SUPERIOR COURT OF NEW JERSEY

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JUDGE

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RE: 800 Sylvan Avenue LLC v. Planning Board of the Borough of Englewood Cliffs
BER-L-9088-17

Dear Counsel and Ms. Geiger:

This matter came before the Borough of Englewood Cliffs Joint Zoning and Planning Board for preliminary and final site plan review; major subdivision approval and miscellaneous variances, on July 26, August 10, September 14 and October 12, 2017. Pursuant to Chapter 18, Section 1.7 Englewood Cliffs has a joint zoning and planning board. A motion to deny application was approved 4 to 3 at the Board's November 8, 2017 meeting.

The property is the former Unilever campus located at Block

910, Lot, commonly known as 800 Sylvan Avenue. The site is approximately 28 acres in area, improved by one interconnected, multi-use building. The applicant, Normandy Development and Construction Services, LLC purchased the property in 2016. Normandy converted the property to a condominium form of ownership with that part of the building subject to a lease with approximately seventeen (17) years remaining owned by Unilever, and the balance of the building owned by Normandy. In conjunction with the condominium conversion, Normandy proposed subdividing the property separating those parts of the building designated B-1 and C from B-3 and A. B-2 was proposed to be demolished, effectively dividing the building into two separate ones. Normandy represented that both the subdivision and condominium conversion were related to financing for the renovation and site work for B-3 and A, as well as providing ownership interests to the Unilever tenants. Upon receiving subdivision approval, the applicant intended to convert the property to individual ownership by the separate entities.

Normandy called four witnesses, including Kris Bauman, Senior Vice President of Normandy; John Gering, AIA of HLW International, Architects; Patty Ruskan, P.E. of PS&S; John McDonough, PP; and William Lothian, Traffic Engineer.

Mr. Bauman testified that Unilever would continue to operate in a small portion of one of the existing buildings on

the site. He testified the buildings were constructed in the 1960s, and although well maintained, needed to be upgraded, requiring a gut renovation and installation of new windows and operating systems and improvement of flow. The applicant proposed to subdivide the lot to provide ownership interests to tenants in that part of the lot not occupied by Unilever. The applicant proposed slightly less than four parking spaces per thousand feet of office space.

John Gering was accepted as an expert by the board. He testified presently on site were three interconnected buildings of two to three stories. Presently the building consists of is 238,596 square feet. Gering testified the proposal was to combine sections of the buildings for a total square footage of 266,000. Gering testified that the building was state of the art in 1962, but presently was energy inefficient and had very limited natural light. The goal he testified, was to have a contiguous floor plan. He testified the new floor plan would make the building Code and ADA compliant. The applicant proposed to build a parking deck in the front which would be partially buried and camouflaged with landscaping. The plan proposed a second pond in addition to the existing one, constituting the storm water detention system. The building was proposed to be re-constructed with glass on the street side, topped by a parapet which would hide building systems located on the roof.

The height of the proposed building was not to be raised above the existing 60.5 feet from the bottom of the curb at Sylvan Avenue, but the parapet would add 3'6" in the front and rear, and 5 feet on the sides. The actual building, measured from base to top was proposed to be 36'9". The Borough ordinance permits 35 feet. Gering testified that the variance was necessitated because the drop off from the front of the building to Sylvan Avenue is 18 to 20 feet.

The applicant next called Patty Ruskan, P.E., Vice President of Paulus Sokolowski & Sartor Engineering, who was accepted as an expert. Ms. Ruskan testified the site consists of 28.37 acres bordering Sylvan Avenue on the east, CNBC office building on the north, 700 Sylvan on the south (also an office building) as well as residential homes along Hollywood Avenue and Floyd Streets. The site is in the B-2 Limited Business zone. The B-2 Zone permits business, professional, governmental and corporate offices, laboratory and research facilities, houses, of worship and accessory parking areas on the same lot as the principal use. The present site has 998 parking spaces. On site are buildings C to the far south, B-1 immediately to the north of C, B-2 proposed to be demolished, B-3 and Building A to the far north. Building A and B-3 will be the "new building." Buildings B-1 and C are occupied by Unilever, which holds a lease with 17 years remaining at the time of the application.

Unilever does research and development at the site.

The proposed new building technically has three front yards on the adjacent streets. Access to the site is via Sylvan Avenue. There is a two-lane service road which parallels Sylvan Avenue. Ruskan testified there are six loading docks which are pre-existing. At the time of the application, eight were required. The site had large deciduous buffer zones along Floyd Street and the CNBC building. Wetlands have been verified by New Jersey DEP on the site and the letter of interpretation was obtained showing the locations and the 50-foot wetland buffer. The existing pond on site is designated as State Open Water. The proposed surface parking would not impact the wetlands. The site drains from west to east and from north to south. The topographic relief on site is approximately 60 feet, the highest elevation, 420 feet, located in the northwestern corner. The lowest point is mid-site at 360 feet. Ruskan testified the applicant proposed to construct four additions with a total of 28,069 square feet. The applicant proposed to reconfigure the entrance drive, resulting in removal of a large area of impervious coverage. The main level parking structure was proposed to have two levels and 181 parking spaces. Ruskan testified that because of the topography, the upper level of the proposed parking would be at the same elevation as the main lobby entrance. It would not be visible from Sylvan Street.

The new parking structure was proposed on the northeastern side of the site adding 34 additional spaces.

Ruskan advised the Board the applicant had filed an application before the New Jersey Department of Transportation to have a left turn lane stripped on Sylvan Avenue, also known as 9W, a state highway.

The applicant proposed relocating some of the loading berths, in the "new building" (Buildings B3 and A). The existing cooling system, along with its enclosing structure tower, was proposed to be moved to a position adjacent to buildings C and B1, the building it serves.

Ruskan testified that variances were needed for an existing condition on northern driveway which has a curb-cut of 124.85 feet where the ordinance allows up to 60 feet; parking for 1,408 spaces where 1,776 were required.

Ruskan testified that lighting on the entire site would be upgraded to single head LED fixtures on 25-foot poles. She testified there would be no spillage onto Floyd Street, and .1-foot candle spillage onto Hollywood Avenue would be shielded by new evergreen buffering. The proposed lights were to be internally shielded with no sky lighting. The proposed landscaping included evergreen plantings of 12-15 foot trees. Also proposed was a mass evergreen planting buffering the proposed parking along Sylvan Avenue. The retaining walls would

be constructed using a modular block system with textures selected to complement the building façade. In response to Board member inquiry, she testified that 390 trees were to be removed, 356 were being replaced, 307 of those are evergreens and 49 were deciduous or ornamental. In addition, 829 shrubs of various heights were proposed to be installed and 300 grasses in addition to ground cover and other perennials.

In addition to the two retention ponds, the applicant proposed to construct a subsurface detention basin that would detain runoff, prior to releasing it following water quality treatment and storm filtering. The storm water system was represented to have been designed in accordance with the Borough's Storm Water Management Ordinance as well as the NJDEP Storm Water 2 regulations.

Ruskan testified that the proposed subdivision entailed dividing the existing lot of 28 acres into two lots. She later testified that the applicant sought to amend the subdivision line 34.95 feet south. The purpose was to have Unilever continue to maintain ownership of Building C. Unilever consented to the subdivision application. Proposed Lot 1.01 on the south side would consist of 7.638 acres and contain Building C and B1 and a portion of B2 until it was demolished. Proposed Lot 1 would consist of 20.732 acres and include Buildings A, B3 and a small portion of B2 until it was demolished. The proposed

subdivision generated the need for several variances because of the lot line, including parking, loading spaces, zero setback from side yard (because the lot line goes through the building). Ruskan testified that although the subdivision is a simple two lot subdivision, the Borough's ordinance deemed it a "major" subdivision because of the property's location on a major roadway.

The applicant also required variances for setbacks along Sylvan Avenue.

Ruskan testified that a variance was required for the height of the parking structures as an accessory uses. She testified that depending on where the measurement was made the height overage was greater or lesser. From Sylvan Avenue, for the existing parking structure, the calculation was 24.5 feet, however, she noted that the differential from the lower level to the upper level was ten feet. The ordinance permits 14 feet. The proposed new parking structure also required a setback variance as 14.37 feet were proposed and the ordinance requires 30. The applicant requested variances for 9X18 foot parking spaces as opposed to the 9X19 required by ordinance; and 24-foot aisle width, as opposed to the 25 feet required by ordinance. The applicant also requested a setback variance for the pre-existing parking structure frontage on Hollywood Avenue where 60 feet were required and 30.48 is the existing condition.

Ruskan spoke to the height variance. She argued that it was required because of the steep drop off of the property down to Sylvan Avenue. Finally, she testified the proposed plan and variances would not affect any use of adjoining property.

Ruskan testified that impervious lot coverage would be 16.22 acres as opposed to the 14.39 existing.

The applicant called William Lothian, P.E., Senior Consultant Engineer of Langan Engineering and member of the Institute of Traffic Engineers. Lothian was accepted as an expert. He testified that he prepared a Traffic Impact Statement, which was commented on by Petry Traffic, traffic engineers for the Board and addressed in a response. He testified that the applicant had not yet received a response from NJDOT regarding the stripping left hand turn lane. He testified much of the egress to the site will be at the intersection of Hollywood and Sylvan Avenues. He opined that the proposed modification of the site and the change of use of part of the site would generate 100 peak hour trips, approximately two cars per minute on average. He testified based on personal observation, that the proposed project would generate stacking at the traffic signal of five (5) cars and the turn was operating satisfactorily without the proposed stripping. He opined that the increase in the number of parking spaces by 405 was sufficient. He testified that the spaces

provided a ratio of 3.3 spaces per thousand square feet, and that typically 2.8 or 2.9 spaces would be deemed sufficient. He testified based on personal observation that there are currently 450 empty parking spaces on site. He noted that the Unilever lease was for seventeen years, and under the terms of the proposed easement, it would have use of 430 spaces.

The Board's traffic engineer, John J. Jahr, PTP, TSOS of Bright View Engineering, indicated that the Board was concerned about the 156 parking spaces proposed to be allocated to Unilever. He testified that the proposed parking structure in the front yard was most likely the only place it could go. He agreed with the applicant's traffic engineer that the increase in traffic was not significant and endorsed the proposal of a left hand turning lane. Jahr characterized the proposed traffic flow and circulation an improvement and a benefit of the application.

In response to citizen concerns and questions of the Board, at the September meeting of the Board, the applicant advised it was providing additional screening for the residences on Hollywood Avenue and Floyd Street, and had reconfigured the parking in the northeast corner of the site to preserve 48 additional trees. In addition, the architect testified in response to concerns about glare from the glass façade he had contacted glass manufacturers and found a product like the glass

which was used to construct the LG building, also in the Borough. He testified that glass with a 63 percent transmission level would be used in the entrance port. A second type glass, with 43 percent transmission level, would be used on the windows.

Ruskan was recalled and testified that the applicant had moved seven parking spaces along the Hollywood Avenue side of the property. She noted the detention basin had been relocated to below a proposed parking area in the north end of the property. The new proposed parking structure was moved to the central west portion of the site, providing 30 parking spaces, as opposed to the 34 proposed in the original new parking structure, together 40 surface spaces. With the relocation of the parking structure, Ruskan testified that 400 trees would be removed and 380 planted, not including the trees proposed to be added to the buffers.

The applicant called John McDonough, PP who was accepted as an expert in planning. McDonough testified that there was a single D variance sought for height and 15 C variances which he related to Sections 6, 7 and 10 of the Borough's ordinances. He testified that the Board should look at the application qualitatively, not quantitatively. He noted the upgrade and modernization of an existing building to elevating it to a status designed to attract Class A tenants to "Billionaire's

Row" as Sylvan Avenue is sometimes referred, was a benefit to the community. He noted the upgrades would enhance the Sylvan Avenue area aesthetically. He observed that removal of old trees to create a beautiful campus with an aesthetically pleasing building was also a benefit. He opined that the plan was an efficient use of the land by working with what presently exists. He noted the enhancement of the property with the ponds, the removal of the service road. He opined that the parking plan was a good balance of form and function.

McDonough noted that the Borough's planner opined that the Borough's Master Plan envisioned a low-rise campus on the property. The buildings except for the façade would remain the same height, rising to an elevation of 60.5 feet on proposed Lot 1.01, and 42.6 feet on proposed Lot 1. McDonough urged the Board to apply the Medici test, which standard he testified was whether the height is consistent with the surrounding area and did not offend any purposes of the height limitation. He testified the design promoted a desirable visual environment and efficient use of land. He analyzed the variance in light of Jacoby v. Engelwood Cliffs Zoning Board of Adjustment, 442 N.J. Super. 450 (App. Div. 2015) and Grasso v. Borough of Spring Lake, 375 N.J. Super. 41 (App. Div. 2004) and found that there was no skyline effect, and the actual height of the building from the finished floor complies with the ordinance. He noted

that the building would be framed by trees and not rise above them and would not block any views or create negative shadow effects. He testified the height was mitigated by the extreme setback from the road. He noted that the way the ordinance calculated height made a conforming building impossible. He testified any increase in density on site was within the capacity of the property.

McDonough addressed the zero-side yard by noting the subdivision would not be visible in "real world" merely existing to facilitate the overall project and was a "financial subdivision". He found, pursuant to C2, that the benefits outweighed any detriments, particularly in light of the 60-foot green area which was a "no-build" area.

Regarding the accessory use, the main parking structure in the front yard and Ordinance Section 30-7.2A.4, he found the benefits outweighed the detriments, relying upon the testimony of the engineer and the developer. He noted that the structure would be largely hidden. He opined the structure was related to the main building and therefore did not offend Section 30-7.2A.5, fitting well into the land form and not intruding into the front yard. He noted the accessory structure also needed a variance for height pursuant to C2, not D, the variance being triggered by the land form. He addressed the retaining walls pursuant to Ordinance Section 30.7.15 opining that the modular

construction walls would give greater flexibility and permit complimentary materials with no substantial detriment.

McDonough next addressed parking and opined that the Pullen v. Twp. of South Plainfield Planning Board, 291 N.J. Super 1 (App. Div. 1996) dictated that the Board look at the benefits of the application as a whole. He pointed out that the subdivision would be mitigated by the shared access and shared parking agreements. The condition of the parking would not change from what had existed on the property for many years. He opined that the overall benefits substantially outweighed any detriment, and the parking went with the buildings and was site suitable. He also noted the existing condition, wherein most of the parking was located away from proposed Lot 1.01, was a hardship. He testified the intent and purpose of the zone plan and ordinance would not be violated by any of the physical improvements the applicant was proposing.

Jason Kasler, P.P. testified on behalf of the Board and was accepted as an expert in planning. He conceded the topography of the lot made it impossible to comply with the height ordinance and had no issue with the proposed building height. He disagreed with McDonough's conclusion about the side yard and location of the subdivision line. He testified that presently the two occupants of the lot were cohabitating, but that might not always be the case. He testified that but for the

easements, proposed Lot 1 was severely under-parked and the Borough ordinance prohibited off-site parking. He noted that approximately two-thirds of the proposed parking was "off site."

Kasler had no issues with the parking itself or with the parking structure in the front yard.

At the final Board hearing on this matter, (October 12, 2017) the applicant, in response to Board concerns, returned the subdivision line to its original location and agreed to demolish building B2 within one year. The applicant requested a four-year vesting period from final approval. The purpose of the extended vesting was to permit the applicant to obtain a tenant. The applicant enhanced buffering throughout the property. The applicant also testified that they agreed to install acoustical panels on the property to reduced noise and vibration for a minimum of 225 feet along the west side of the property and to increase buffering including installation of a fence.

The court grants substantial deference to the municipal zoning board's decision to grant or deny variances and related land use applications. Bressman v. Gash, 131 N.J. 517, 529 (1993); D. Lobi Enters., Inc. v. Plan./Zoning Bd. of Sea Bright, 408 N.J. Super. 345, 360 (App. Div. 2009). Decisions of zoning boards to grant or deny applications are presumed to be valid. Cell South of N.J. v. Zoning Bd. of Adj. of W. Windsor Twp., 172 N.J. 75, 81 (2002). "A local zoning determination will be set

aside only when it is arbitrary, capricious or unreasonable." Kramer v. Bd. of Adj. v. Sea Girt, 45 N.J. 268, 296 (1965). The burden is on the challenging party to overcome this highly deferential standard of review. See Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adj., 152 N.J. 309, 327 (1998); Kramer, supra, 45 N.J. at 296. A court must not substitute its own judgment for that of the local board unless there is a clear abuse of discretion. See Cell South, supra, 172 N.J. at 82. The court found in CBS Outdoor, Inc. v. Borough of Lebanon Planning Board, 414 N.J. Super. 563, 577 (App. Div. 2010), "[e]ven were we to harbor reservations as to the good judgment of a local land use agency's decision, 'there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved.'" (quoting Kramer, supra, 45 N.J. at 296-97).

Consistent with this jurisprudential policy of deference to local board's peculiar knowledge of local conditions, a reviewing court must afford "greater deference . . . to [a] denial of a variance[.]" Ne. Towers v. Zoning Bd. of Adjustment of Borough of W. Paterson, 327 N.J. Super. 476, 493-94 (App. Div. 2000) (citing Funeral Home Mgmt. v. Basralian, 319 N.J. Super. 200, 208 (App. Div. 1999)). This "heavier burden requires the proponent of the denied variance to prove that the evidence before the board was 'overwhelmingly in favor of the

applicant.'" Nextel of N.Y. v. Borough of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 38 (App. Div. 2003) (quoting Ne. Towers, 327 N.J. Super. at 494. A court's job is to determine whether the board followed the statutory guidelines, and properly exercised its discretion. Med. Ctr. At Princeton v. Princeton Zoning Bd. of Adj., 343 N.J. Super. 177, 199 (App. Div. 2001). A court's scope of review "is not to suggest a decision that may be better than the one made by the board, but to determine whether the board could reasonably have reached its decision on the record." Jock v. Zoning Bd. of Adj. of Twp. Of Wall, 184 N.J. 562, 597 (2005).

The Board denied the applicant's subdivision application finding that the proposed subdivision did not advance the purposes of the MLUL or the zoning ordinance. It is well established that a planning board must approve a subdivision unless it fails to comply with requirements specifically set forth in the zoning ordinances. Pizzo Mantin Group v Twp. Of Randolph, 137 N.J. 216 (1994). The MLUL specifically provides that "[t]he planning board ***shall***, if the proposed subdivision complies with the [subdivision] ordinance and this act, grant preliminary approval to the subdivision. N.J.S.A. 40:55D-48 (emphasis provided). The municipality is free to adopt measures reasonably designed to advance the purposes of zoning and sound

planning. Subdivision ordinances may be flexible enough to allow broad discretion in the protection of the public interest, even though they must be reasonably specific to provide guidance and to foster consistency and fairness in their application. The provisions of the subdivision and zoning ordinances provide standards relating both generally and specifically to the suitability of a proposed subdivision and, in some measure, reflect the general purposes of zoning and planning of the MLUL. The standards of the ordinances should be applied in assessing the significance of the factors considered by the board in determining the suitability of the proposed subdivision.

Section 15-10.1 Minimum Standard States; Variances, of Borough's Revised General Ordinances states:

> These rules, regulations and standards shall be considered the minimum requirements for the protection of the public health, safety and welfare of the citizens of the borough. Any action taken by the borough council and the planning board under the terms of this chapter shall give primary consideration to the above mentioned matters and to the welfare of the entire community. However, if the subdivider or his agent can clearly demonstrate that, because of peculiar conditions pertaining to his land, the literal enforcement of one or more of these regulations is impracticable or will exact undue hardship, the planning board and the borough council may permit such variance as may be reasonable and within the general purpose and intent of the rules, regulations and standards established by this chapter.

The court finds the denial of plaintiff's subdivision application was arbitrary, unreasonable and capricious and for

that reason reverses the denial of the subdivision and REA for parking. The proposed subdivision would create two lots. It would also end the continuation of two uses on one lot, also prohibited by Borough ordinances. Buildings B-1 and C would be located on proposed Lot 1.01 consisting of 8.33 acres. Proposed Lot 1, on which the new building would be located, would consist of 20.04 acres. The applicant and the owner of Lot 1.01 proposed to terminate the condominium and enter into a Reciprocal Easement Agreement, including cross access and parking easements. The proposed subdivision would keep in place the same physical parking arrangement existing, and the REA would mirror the respective parking rights contained in the Master Deed. The Board's Resolution states, the "Board finds the subdivision would not further the Master Plan and is not consistent with good planning." The only basis for that statement vis a vis the subdivision is the Board's citation of part of the 2009 Master Plan Re-Examination envisioning larger lots in the northern portion of the B-2 Zone, which vision was rescinded in the 2016 amendment. As set forth in the brief of the Intervener, the 2009 Master Plan Redevelopment Report was never adopted nor codified. The Intervener notes the 2016 Amendment to the Master Plan is the only approved amendment since the adoption of the Master Plan in 2001. That amendment reaffirmed the intent of the Master Plan in Zones B-2 and B-5 to

attract, facilitate and maintain corporate development and notes the importance of corporations to the continued economic vitality of the Borough. The Intervener notes that the 2016 Master Plan amendment, which was codified in a new zoning ordinance approved on March 30, 2016, did not ignore the 2009 Reexamination Report which had recommended the creation of a new B-5 zone for the corporate campuses in both the northern and southern portion of the Sylvan Avenue corridor. As noted by the Intervener, the 2016 amendment rejected changes for the northern part of the corridor and recommended that they remain as they were. The record is unrefuted that the proposed REA would continue the use of the parking lot as it currently exists without issue. It would continue to provide onsite flexibility as to parking. The subdivision, together with the REA has no present or future effect on the parking. The Borough Engineer's observation that the two uses presently extant, while they presently cohabitate, might not in the future is without support in the record and ignores the legal effects of the easements which run with the land. The Borough Engineer had no issues with the parking as it existed. Any change in the use or occupancy of Lot 1.01 would require Business Zoning approval according to the Englewood Cliffs ordinances.

The court further finds the Board's denial of the D(6) variance for building height to be arbitrary, unreasonable and

capricious. The Board's own engineer testified that the topography of the lot made compliance with the height ordinance impossible, and further testified that the height variance was otherwise unobjectionable. The denial of the height variance is reversed and same is granted.

The applicant argues the zoning ordinance of Englewood Cliffs do not prohibit parking structures, and therefore no variances were needed for the parking structures proposed. "The goal of statutory interpretation is to effectuate the intent of the Legislature, and the plain language chosen by the Legislature is the best indicator of its intent. When the language is clear and leads to a result that is consistent with statutory objectives and related provisions, the law is applied as written. When the language suggests more than one reasonable interpretation, courts will consult other statutory construction tools, as well as extrinsic aids." State of New Jersey v. Robinson, 200 N.J. 18 (2009), at pp. 11-12). Here Section 30-10.1(e) of the Borough ordinances provides:

> All parking of motor vehicles shall be at grade level. Structure parking garages, platforms and deck parking are prohibited. For the purpose of this chapter, any combination of materials to form a construction or uses so as to allow above grade parking shall be considered a structure, and is prohibited.

The applicant argues that the section prohibits only "above grade" parking structures, not those below grade. While the

applicant might more plausibly argue that the ordinance did not contemplate below grade parking structures, the court finds the ordinance as written requires all parking to be a grade level and prohibits parking structures. The language is clear and unambiguous and the court need not go further: a D variance is required for the parking structure, above or below grade and for such a structure in the front yard. Since only at grade parking is permitted, it is clear that the height restrictions contained in the ordinance do not apply to parking structures which are prohibited. In as much as a "D" variance was required as to the front yard parking structure; the applicant was required to prove special reasons. Having determined to remand this matter on this aspect of the application, the court makes no findings here as to whether or not the applicant met the special reasons test. The court notes that the Borough engineer opined that the front yard was the only location that the structure could be located on the property, and his testimony appears to indicate his concerns were addressed when the subdivision line was returned to its original location. Further, Scenic Hudson had no objection to the proposal, and the testimony that the structure would not be visible from 9W appears to be uncontroverted. The comments of the Board Chair as to visibility of the structure from 9W appear to be without support in the record.

The court also notes the brief of the Intervener, wherein an application relating to the Conopco property is cited for the proposition that the Planning Board has previously determined a parking structure to be an accessory use requiring a C variance, and that determination was disputed by the then Borough representative to the Planning Board. It would appear the ordinance has caused and continues to cause confusion, particularly with regard to parking structures accessory to corporate structure in the Business Zones.

With regard to surface parking, the court finds no variance was necessary. In the event a variance was necessary, it would not be a D variance, as Section 30-10.1(h) provides that off street parking not directly related to the building parking requirements of that site are permitted without Planning Board approval. That section reads:

> No property owner or lessee shall permit (by agreement in any form) the premises to be used for off-street parking which is not directly related to the building parking requirements of that site, without Planning Board approval. . .

It is clear that the variance necessary, if any, would have been a c(2) variance, otherwise known as a flexible c variance. Under Pullen, supra, the Board is required to consider the benefits of the entire proposal in determining whether or not to grant such a variance.

Mixed on-site and off-site parking arrangements are generally prohibited in Section (g), "For all developments, the site in question shall be of adequate size to contain all required parking space. Any combination of on-site and off-site parking shall not be permitted." Section (h) however, allows off-street parking for uses not directly related to the building parking requirements of the site with Board approval.

These two sections of the ordinance are inconsistent. Section (h) permits what would amount to mixed on-site and off-site parking with Board approval, as an owner or lessee who was allowed to use their property for parking related and unrelated to the use, would ipso facto be mixed on and off-site parking.

Section 30-10.1 states:

> The intent of these regulations is to insure(sic) that all uses and structures have sufficient off-street parking and loading spaces to provide for all vehicles attracted to those uses and structures in order to avoid congestion of the public streets, to promote the safety and convenience of motorists and pedestrians and to insure the continued efficient operation of the uses established on the premises.

There is nothing in the record to suggest that the proposed subdivision and REAs violate the intent of Section 10.1. Without any such findings, the denial by the Board of the subdivision and off-site parking is found to be unreasonable.

The evidence was uncontroverted that the proposed parking on Lot 1 for Buildings B-1 and C on Proposed Lot 1.01 are reasonably convenient to Building B-1 and C and the evidence is clear that they have been in such use for years while ownership was unified. There were no concerns about safety or circulation raised by the Board's engineers. The Board's planner acknowledged that the offsite parking met the particular suitability test, conceding that any concern he had was addressed by the shared parking easement. The concern appears to have been that once the Unilever lease expired, the subsequent tenant would not "cohabitate" as well, and proposed Lot 1 was severely under parked. It was not contested that the property has a whole has more than sufficient parking. It was not explained by the Board or its experts how the reciprocal parking easements, which would run with the land, would be impacted by a change in tenants. There is no evidence in the record to show that with the proposed REAs proposed Lot 1 would be "under parked." It was uncontested that the proposed lots are oversized and under the permitted lot coverage. The proposed sharing arrangement will not result in over utilization of the property. Although the court finds a variance was not required, the standards for granting a c(2) variance provide useful guideposts in assessing whether the Board here abused its discretion in failing to grant the off-site parking in

conjunction with the subdivision and the court finds those standards have been met and satisfied by this applicant. Essentially, a c(2) variance may be granted where the board concludes the harms, if any, are substantially outweighed by the benefits. Kaufman v. Planning Bd. of Warren, 110 N.J. 551, 565 (1988). The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. Pullen v. Twp. Of S. Plainfield Planning Bd., 291 N.J. Super. 1, 8 (App. Div. 1996) stands for the proposition that the board must calculate the totality of all benefits arising from the entire proposal in the application for the variance, not just the benefits directly arising from the proposed deviation from the zoning ordinance. The applicant presents the following as benefits deriving from the property: prevention of blight, aesthetic improvement along Sylvan Avenue, net increase in trees and other of additional shrubs and vegetation, elimination of parking in the Hollywood Avenue front yard and buffer, enhanced evergreen buffer and fencing to screen residential homes, outdoor plaza space for employees, screening of mechanical roof elements, enhancements to the new building bringing it up to code and ADA compliant as well as more energy efficient, new LED lighting fixtures with night light reduced, improved circulation through the property including ingress and egress, improved parking conditions, reduction of impervious

coverage, soil disturbance and blasting elimination by location of structured parking in front yard, improved drainage, mitigation of noise from the Unilever facility, separation of uses (research and development) into separate ownership and buildings on separate lots eliminating multiple uses on one lot. The applicant claims that the benefits advance many purposes of the MLUL, including safety and general welfare, flood prevention, promotion of desirable visual environment, efficient use of land, provision of adequate light, air, and open space, conservation of energy resources, prevention of urban sprawl and degradation of the environment. It points to the lack of opposition from the NRDC and Scenic Hudson as corroboration for these claims. The Board's resolution disputes this conclusion, finding that the benefits inure mostly to the applicant, and not to the public. The Board's finding begs the question. All applications, by their very nature, benefit the applicant. The Board ignored and did not present evidence contrary to that presented by the applicant to the manner benefits to the public and advancement of the purposes of the Master Plan. Again, the Intervener agrees with the applicant based upon the Master Plan, the 2016 amendment thereto, as well as the reduction of noise, light spillage as well as the enhancement of landscaping on the site and the enhancement and expansion of the buffer zones.

Defendant argues that because 800 Sylvan did not disclose

during its application that intended to file a builder's remedy, stating:

> Plaintiff's true intentions regarding the development of the property are further demonstrated by the fact that within ten (10) days of the adoption of the Resolution denying Plaintiff's application, 800 Sylvan Avenue, LLC, through its counsel, Hill Wallack, LLP, wrote to the Court-appointed Special Master, Mary Beth Lonergan PP., AICP, and the Borough Attorney for Engelwood Cliffs, "wish[ing] to proposed(sic) a 20+/- acre portion of the subject property for inclusionary zoning. . .

The Board does not explain how this is so. The filing is as likely a leverage technique as an indication of "what the applicant's true intentions [were]." The Board knows that it is the municipality's prerogative to locate their constitutional obligation for low and moderate-income housing where the municipality sees fit. Tellingly, the 800 Sylvan property was not included in the Borough's recently submitted housing plan. The court rejects these arguments as calculated to inflame local citizens against the applicant as opposed to demonstrating the applicant's unclean hands. Arguments of this ilk, and the unprofessional attacks on the applicant or their counsel (characterizing their legal arguments as "ludicrous" (page 24, 51, 54) preposterous (page 19) and nonsensical (page 24)) are both unproductive and unpersuasive.

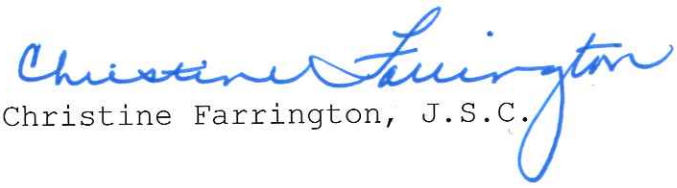
Similarly, the court is not persuaded that 800 Sylvan

either concealed a deed restriction from a prior application or erred in not addressing same. Presumably, the Board has a record of variances granted with respect to individual properties in the Borough and that record should have been made available to the Board by the Board Secretary and/or Zoning officer. The Board cannot task the applicant with providing or concealing history of the property particularly about a deed restriction which would have been recorded (and therefore public record), and which was contained in the prior approving Resolution. The applicant is clearly entitled to apply to a land use board to reconsider a previously imposed condition of approval by applying for a variance. Aldrich v. Schwartz, 258 N.J. Super. 300(App. Div. 1992) under the same criteria applied to consideration of variances. The Board shall consider the deed restriction when considering on remand the front yard parking structure. In that the deed restriction provides for consideration of front yard parking in the future, and in light of the development pattern of the nearby properties, as well as lack of consistency in the board's interpretation of the ordinances provisions regarding front yard parking structures such consideration is clearly warranted. The court finds that no modification of either the application or the complaint is necessary for the Board

to grant modification.

Counsel for the applicant shall submit an order incorporating the terms of this decision pursuant to the five-day rule within 10 business days of today's date.

Very truly yours,



Christine Farrington, J.S.C.