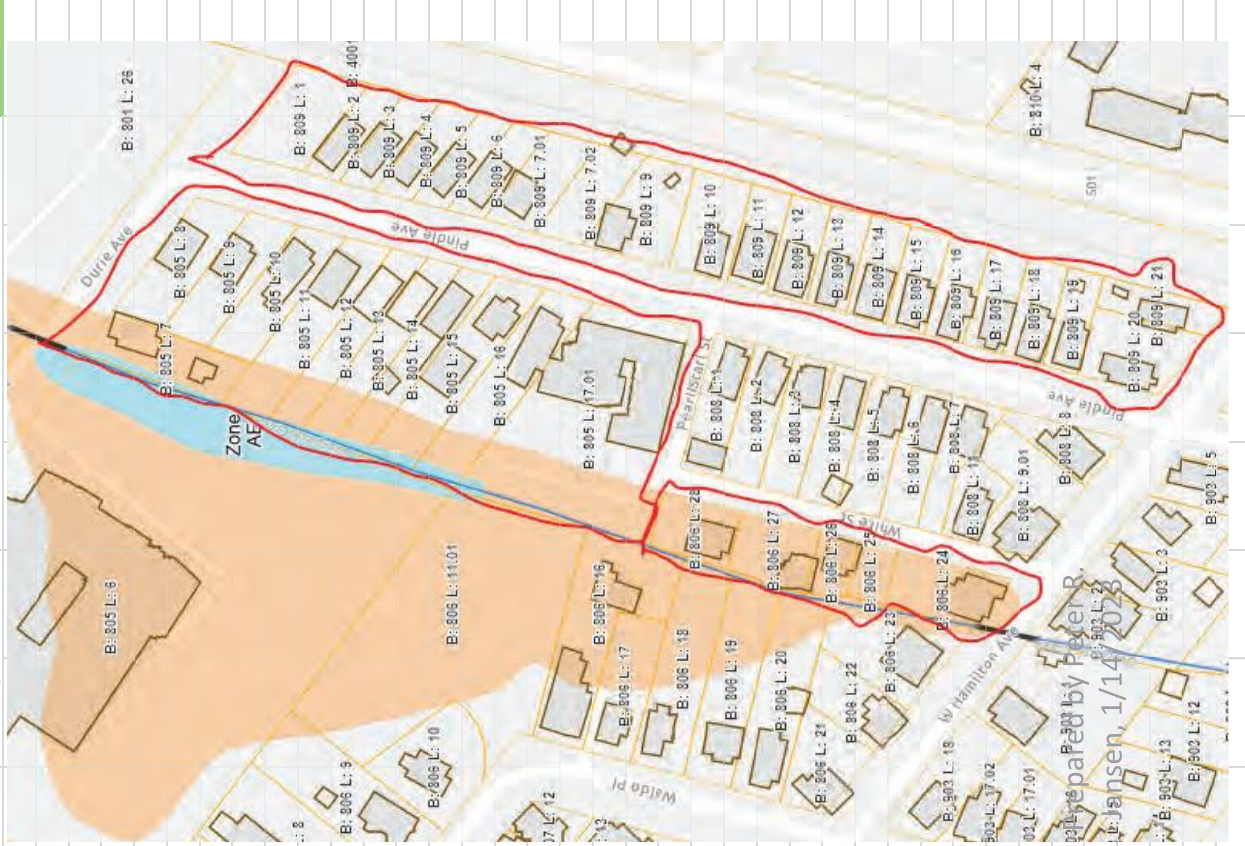
- Red Line outlines lots selected to be in EFSH Overlay for the Block/Lot combination listed above
- City documents are in error, the selected lots are in Block 306, NOT 305
- Lots Impacted by Flooding = ALL
- Sample Flooding 1 of 5

Prepared by Peter R. Jansen,
1/14/2023

Englewood Fair Share Housing Overlay – Lots in Flood Zone, pg 3

ID #	Block	Lots	Addresses	Floodzone
6a	805	7 through 17.1	304-270 Pindle Ave	YES
	806	24 through 28	29 W. Hamilton Ave; 240-252 White St.	YES
	809	1 through 21	304-235 Pindle Ave; 1-5 W. Hamilton Ave	NO

- Red Line outlines lots selected to be in EFSH Overlay for the Block/Lot combination listed above
- Lots Impacted by Flooding = ALL in Blocks 805 & 806, None in Block 809
- Sample Flooding 3 of 5
- The White St properties were particularly inundated by Tropical Storm Ida flooding, with cars floated on top of other parked cars. This confirms a flooding level of 5+ feet above the road surface. Engineering analysis indicates this is partially caused by the Hamilton Avenue culvert dimensions. FEMA Flood Zone map is evidently out of date and does not show the acute local impact of the dynamics of the culvert restriction.



FEMA Flood Zones

- Flood Hazard Zones
- 1% Annual Chance Flood Hazard
- Regulatory Floodway
- Special Floodway
- Area of Undetermined Flood Hazard
- 0.2% Annual Chance Flood Hazard
- Future Conditions 1% Annual Chance Flood Hazard
- Area with Reduced Risk Due to Levee
- Area with Risk Due to Levee

Prepared by Peter R. Jansen, 1/14/2023

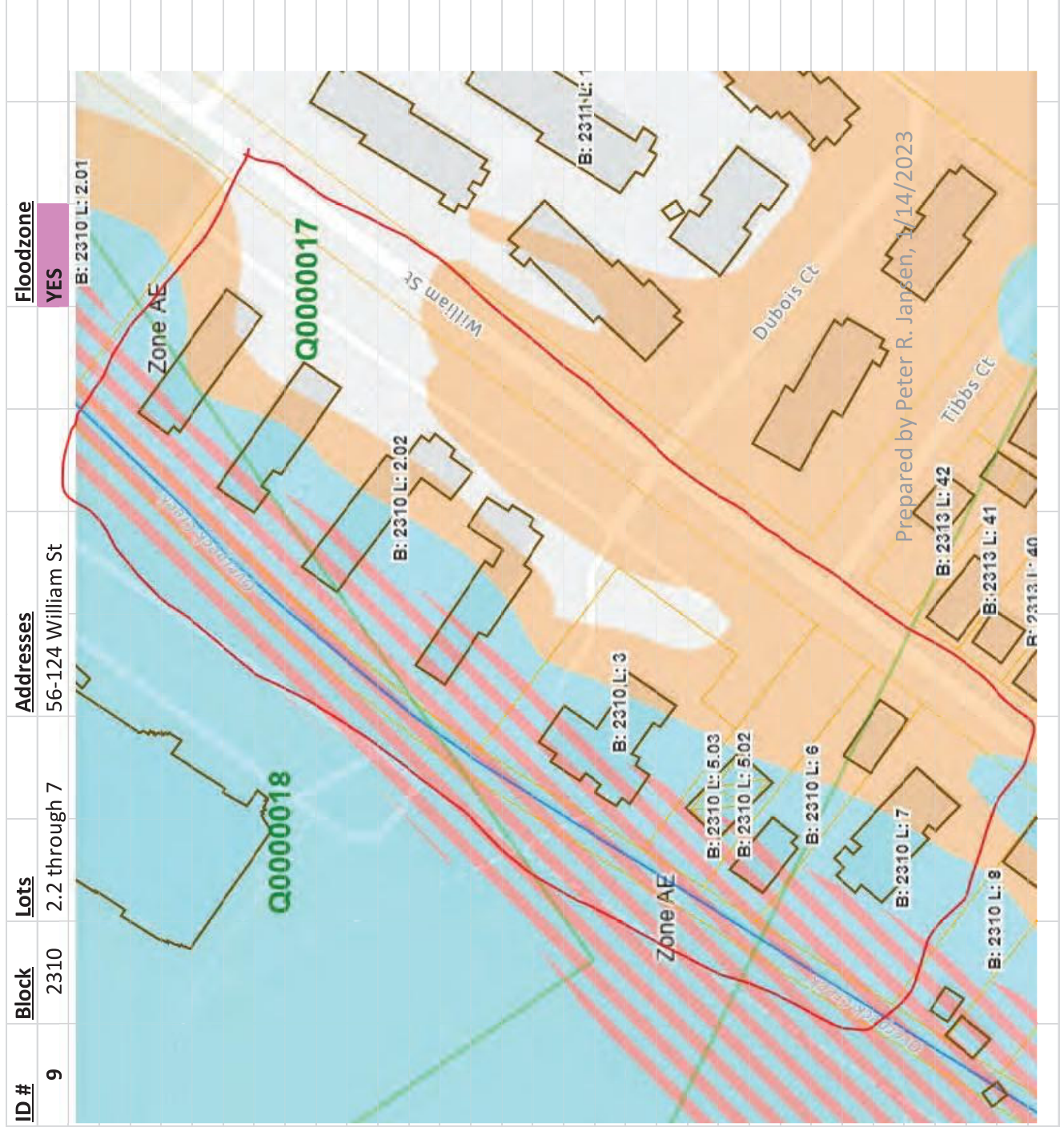
Englewood Fair Share Housing Overlay – Lots in Flood Zone, pg 2



- Red Line outlines lots selected to be in EFSH Overlay for the Block/Lot combination listed above
- Lots Impacted by Flooding = ALL
- Sample Flooding 2 of 5
- City intends to acquire the property at Block 2310, Lot 2.01, shown by smaller red outline in bottom left of pic

Prepared by Peter R. Jansen, 1/14/2023

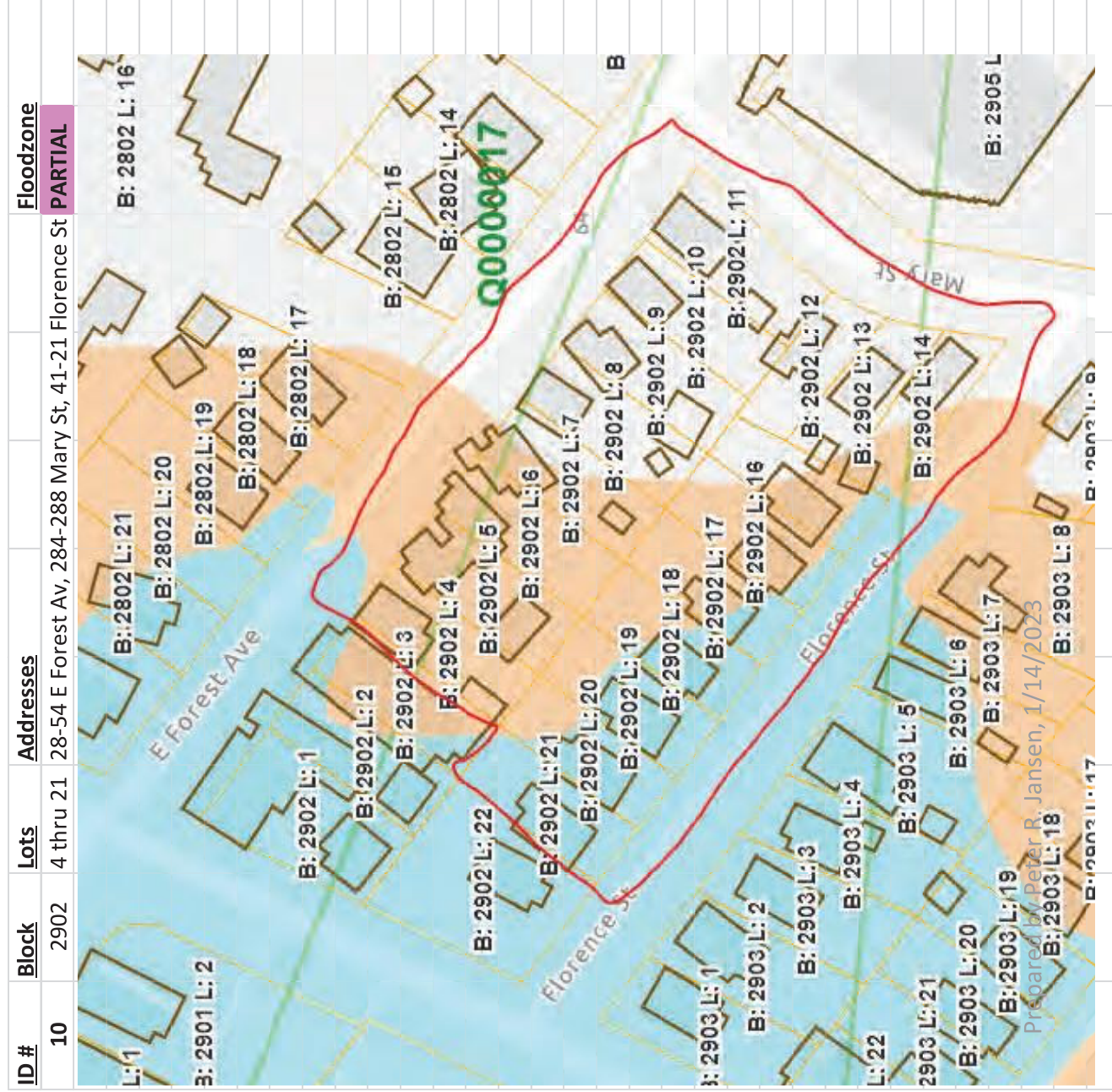
Englewood Fair Share Housing Overlay – Lots in Flood Zone, pg 4



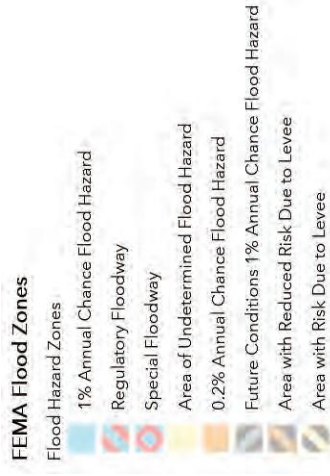
- Red Line outlines lots selected to be in EFSH Overlay for the Block/Lot combination listed above
- Lots Impacted by Flooding = ALL
- Sample Flooding 4 of 5

Prepared by Peter R. Jansen,
1/14/2023

Englewood Fair Share Housing Overlay – Lots in Flood Zone, pg 5



- Red Line outlines lots selected to be in EFSH Overlay for the Block/Lot combination listed above
- Lots Impacted by Flooding = PARTIAL
- Sample Flooding 5 of 5



Prepared by Peter R. Jansen, 1/14/2023

Englewood Fair Share Housing and Flooding - Summary

**Total Units based on Lot Acreage:
In Flood Zone?**

<u>Ward</u>	<u>NO</u>	<u>YES</u>	<u>Grand Total</u>	<u>% of Total</u>
Ward 1	2,019	67	2,086	60%
Ward 2	18	14	32	1%
Ward 3	162	33	195	6%
Ward 4	269	911	1,180	34%
Grand Total	2,468	1,025	3,493	100%
% of Total	71%	29%	100%	

- 60% of the proposed units are in the 1st Ward, 34% in the 4th Ward
- Minimal amounts in the 2nd and 3rd Wards
- 29% of the proposed lots are in FEMA Flood Zones (1999 Data, 1% and 0.2% Annual Flood Chance)
- Why wasn't flooding considered in the selection of Overlay Zones?