

PASHMAN STEIN WALDER HAYDEN

A Professional Corporation

Andrew Bayer Esq./ 033871988

Janie Byalik, Esq./040702006

Court Plaza South

21 Main Street, Suite 200

Hackensack, NJ 07601

(201) 488-8200

Attorneys for Plaintiffs

Englewood One Community Corp.,

Horace H. Ragbir, Amy Bullock, and

James S. Cohen

<p>Englewood One Community Corp., Horace H. Ragbir, Amy Bullock, and James S. Cohen</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>City of Englewood, Mayor and City Council of the City of Englewood</p> <p style="text-align: center;">Defendants,</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY</p> <p>DOCKET NO.: BER-L-5110-23</p> <p style="text-align: center;"><u>Civil Action</u></p> <p style="text-align: center;">PLAINTIFFS’ STATEMENT OF FACTUAL AND LEGAL ISSUES, AND EXHIBIT LIST PURSUANT TO RULE 4:69-4</p>
---	---

Plaintiffs Englewood One Community Corp. (Englewood One), Horace H. Ragbir, Amy Bullock, and James S. Cohen, by and through their attorneys Pashman Stein Walder Hayden P.C., hereby submit their Statement of Factual and Legal Issues and Exhibit List pursuant to Rule 4:69-4. The present action in lieu of prerogative writs challenges an Ordinance and three accompanying Resolutions adopted by the City of Englewood that purports to implement a Settlement Agreement reached with the Fair Share Housing Center in connection with Englewood’s obligations under the Mount Laurel doctrine to provide affordable housing.

On November 1, 2022, the City – without input from the Planning Board or the residents – entered into a Settlement Agreement with Fair Share Housing Center that contractually obligated the City to enact sweeping and transformative zoning changes throughout the City, particularly implementing massive overlay zones that incentivized the building of over 3,200 multi-family units in areas zoned as single-family neighborhoods, FEMA designated flood zones, historic sites, the Englewood Police Department building, and even the City jail. From that time, and despite there being no basis in the Settlement Agreement itself, or the supporting documents, for why or how any of these overlay zones were selected, the enactment of Ordinance 23-22 – the Ordinance implementing the required overlay zones – was a foregone conclusion. Using the excuse that it was now contractually bound to enact such zoning, the City Council constructively usurped the Planning Board’s statutory role to plan for the City’s Zoning. That the Planning Board determined the proposed rezoning was materially inconsistent with the City’s Master Plan was of no moment to the City Council. The Planning Board’s several recommendations for how the proposed zoning changes should be modified were flippantly ignored by the Governing Body. Likewise, fervent public opposition to the rezoning fell upon deaf ears; public meetings on the matter were a mere formality and a means to implement the settlement agreement with Fair Share that had been approved in the dark.

The ordinance adopted by Englewood in August 2023 that is at issue rezones 131 acres of Englewood. It contains, among other things, overlay zones throughout all four wards of the City that incentivizes the building of over 3,200 multi-family, with a twenty percent affordable housing set aside of 648 units in improper zoning districts, such as single-family neighborhoods, FEMA designated flood zone, historic sites, the Englewood Police Department building and the City jail.

If left to stand, the ordinance would permit the construction of high-density apartment buildings in between single-family lots – an utter zoning absurdity.

Englewood offered no rationale to support the arbitrary and improper proposed overlay zones, as no experienced planner could justify the measures taken by the City. Indeed, the Englewood Planning Board determined that the Ordinance was *inconsistent* with the City's Master Plan in multiple respects, and issued a Resolution that made multiple recommendations for how the Ordinance should be modified. Despite that inconsistency, the City Council went forward with adoption of the Ordinance, without implementing a single one of the Planning Board's recommended modifications. In fact, there is no basis on the record below to support the proposition that the Council even gave due consideration to the Planning Board's proposed modifications. What is more, no prior notice was given to the Planning Board before it was instructed that it had to approve the Housing Element and Fair Share Plan that became the basis for the Ordinance, so there was no adequate opportunity for the Planning Board to actually consider the ramifications of the proposed plan.

Last but certainly not least, all of this was done behind closed doors, with the public having been shut out of the process. The settlement was reached on November 1, 2022, yet it was not until August 8, 2023 – more than eleven (11) months later that the public had an opportunity to voice their thoughts and objections. Neither the settlement agreement nor the documents that purported to effectuate the agreement, including the Housing Element and Fair Share Plan, were provided to the public or posted to Englewood's website until just before the hearing to vote on the Ordinance. Once the public learned of the City's actions, the residents unanimously expressed their frustration with and objections to the ordinance, raising serious concerns for flooding, crowding, safety, and

alteration of the character of their neighborhoods, all of which fell on deaf ears. Over the Mayor's veto, and the residents' fervent opposition, and in the face of a Master Plan inconsistency and no rationale to support the rezoning, Englewood adopted the Ordinance anyway.

By way of this action, Plaintiffs challenge the Ordinance and its implementing Resolutions which are arbitrary, capricious, unreasonable, enacted in violation of the Mt. Laurel doctrine, Open Public Meetings Act, the Local Government Ethics Law, and the Municipal Land Use Law and seek that the Ordinance and associated Resolutions be invalidated by the Court.

BACKGROUND

Englewood has a long history of providing affordable housing for its residents through local and Federal government programs. Even without the mandates under the Fair Housing Act and the Mount Laurel doctrine, Englewood has been a leader at providing affordable housing and developing and implementing supportive social programs to ensure the creation and support of affordable housing in the City. Englewood has exhibited one of the most robust legacies of affordable housing over the last fifty-plus years. Indeed, in granting Englewood a Final Judgment of Response and approving a 2014 settlement that challenged the City's provision of low-and moderate-income housing, the Court emphasized that "Englewood has been a trailblazer in establishing, providing, and sustaining low and moderate income housing for [its] residents" and there is "no similar municipality in the Northern region which has the commitment to low and moderate income housing... than Englewood has exhibited."

Englewood's history and strong commitment to affordable housing provides important context, as the challenge to the Ordinance here is not about the creation of affordable housing (a laudable objective that Englewood One supports) but rather the overbroad and thoughtless *manner*

in which Englewood has chosen to accomplish that objective. The Ordinance permits greater density and height of the buildings with less buffers for open and green space, provides for Overlay Zones in known designated FEMA flood zones or areas that would not be compliant with the NJDEP guidelines, areas zoned for single family homes, or in areas containing historic landmarks and other noteworthy and important structures, such as the City of Englewood Public Library, the City's Court, Police Department building, the Elks Ideal Lodge or the Englewood Field Club. The HEFSP lacks any analysis of why those zones were chosen or the impact that building will have on those areas.

Constructing affordable housing units in improperly zoned areas, such as single-family lots and important landmarks, among other grave concerns, threatens to destroy the character of the neighborhood in contravention to the City's Master Plan. Englewood's 2014 Master Plan makes clear that "preserv[ing] residential neighborhoods" and "protect[ing] the character of the City neighborhoods and districts" is one of the key turning points for Englewood. Preservation of the character of Englewood's various neighborhoods, particularly in light of commercial and institutional expansion and development interests discussed several dozen times in its Master Plan due to the importance of the issue to the City's residents. The Master Plan notes that "the City should encourage a built form and appearance that reflects existing character and respects adjacent uses" and that "[a]ny improvements that are made will respect the form, character and history of the neighborhood, so that single-family home neighborhoods will remain as such."

Moreover, and significantly, Englewood's historic commitment to low income and affordable housing has led to the City's unique racial and ethnic diversity. That diversity is threatened by the Ordinance, which permits development requiring only 20% affordable housing

units in areas that are currently almost exclusively dedicated to low-income housing. The new developments threaten to displace those low income minority residents and otherwise drive-up rents and home prices across the City. Rather than promoting the expansion of affordable housing, the Ordinance instead incentivizes compensation to developers at the expense of Englewood's residents, displacing the very people who affordable housing is designed to help.

FACTUAL ISSUES

1. Following a 2014 lawsuit wherein Englewood was granted a five-year Final Judgment of Repose, as that period was about to lapse, on May 30, 2019, Englewood filed a complaint in the Bergen County Superior Court, Law Division bearing Docket No. BER-L-4069-19 seeking a declaration of its compliance with the Mount Laurel doctrine and the Fair Housing Act of 1985, N.J.S.A. 52:27D301, et seq.

2. Over three years later, and without any public notice or participation, on November 1, 2022, the City Council unanimously passed Resolution #277-11-01-22 - A Resolution "Authorizing a Settlement Agreement with the Fair Share Housing Center." Neither the Settlement Agreement nor the Resolution was provided to the public in advance of its approval.

3. The terms of the Settlement Agreement contractually required the City Planning Board to adopt a Housing Element and Fair Share Plan (HEFSP) and for the City Council to adopt Ordinances and Resolutions implementing the terms of the settlement. Among other things, the Settlement Agreement required Englewood to adopt an overlay zoning ordinance disproportionately throughout all four wards of the City in single family zoning districts with

densities between 15 dwelling units/acre to 50 dwelling units per acre with a twenty percent affordable housing set aside to address its unmet need obligation.

4. After the Settlement Agreement that was approved by the City Council (without public notice), it was submitted to the Court for approval and following a January 10, 2023 Fairness Hearing, on January 20, 2023, the Court entered an order approving the Settlement Agreement, thereby contractually obligating Englewood to implement all of the terms of the settlement, including the adoption of the overlay zoning.

5. On March 10, 2023, Englewood's Affordable Housing Planner prepared a HEFSP, as contemplated by the Settlement Agreement. To satisfy Englewood's unmet need of 648 affordable housing units, the HEFSP proposed that "The City will create overlay zones for affordable housing at the prescribed densities . . . and requiring a 20% set-aside of affordable units." In order to produce 648 affordable housing units through inclusionary zoning, the City would have to allow the construction of an additional 3,200 total housing market rate units. The HEFSP contained no explanation why certain properties were designated for the overlay zones, or what impact overlay zoning would have on those areas. The City prepared HEFSP without any public notice or hearings, or disclosing it to the Planning Board (that has an obligation to approve the Settlement Agreement).

6. Although the HEFSP had been prepared on March 10, 2023, it was not presented to the Planning Board until six weeks later, on April 27, 2023, the date of the meeting at which the Board was instructed that it had to vote to approve the plan. The HEFSP was similarly unavailable to the public until after April 27, 2023 and only upon request; it was not posted to the Englewood website until July 11, 2023.

7. During the April 27, 2023 Planning Board meeting, the Board was presented with the HEFSP and a presentation by the City Planner John P. Szabo, Jr. of Burgis Associates, who discussed addressing Englewood's unmet need by creating overlay zones permitting inclusionary multifamily residential development, but who presented no rationale for the inclusion of the areas selected for overlay zoning. Despite not having had an opportunity to review the HEFSP and voicing objections regarding same, the Planning Board voted to approve it.

8. On June 27, 2023, Ordinance 23-22 was introduced for its first reading - "An ordinance to amend and supplement chapter 250, titled "Land Use" creating affordable housing overlay zones." It was not provided to the public in advance of the meeting. The Ordinance amended the Zoning Map to add new Affordable Housing Overlay Zones (AHOs). The Ordinance provided in relevant part, that "within the AHO Districts multifamily and single-family attached townhouse residential development of 15 units per acre and 40 plus in height 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 listed various restrictions, limitations, and specifications of any development.

9. One of the parcels designated by the Settlement Agreement, the HESFP, and Ordinance 23-22 that would be significantly upzoned with a 20% affordable housing requirement is the property located at 39 Park Place, Englewood, New Jersey, also known as Block 1203, Lot 5 on the Tax Map of the City of Englewood (the "Property"). That Property was secretly purchased by Mayor Michael Wildes and Planning Board attorney Doug Bern through an LLC, weeks prior to the City approving the November 1, 2022 Settlement Agreement – an agreement that Mr. Wildes

is believed to have been involved in negotiating. Mayor Wildes also participated in Planning Board meetings in consideration of the HEFSP and Ordinance 23-22, without disclosing his ownership of the Property and/or his potential financial interest in approval of the HEFSP and Ordinance 23-22.

10. On July 10, 2023, a notice concerning the AHOs was mailed out to property owners advising that Ordinance 23-22 was introduced for a first reading.

11. On July 13, 2023, a copy of the Ordinance was published in The Record, which advised that the Ordinance would establish new affordable housing overlay zones. Like the Settlement Agreement, the HEFSP, and Ordinance 23-22 itself, the notice identified affected properties only by tax lot and block only, thereby depriving individuals of vital information to ascertain whether his or her property was affected.

12. The Ordinance was subsequently referred to the Planning Board to determine its consistency with the City's Master Plan and on August 3, 2023, the Planning Board found that Ordinance No. 23-22 is **inconsistent** with the Master Plan in multiple respects, including the failure to preserve the character of the neighborhood and constructing affordable housing in inappropriate locations. The Planning Board recommended that it be "studied with transparency and public input to identify appropriate sites in appropriate neighborhoods where the Ordinance's worthy objective of achieving affordable housing can be accomplished while maintaining the character of residential neighborhoods."

13. On August 8, 2023, the City Council proceeded with a hearing to consider the passage of Ordinance 23-22, despite a finding of inconsistency with the Master Plan and the urging to explore alternative locations. That was the first time that the public was able to participate and

voice objections to the Ordinance, which were overwhelming. The Mayor and City Council were asked to permit a Community Planning Consultant Peter Steck, an expert in the field, to put on a presentation analyzing the Ordinance and its logistical and legal problems but the request went ignored.

14. The August 8, 2023 meeting had an unprecedented resident turnout that was so overwhelming that the Englewood Municipal Courtroom (the regular venue for council meetings) could not accommodate the crowd, leading to residents being shut out from the meeting, in some instances by law enforcement who prevented entry.

15. Those who were able to attend vehemently opposed the Ordinance, expressing fear and frustration about the impact of the overlay zones, including, among other things, increased flooding and traffic, parking issues and safety concerns. Residents expressed outrage and the lack of transparency. Despite it being finalized months earlier, Plaintiffs do not believe that notice of the settlement, nor any related documents were publicly posted on Englewood's website until July 2023, and the August 8, 2023 hearing was the first time the public was invited to offer input on the Ordinance.

16. At that August 8, 2023 meeting, notwithstanding fervent public opposition, and the prior finding of inconsistency with the Master Plan, the City Council approved the overlay zoning ordinance by a 4-1 vote. Mayor Wildes did not recuse himself from the hearing nor disclose his interest in a Property he purchased weeks before the City approved the Settlement Agreement and that is situated in one of the overlay zones.

17. On August 8, 2023, the City Council adopted Resolution #267-08-08-23 purporting to set forth the “reasons” for the Ordinance adoption in face of its Master Plan inconsistency, although no actual explanation was provided for how or why the overlay zones were selected.

18. On August 8, 2023, the Council also adopted Resolution #268-08-08-23, “Resolution endorsing the Housing Element and Fair Share Plan adopted by the City Planning Board on April 27, 2023 with a memorizing resolution adopted on July 27, 2023.” There was no explanation given for its approval despite its inconsistency with the Master Plan.

19. On August 11, 2023, the Mayor of Englewood Michael Wildes issued a veto of Ordinance 23-22 and noted in his Statement of Objections that the Ordinance is inconsistent with the City’s Master Plan and fails to respect residential zoning; fails to preserve the City’s goal of maintaining neighborhood character; fails to consider the Planning Board’s suggestion to explore redevelopment study areas; was conducted in a fashion that alienated Englewood’s citizenry; and diminishes support for Englewood’s noble and historic efforts to provide low-income and affordable housing.

20. On August 22, 2023, a Special Council Meeting was held for the express purpose of overriding the Mayor’s Veto. The August 22, 2023 Council meeting has been noticed as a remote meeting to be held telephonically and virtually by Zoom, even though no emergency of kind existed and any public health related emergency due to the COVID-19 pandemic had long ended. Englewood One advised the City that its meeting remote meeting was in violation of the Open Public Meetings Act. The Zoom meeting proceeded and arbitrarily limited the public’s ability to speak to three minutes.

21. At the August 22, 2023 meeting, the Council voted to override the Mayor’s veto and through the adoption of Resolution #272-08-22-23, entitled “Resolution to Override the Veto of Ordinance No. 23-22 relating to the creation of affordable housing overlay zones in the City of Englewood.”

22. On August 23, 2023, a hearing was held before Judge Farrington wherein the Court granted Englewood a conditional Final Judgment of Compliance with the Settlement Agreement, subject to several outstanding items. At the hearing, it was acknowledged that Ordinance 23-22 had a purported typographical error with respect to the lot/block descriptions of the overlay zones, and as a result, notice of the zoning changes was not sent to all impacted property owners. Particularly, Ordinance 23-22 incorrectly included Block 305, Lots 15 through 25 in an overlay zone, instead of Block 306, Lots 15 through 25.

23. Accordingly, Judge Farrington conditioned the issuance of final judgment on the City correcting Ordinance 23-22. On October 24, 2023, the City enacted Ordinance 26-22, fixing the purported typographical error on Ordinance 23-22.

LEGAL ISSUES

- 1. Whether Ordinance 23-22 and Resolution Nos. 267-08-08-23, 268-08-08-23 and 272-08-22-23 should be invalidated for being inconsistent with Englewood’s Master Plan, and no reasons provided by the Governing Body for the deviation.**

It is inarguable that a municipality’s Master Plan is the keystone of all zoning and development within the municipality. The Englewood Master Plan was adopted in 2014 by the Planning Board in conformance with the Municipal Land Use Law, 40:55D-1, et seq. (MLUL). Prior to the adoption of its Master Plan, the City engaged in a robust public process, 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.

Those committees conducted three public town hall workshop meetings in the houses of worship located in the community and downtown 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 Englewood 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 principle in the Master Plan is to “respect, maintain and enhance the character of all neighborhoods and make quality of life improvements within them. Nevertheless, the legally effective Master Plan was obliterated by the City Council, without notice to the community and its stakeholders, when it adopted the Settlement Agreement with FSHC 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, which was subsequently effectuated through the adoption of Ordinance 23-22.

The Ordinance was referred to the Planning Board to determine its consistency with the Master Plan; by Resolution dated August 3, 2023, the Planning Board determined that the Ordinance was *inconsistent*. Particularly, the August 3, 2023 Resolution found that the Ordinance

was inconsistent with Master Plan in no fewer than nine (9) material ways, and made recommendations to the Council to modify the Ordinance accordingly.¹ The Planning Board primarily took issue with the location of the proposed overlay zones, finding such addition construction would drastically alter the character of the neighborhoods in contravention to the Master Plan. The Planning Board suggested the Council consider other sites, “with transparency and public input”, to achieve the dual goal of providing affordable housing while maintaining the character of residential neighborhoods. Nevertheless, the Planning Boards findings, concerns, and recommendations, fell upon deaf ears. The City Council utterly ignored them, and no reason whatsoever was given by the City Council supporting its obliteration of the City’s Master Plan.

N.J.S.A. 40:55D-64 requires the referral of any proposed zoning ordinance or amendment to the municipal planning board. N.J.S.A. 40:55D-26 defines a planning board's function in this regard. It provides, in part, that prior to the adoption of an amendment to a zoning ordinance, “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 ... amendment which are inconsistent with the master plan and recommendations concerning these inconsistencies...” N.J.S.A. 40:55D-62a authorizes a governing body to adopt and amend zoning ordinances “substantially consistent” with the land use element of the master plan. If, however, a zoning ordinance or amendment is inconsistent with the Master Plan, the governing body may adopt it with “affirmative vote of a majority of the full authorized membership of the governing body”

¹ The August 3, 2023 Resolution correctly frames the analysis as whether the proposed zoning is *substantially* consistent with the master plan, and notes that Supreme Court’s holding in *Manalapan Realty v. Township Committee*, 140 N.J. 366, 384 (1995) acknowledging that *some* inconsistencies are permitted.

provided that “*the governing body's reasons for deviating from the master plan must be expressed in a resolution and recorded in its minutes.*” (emphasis added)

As determined by the Planning Board, Ordinance 23-22 is inconsistent with the Englewood’s Master Plan. The City Council, however, failed to provide any reason for deviating from the master plan in the resolution. Resolution #267-08-08-23 did nothing more than state that Englewood is adopting the Ordinance in conformance with the requirements of the Settlement Agreement. However, no reasons were provided why, in the face of a Master Plan inconsistency as substantial as the one that exists – disrupting the entire character of the neighborhood- the Ordinance had to be adopted rather than exploring alternative locations where the overlay zones would be consistent with the Master Plan.² The failure to articulate reasons to deviate from the Master Plan renders the Ordinance invalid in violation of *N.J.S.A. 40:55D-62a* .

2. Whether Ordinance 23-22 and Resolution Nos. 267-08-08-23, 268-08-08-23 and 272-08-22-23 should be invalidated as arbitrary, capricious and unreasonable.

N.J.S.A. 40:55D-62 provides among other things that a 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.” Additionally, “[t]he 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...” Ordinance 23-22 fails to consider the character of each

² The August 3, 2023 Planning Board Resolution expressly notes that three (3) proposed redevelopment projects, which would provide affordable housing credits, were referred to the City by the Planning Board recently. The Resolution recommends that the Council investigate and explore these alternative projects. It appears this recommendation was ignored by the Council.

district and suitability of use. The HEFSP, and subsequently, Ordinance 23-22 that implements it commits Englewood to creating overlay districts for a 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. As such, to create 640 affordable units in the overlay zones, a total minimum of 3,200 new dwelling units must be built. [20% x 3,200 units = 640 affordable units.] Those units are proposed to be scattered over 131 acres of land all over Englewood and include areas are not suitable for the construction of affordable housing units.

Crucially, and demonstrating the arbitrariness of the overlay zone selection, the HEFSP, Ordinance 23-22 and its accompanying Resolutions, are devoid of any explanation for how or why any overlay zones were selected.

Ordinance 23-22 permits the construction of townhouses and multifamily in areas that previously only allowed single-family detached homes, and it gives them a right as a matter of law to construct apartment buildings 45 to 60 feet tall. It encourages developers to buy out current homeowners and construct multi-family buildings in the midst of streets containing single family homes. Some of the overlay zones being recommended are those in known designated FEMA flood zones, with the City conceding that improvements would need to be made to the drainage system. However, based on the information publicly available, those required “improvements” have not been specifically identified, nor has there been any analysis into whether they are physically possible or financially feasible. 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. Indeed, nearly thirty percent of the proposed lots are in the FEMA Flood

Hazard Zone. That this development was in contravention to NJDEP regulations was brought to the Council's attention by Plaintiff's planner, Mr. Peter G. Steck, in a memorandum presented to the Council on August 8, 2023. The Council ignored these concerns (and governing regulations).

The Ordinance further proposes rezoning areas containing historic landmarks and other noteworthy structures. The proposal of overlay zones containing multi-family dwellings adjacent to single family homes, construction in flood zones, and zoning historic landmarks 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 Ordinance was not drawn with consideration of the character of each district and suitability of appropriate uses of land. In adopting the Ordinance, Englewood failed to consider, or purposefully disregarded, the impacts of the zoning change and the development of on the City and its neighborhoods. The Ordinance is inconsistent with the Mt. Laurel doctrine because it constitutes bad planning. Accordingly, Ordinance No. 23-22 and its implementing regulations are arbitrary, capricious and unreasonable, and therefore invalid.

3. Whether Ordinance 23-22 and Resolution Nos. 267-08-08-23, 268-08-08-23 and 272-08-22-23 should be invalidated for Governing Body's failure to put forth findings sufficient to warrant the adoption of the ordinance.

Ordinance 23-22 proposes rezoning areas containing single family homes, historic landmarks and other noteworthy structures, with no information from the City about why those zones were selected. Ordinance 23-22 also proposes layover zoning in areas prone to flooding with admitted need for the construction of improvements to the drainage system. Yet, no

explanation or analysis concerning what those improvements would look like or how they would impact current residents was provided.

The Planning Board found that the Ordinance was inconsistent with the Master Plan and conveyed that finding, with several proposed modifications to the Ordinance, to the Council. In fact, the Planning Board did not even have a fair opportunity to review the HEFSP. Although the draft document was available as early as March 10, 2023, the Planning Board was not provided a copy of the draft document until six (6) weeks later, on April 27, 2023 and was told it had to be approved on that evening. It is clear that the overlay zones were not chosen by the Planning Board but the plan was simply rubber-stamped because the Board was told that it had to approve it. *See* N.J.S.A. 40:55D-26(a)

The City Council failed to make requisite or comprehensive findings of fact sufficient to warrant adoption of Ordinance 23-22. The failure of the members of the Council to set forth adequate findings caused the adoption of Ordinance 23-22 to be defective and invalid.

4. Whether Ordinance 23-22 and Resolution Nos. 267-08-08-23, 268-08-08-23 and 272-08-22-23 should be invalidated due to the Mayor's conflict of interest.

Both Mayor Wildes, as a member of the Planning Board, and Mr. Bern, as Planning Board attorney, were, upon information and belief, participated in the negotiation and/or the implementation of the Settlement Agreement and the Planning Board's later adoption of the HEFSP, the provisions of which Ordinance 23-22 was intended to implement.

Under the proposed Ordinance, several specific parcels in the City are to be significantly "upzoned" with a 20% affordable housing requirement as set forth in the Settlement and the Housing Element, one of which is the Property in which both Mayor Wildes and Mr. Bern hold a

financial interest. The purchase of the Property that benefitted from the Settlement by an entity that Mayor Wildes and Mr. Bern had an ownership interest, 39 Park Place, LLC, immediately before the Settlement was finalized, demonstrates a patent conflict of interest. The Mayor concealed, and did not disclose his conflict of interest until after this lawsuit was filed.

The financial interest of those individuals in the Property contravenes N.S.J.A. 40A-9-22.5, “Code of Ethics for Local Government Officers or Employees Under Jurisdiction of Local Finance Board.” Mayor Wildes and Mr. Bern have used information not generally available to the members of the public to procure a property being significantly upzoned pursuant to the Settlement, thereby creating a financial gain for themselves via 39 Park Place, LLC. Mayor Wildes and Mr. Bern’s clear conflict of interest taints both the Settlement and HEFSP, which was ultimately implemented through Ordinance 23-22 and the attendant resolutions. The Ordinance and the implementing Resolutions must, therefore, must be invalidated as tainted by such conflict.

5. Whether Ordinance 23-22 and Resolution Nos. 267-08-08-23, 268-08-08-23 and 272-08-22-23 should be invalidated because the public was excluded from relevant public hearings in violation of the Open Public Meetings Act (“OPMA”)

OPMA's purpose is well-defined and unequivocally declared at the outset of the Act. N.J.S.A. 10:4-7 provides, in pertinent part:

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, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly

endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion. The Legislature further declares it to be the public policy of this State to ensure that the aforesaid rights are implemented pursuant to the provisions of this act so that no confusion, misconstructions or misinterpretations may thwart the purposes hereof.

The Defendants publicized a public hearing on August 8, 2023 to discuss the passage of Ordinance 23-22. Given the overwhelming opposition to the Ordinance, droves of concerned citizens came to the August 8 Council meeting. The anticipated large turnout at the August 8 meeting was not unexpected. Englewood residents are opposed to the Ordinance and that opposition was well known to Englewood. In fact, concerned citizens warned the Council in advance on the meeting that the Council meeting room would likely not be able to accommodate the large crowd, and it was requested that meeting be rescheduled to a larger venue (Bergen PAC) that could accommodate the members of the public wishing to participate in this important public proceeding.

The City council held the meeting without making accommodations for the large turnout. The Council rejected the suggestion of relocating the meeting to a more-appropriately sized venue, and as a result, as anticipated, many members of the public could not attend the meeting. Members of the public were turned away at the door as there was not even standing room available. The Council chambers, hallways, and stairs were packed with members of the public that could not gain access into the hall or the Council chambers. Defendants failed to make arrangements to have the public hearing on Ordinance No. 23-22 at another venue that would have accommodated all members of the public that wished to attend the public hearing and speak at that meeting.

The City Council subsequently held another meeting to consider overriding the Mayor's veto of Ordinance 23-22 on August 22, 2023, which was conducted virtually by Zoom. N.J.S.A.

10:4-9.3 only permits public bodies to conduct meetings by electronic means “during a period declared pursuant to the laws of this State as a state of emergency, public health emergency or state of local disaster emergency[.]” While virtual meetings became commonplace as a result of the COVID-19 pandemic, Governor Murphy ended the COVID-19 Public Health Emergency on March 4, 2022 pursuant to Executive Order 292. The federal public health emergency related to the COVID-19 pandemic ended on May 11, 2023. There are currently no ongoing declared public health emergencies or local disaster emergencies in effect which permit the City Council to conduct a Special Council Meeting electronically pursuant to N.J.S.A. 10:4-9.3. Accordingly, the City Council’s election to conduct the scheduled Special Council Meeting via Zoom is unlawful and in contravention of the OPMA.

The exclusion of members of the public who wanted to attend the public hearing on Ordinance No. 23-22 on August 8, 2023, the conducting of the meeting to override the Mayor’s veto by way of Zoom in August 22, 2023 and the limitations placed on the public to express their viewpoints to three minutes were arbitrary, capricious and unreasonable and it violated the Open Public Meetings Act, the Municipal Land Use Law, and was a denial of due process.

6. Whether the Governing Body can usurp the Planning Board’s dominion over zoning by entering into a contractual agreement with Fair Share Housing Center.

The MLUL itself provides that a zoning 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.

N.J.S.A. 40:55D-62(a)(emphasis added).

At the same time, the MLUL permits the governing body to adopt a zoning ordinance or an amendment to the zoning ordinance that is inconsistent with the Master Plan, 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.” N.J.S.A. 40:55D–62(a). In other words, the zoning ordinance must be “substantially consistent” with the Master Plan, or alternatively the governing body “***explain its reasons for adopting an inconsistent ordinance preclude the governing body from making its decision arbitrarily.***” *Riya Finnegan LLC v. Twp. Council of Twp. of S. Brunswick*, 197 N.J. 184, 192 (2008)(emphasis added)

Here, the Planning Board determined that the Ordinance is inconsistent with the Master Plan. Resolution #267-08-08-23, purporting to set forth the Council’s “reasons” for adopting the Ordinance despite the Planning Board’s determination, merely states that the Ordinance is “consistent with the November 1, 2022 Settlement Agreement.” While this statement is literally true, the Council’s rationale could be used to justify any rezoning, no matter how absurd or non-sensical. Plaintiffs submit that it is in contravention to public policy and the MLUL to permit a governing body to circumvent the Planning Board’s statutory authority by simply entering into a settlement agreement.

EXHIBIT LIST³

<u>Exhibit</u>	<u>Description</u>

³ As will be discussed at the upcoming case management conference, Plaintiff will be requesting that discovery be taken from Defendants. Plaintiff reserves the right to amend its Exhibit List and rely on documents subsequently received in discovery.

P-1	Englewood 2014 Master Plan
P-2	November 1, 2022 FSHC Settlement Agreement
P-3	Resolution #277-11-01-22 - A Resolution “Authorizing a Settlement Agreement with the Fair Share Housing Center.”
P-4	January 20, 2023 Order approving settlement
P-5	March 10, 2023 Housing Element and Fair Share Plan
P-6	Ordinance 23-22 - “An ordinance to amend and supplement chapter 250, titled “Land Use” creating affordable housing overlay zones.”
P-7	August 3, 2023 Resolution of Planning Board determining Inconsistency with Master Plan
P-8	Resolution #267-08-08-23 – Reasons for adoption Ordinance 23-22 despite inconsistency
P-9	Resolution #268-08-08-23, “Resolution endorsing the Housing Element and Fair Share Plan adopted by the City Planning Board on April 27, 2023 with a memorizing resolution adopted on July 27, 2023.”
P-10	Mayor’s veto of Ordinance 23-22
P-11	Resolution #272-08-22-23, entitled “Resolution to Override the Veto of Ordinance No. 23-22 relating to the creation of affordable housing overlay zones in the City of Englewood.”
P-12	Records of Mayor Wylde’s/Doug Bern’s ownership of 39 Park Place

P-13	Records of 39 Park Place purchase of upzoned property
P-14	Report of Peter G. Steck dated August 8, 2023
P-15	Ordinance 23-26 – “An Ordinance to Amend Section 250-55 Entitled “Zoning Map” of the City of Englewood Land Use Code”
P-16	August 8, 2023 Letter from Andrew Bayer to City Clerk
P-17	August 22, 2023 Letter from Andrew Bayer to City Clerk

PASHMAN STEIN WALDER HAYDEN, P.C.
Attorneys for Plaintiffs

BY: /s/ Andrew Bayer
Andrew Bayer

Dated: January 5, 2024