

FILED

FEB 17 2020

IN THE MATTER OF THE : SUPERIOR COURT OF NEW JERSEY, CHRISTINE A. FARRINGTON,
BOROUGH OF ENGLEWOOD : LAW DIVISION: BERGEN COUNTY J.S.C.
CLIFFS : DOCKET NO. BER-L-6119-15
: CIVIL ACTION
: ORDER
:

This matter having come before the court for trial on January 22, 2020 and February 5, 2020; and

The court having heard the testimony of witnesses, arguments of counsel and considered the legal submissions of all parties, and for reasons set forth in the attached Decision and for good cause shown;

IT IS on this 12th day of February, 2020,

ORDERED:

The court having found previously found the Borough of Englewood Cliffs to be constitutionally non-compliant, the court grants 800 Sylvan Avenue, LLC a builder's remedy having found that the proposed plans meet the sound planning criteria and there are no environmental or other constraints which would prohibit the remedy for reasons set forth in the decision filed this date;

The court further finds proposed Plan A to be the plan which best meets sound planning criteria;

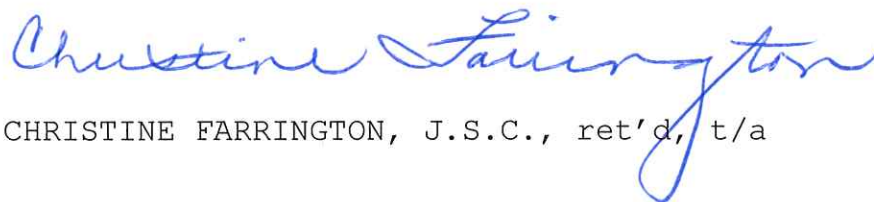
The court further grants 800 Sylvan Avenue LLC's motion to conform its pleadings;

The court further directs the Borough of Englewood Cliffs to reserve capacity for all utilities and sewer capacity for all sites designated for Mount Laurel housing, including but not limited to 800 Sylvan Avenue, all properties designated for rezoning, the overlay zones and proposed municipal site;

The court finds the restriction against parking contained in a prior resolution pertaining to an application before the

Planning Board for this site not to require a quiet title action is addressed by the court in the attached decision

The court has deferred the issue of the appointment of a special hearing officer to assume the function of the joint land use board pending submissions by the parties;



CHRISTINE FARRINGTON, J.S.C., ret'd, t/a

NOT TO BE PUBLISHED WITHOUT THE APPROVAL OF THE COMMITTEE ON

OPINIONS

IN THE MATTER OF THE : SUPERIOR COURT OF NEW JERSEY
BOROUGH OF ENGLEWOOD : LAW DIVISION: BERGEN COUNTY
CLIFFS : DOCKET NO. BER-L-6119-15
: :
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: CIVIL ACTION

FILED

FEB 12 2020

DECISION

Trial: January 24 and February 5, 2020

**CHRISTINE A. FARRINGTON,
J.S.C.**

Decided: February 12, 2020

Honorable Christine Farrington, J.S.C., ret'd, t/a

Thomas J. Trautner, Jr., Esq. and Marie Mathews, Esq., Chiesa, Shahinian & Giantomasi; Jeffrey R. Surenian, Esq., Jeffrey R. Surenian & Associates; Albert H. Wunsch, III, Law Office of Albert H. Wunsch appearing on behalf of plaintiff, Borough of Englewood Cliffs.

Christopher Martin, Esq., Morrison & Mahoney appearing on behalf of the Borough of Englewood Cliffs Planning Board

Antimo A. DelVecchio, Esq., and Daniel Steinhagen, Esq., Beattie Padovano; and Thomas F. Carroll, III, Esq., Hill Wallach appearing on behalf of Defendant- Intervenor 800 Sylvan Avenue, LLC.

Joshua Bauers, Esq., appearing on behalf of Fair Share Housing Center.

Special Master, Mary Beth Lonergan, PP

This matter comes before the court for a determination whether Defendant-Intervenor, 800 Sylvan Avenue LLC is entitled to a builder's remedy. The court previous revoked the Borough's

immunity and found that the Borough's Housing Element and Fair Share Plan was constitutionally non-compliant.

The following exhibits were marked into evidence:

DS1	Current conditions (previously DS 49)
DS12	Andrew Clark resume
DS15	Letter of Interpretation
DS37	Concept Plans AO3 and AO4
DS51	Concept plans
DS71	Photographs
DS72	Photographs
DS73	State Development Plan
DS68	Townhome designs
DS69	Townhome concepts
DS70	Building rear elevation
DS74	Concept Site Plan A revision date February 4, 2020

Defendant-Intervenor filed two builder remedy plans, here referred to as Plan A and Plan B. The plans call for 600 units and 617 units respectively, with full 20% set aside and the appropriate bedroom mix and affordability categories. The distinguishing factor between the two plans is Plan A calls for intrusion into the front yard where parking, but not residences, are prohibited as a result of a restriction contained in a Planning Board resolution. The intrusion would result in a

smaller parking structure near Hollywood Avenue and Floyd Street.

The Borough opposes any residential development on the 800 Sylvan site.

800 Sylvan called Stuart Johnson. Mr. Johnson previously testified on the issue of constitutional non-compliance and was accepted as an expert in architecture and land planning. Mr. Johnson described the site as currently existing, as he had previously.

He testified the site slopes west to east and north to south. It has frontage on Sylvan Avenue, Hollywood Avenue and Floyd Street. Adjacent to the property are commercial and office properties. The Borough Board of Education property is located to the west. There are approximately five residential houses on Floyd and Hollywood which are a minimum of 80 feet from the property line. The park adjacent to Floyd Street has tennis courts and batting cages. The property is in close proximity to a state park. The plan proposes the southwest corner of the site will continue as it presently exists, an office building leased by Unilever.

Mr. Johnson identified DS-51 as redevelopment plan for 600 dwelling units, of which 20% or 120 units would be affordable. Of the 600, 80 units would be attached for sale three-bedroom townhomes. The plan proposes 520 rental units in two buildings.

Mr. Johnson testified the townhomes offer a diversity of housing on site and provides a true transition of scale and mass to residences along Floyd Street. He testified the townhouses would also help buffer the multi-family units.

A 1 ½ level parking deck with 122 structured spaces was proposed to be located on the remaining eight acres on which the Unilever building is located in addition to adjacent 308 surface parking spaces. He testified the proposed parking would be more than sufficient for current and future uses. Mr. Johnson testified currently Unilever has 250 employees of which 60% utilize parking.

Additional on grade parking was proposed at front of the Unilever building which intrudes into the restricted area. Mr. Johnson noted that location of the surface parking at this location was consistent with surface parking at the adjacent CNBC site which has a setback of 74 feet. He noted further south on Sylvan Avenue existing surface parking is closer to the right of way. Mr. Johnson testified the compensating benefit from the proposed front surface parking was the reduction of the height of the parking deck at the rear of the property.

The height of the parking deck proposed is 1 ½ stories (25 feet at the Hollywood portion) with sloping from west to east and the highest point along Floyd is 13 feet.

He testified if front yard parking was disallowed the parking garage would have to be increased one story to 2 ½ stories. The resulting height would be increased to 24 ½ feet along Floyd Street and 33 feet facing Hollywood. Mr. Johnson testified the closest distance to Floyd Street from the parking garage was more than 65 feet plus an additional 20 feet to the curb line. The distance from parking deck to an existing structure on Floyd Street would be approximately 145 feet. The closest distance of deck is 145 feet from property line at Hollywood and closest distance to a house on Hollywood is about 205 feet.

The existing structures on Hollywood and Floyd are approximately 35 feet tall and therefore taller than the proposed parking deck in Plan A.

Mr. Johnson testified the approximate height of the R&D building is about 55 feet. The deck and building appear comparable in height because of the sloping nature of the property.

He testified proposed Building A is approximately 90 feet from the R&D building which exceeded requirements for fire code, light and air.

Mr. Johnson described DS-36 A02 page 2 as showing 342 parking spaces on ground floor. Above the parking are 315 residential units on four levels with three open area court

yards which facing east were proposed. Seventy-two of the units will be affordable be distributed throughout building. Exterior and finishes were proposed to be the same for all units. All units will share the same building entry. Unit doors will be side by side and the affordable units indistinguishable from the market rate units. The proposed structure parking will include 342 spaces which would be screened with articulated windows. Amenities would include a club room for private event and dining room, gaming space, pool and barbeque areas and areas of passive and active recreation. In addition to the structure parking 194 surface parking spaces are proposed.

Mr. Johnson testified DS-36-A01 represents the ground floor plan. He indicated where the restriction fell, part way along the drive aisle. The restriction applies to parking only and does not prohibit residential use within the restriction. He testified approximately 50-60 parking spaces are proposed in the location.

Mr. Johnson testified the ground level parking would have punched windows making it comparable in design to the upper story residential floors.

Mr. Johnson testified the parking supply for building A is 1.7 parking spaces to unit ratio. He testified 1.7 was chosen as opposed to the RSIS which requires 1.8 depending on the number of bedrooms. He testified in his experience there is a

decline in auto ownership and in a building with a significant number of one-bedroom units, many households would have a single vehicle. He testified the proximity of the New Jersey Transit bus route was also a factor in his determination. He testified 1.7 spaces per unit would meet market demand and testified there could be additional parking provided under Building A if required.

Mr. Johnson identified DS-36 A02 as the Building B conceptual which proposes 205 apartment units, of which 157 would be market rate and 48 would be affordable units. He testified Building B is predominately a four-story building at grade. There is a small portion of the building which is 3-story at grade and a small portion which is 5-story as building steps with grading. The plan proposes three-story parking garage with the entrance located at southern end of the building. The main entrance proposed a U-shaped area drop off area. There is proposed a center courtyard at grade with pool, barbeque area and sunbathing deck. Mr. Johnson testified the four-story portion of building is about 50 feet in height, a small portion is 60 feet in height and the three-story portion is 40 feet in height. Building B also proposed 1.7 parking spaces per unit.

Mr. Johnson testified the plan did not envision any sharing of parking between the Unilever use and residential use.

He testified there is shared entry and arrival sequence, but no shared direct access to the Unilever facility.

Mr. Johnson also testified as to the townhouse component. He testified the townhouse provided diversification to the residential project and transitional scale from the apartment buildings to existing residential and Board of Education uses.

He testified the townhouses would help define the street scape along Floyd Street and provide buffering from the apartment buildings.

The proposed eighty townhouses were designed as an enclave and were proposed to have separate and dedicated access, landscaped boulevard ingress and egress off Floyd Street. He testified from a vehicular standpoint the only connection to the rest of the project would be an emergency gate.

Mr. Johnson testified the townhouses were proposed to be attached in clusters of three, four, five and six with one cluster of seven. The buildings were proposed as three stories with 2 car garages and driveway spaces. The townhouses would be 2800-3000 square feet per unit with pitched roofs, 42 feet high from finished first floor level to roof.

He testified the proposed parking for the townhomes was RSIS compliant at 2.5 parking spaces per unit, and more if the driveway parking was included. He testified guest parking spaces were also provided.

Mr. Johnson testified that DS-37 was concept Plan B which is an alternate plan in which proposed parking does not intrude into the deed restricted area.

He testified DS-37 Concept Plan B depicts 617 units of which 124 were affordable housing units. Building A and B comparable to Concept A. Plan B also proposes 80 for sale townhomes. In Plan B, Building A has 17 more units. The building also continues to intrude into the restricted area but is not violative of the restriction because the intruding portion of the building contains only residences and no parking. The parking proposed in Plan A, but lost in Plan B is replaced by 81 spaces in a partial basement in Building A. The height, scale and massing of the building all remain the same.

Mr. Johnson also testified the parking for the Unilever facility had to be modified to respect the parking restriction, by elimination of the parking in front of the building and increasing the proposed parking deck by one story. He testified that residential building footprint, setback everything else remained the same, the height of the parking deck increased by 11 feet making the maximum exposure of the deck to Floyd Street 24 ½ feet measured from adjacent grade and 33 feet measured from adjacent grade on Hollywood Avenue.

Mr. Johnson identified DS-35I as Illustrative theme demonstrating exterior architecture for multi-unit buildings consisting of masonry brick veneer and residential windows.

Mr. Johnson identified DS-35J as an Illustrative illustration of amenities, showing the club amenity room, private event room, fitness room.

DS-35K was identified as an Illustrative illustration of the interior showing among other aspects the lobby lounge and work cube areas.

DS-35L was identified as an Illustrative illustration of the outdoor amenities, barbeque facilities, courtyard and pool.

DS-68 was identified as showing the front elevation of the three story proposed townhomes. Mr. Johnson testified the scale and typical elevations match product type being proposed and were proposed to be articulated horizontally and vertically with faux dormers on the roof.

DS-69 was identified by Mr. Johnson as showing a grouping of four townhouses with masonry brick veneer.

DS-70 was identified as showing the rear elevation illustration of a grouping of 5 townhomes.

Mr. Johnson testified the roofs would be pitched and would have private decks 10 feet deep.

He testified all affordable units would be provided in the rental component.

In cross-examination by Mr. Bauers of FSHC, Mr. Johnson testified that the 120 affordable units would be located Building A (72 units) and Building B (48 units) on a pro-rate share basis. All of the proposed affordable housing would be rentals. Mr. Johnson testified 24 one-bedrooms, 72 two-bedrooms and 24 three-bedroom units were proposed.

He testified whether the court found Plan A or Plan B to be acceptable, all affordable units would be rentals. He testified there would be an additional four affordable units if Plan B were chosen. He testified at least 13% of the units would be very low-income units and the breakdown of bedrooms would be FSHA compliant.

Patricia Ruskan, P.E. was called by 800 Sylvan. Ms. Ruskan was previously accepted by the court as an expert in Civil Engineering. Ms. Ruskan identified DS-35A as an aerial view of site. She testified she had visited the site the previous week and took photographs which she identified as the photographs in DS-71.

The photographs showed the existing conditions of the property along Floyd Street near Hollywood Avenue, Allison Drive and from the school property. Generally, the photographs showed a sparse buffer consisting a small deciduous trees with a small number of evergreens.

Other photographs showed the cul-de-sac toward the municipal recreation area and a "tot" lot at the park. Ms. Ruskan testified the pictures confirmed her earlier testimony that the trees had elevated canopies and provided little buffering. She testified she was familiar with the landscape plans of 800 Sylvan LLC which provided better landscape options including 8-10-foot evergreen trees. She testified the walk from Allison Road to the tot lot took approximately 4 ½ minutes. Based on that she testified she considered the recreational area to be a nearby amenity.

Ms. Ruskan testified she had previously prepared an exhibit which showed building and parking setbacks for buildings along Sylvan Avenue. Ms. Ruskan identified DS-72 as setbacks which exist today. She testified 700 Sylvan is located 135 feet from building to right of way and closest its closest surface parking is 65 feet away. The CNBC building is 60 feet from the right of way and surface parking is 75 feet from right of way.

Ms. Ruskan testified there are also numerous properties along Sylvan Avenue where the buildings and parking are closer - 15 feet, 28 feet, 86 feet, "as you look further south things get much closer." She testified the new LG building is 69 feet from Sylvan Avenue.

Ms. Ruskan testified the LG north parking structure is 4 stories in height with the south wing one level of parking running south to north with three levels above.

Ms. Ruskan testified LG had steep slopes greater than 15% that were developed and were constructed upon with no issues raised.

With regard to the wetlands on the 800 Sylvan site she testified wetlands would not be a problem for development proposed. She testified the total acreage of wetlands is very small totaling .271 acres in six areas.

Ms. Ruskan testified the storm water management requirements could be met and that she had advanced storm water management as part of the wetlands management permit submitted on December 2019.

She testified the existing impervious coverage on site is as per DS-35A 51.5% and 64.2% was proposed. She opined the project could be constructed with sound engineering design.

On cross-examination by Mr. Reagan, attorney for the Special Master, Ms. Ruskan testified she would recommend a sidewalk on Floyd Street to intersect with the connector in the proposed project to Floyd Street.

Plaintiff next called Andrew Clark who was accepted by the court as an expert in Wetlands Science.

Mr. Clark testified he had co-authored the letter report previously marked as DS-15 which speaks to an Letter of Interpretation verifying wetlands location on a subject property and which he says validated the delineation his company found in field.

He testified a permit application was filed in December 2019 for a Fresh Water General Permit Number 6 for filling of the isolated wetlands on the site. He testified a general permit is supposed to be an easy permit to obtain, the main criteria for such a permit is that the wetlands are isolated which he testified the subjects are. He testified the wetlands for which a permit is sought cannot exceed one acre, provide habitat for threatened or endangered species and cannot be an EPA priority. He testified none of these criteria apply to the subject wetlands and he did not foresee any issues with the issuance of a GP6 permit.

800 Sylvan next called Art Bernard who the court accepted an expert in professional planning with expertise in Affordable Housing. Mr. Bernard testified he had reviewed the developers proposed builders remedy plans. He testified the standard to grant builder's remedies was established by the Supreme Court and entitles 800 Sylvan to the remedy where there are no environmental or other substantial planning concerns such that the plan is not contrary to sound land use planning. Mr.

Bernard testified both proposed plans were consistent with sound planning and there were no environmental concerns. He testified he believed Plan A to be a better plan primarily because parking deck is substantially lower with modest encroachment into restricted area. He testified there is a balancing test which attempts to balance an appropriate response which promotes general welfare and addresses needs of New Jersey citizens. He testified the need for affordable housing is very important and it is the only land use of which he is aware which is a constitutional obligation.

He testified affordable housing is particularly significant in Englewood Cliffs because in all the time New Jersey has mandated affordable housing, the Borough has not provided a single unit.

Mr. Bernard testified it was established in Phase I of the trial that 96% of Borough's housing stock is single-family detached homes. The demographics of population show there are much lower percentage of lower income households, African Americans and Latinos in Englewood Cliffs because of the housing stock.

He testified the State Plan is significant because it is a document adopted by State Planning Commission. He testified the Borough lies in Planning Area I which is designated as the area where much of the State's growth is to take place.

Mr. Bernard testified that the 800 Sylvan site does not have environmental concerns that he is aware of which were not addressed by Ms. Ruskan or Mr. Clark. He testified the site is sewerred and has water.

Regarding access Mr. Bernard testified the site has access from Floyd Street and Hollywood Avenue, with Floyd street having 30 feet of cartway. He testified Sylvan Avenue is a state highway with traffic controls. There is a bus stop in front of site. He testified Sylvan Avenue ties into Palisades Interstate Parkway.

He testified the site has access to regional employment, shopping, transportation.

He testified to the west there are schools and recreation facilities, to the east there is Sylvan Avenue and beyond that hiking, a boat launch, and bird sanctuary.

Mr. Bernard testified the proposed density of 30 units per acre was consistent with sound planning practices and the State Plan endorses higher densities.

He testified Judge Jacobson has determined the regional need which exceeds 38,000 affordable housing units and the ability to satisfy that need is limited by the restrictions of the Highlands Region of which Englewood Cliffs is not part.

He testified he was present during the first phase of the trial and was aware the Borough had taken position that site is

too isolated to support density. Mr. Bernard testified the site is not in downtown area, but few of the housing units in Englewood Cliffs were.

He testified the proposed townhomes provided a good transition. He testified no buffer was required between residential buildings and the proposed townhomes did not need to be screened as they will be very attractive.

When shown DS-36 Mr. Bernard testified that the locations of the driveways internal to the site was a good plan because it would allow for uninterrupted landscaping. He testified the developer was more than willing to extend the sidewalk to the municipal park. He testified the proposed building setbacks met or exceeded those existing along Sylvan Avenue.

He testified Plan A in which the proposed parking deck would be one story less was the better plan.

He testified the proposed buildings would not generate noise or emissions, and would not deprive each other, the Unilever building or the CNBC building of air or light and the setbacks were appropriate.

Mr. Bernard found the recreational amenities to be adequate for proposed Buildings A and B in conjunction with the nearby municipal amenities and state park.

Mr. Bernard noted that the townhomes did not have private recreational facilities. He testified data from Rutgers

University shows that expensive townhomes do not generate school age children.

He testified he was present during Mr. Johnson's testimony. Regarding his testimony on bedroom and income distribution he testified the affordable units would be dispersed throughout the apartments. He testified the developer would comply with all requirements to include income mix, marketing and units for very low-income families.

He testified the site is relatively constraint free, the height and mass of the apartment buildings are compatible with adjacent office uses; the townhouse use is an appropriate transitional use between the school and the few existing single-family homes and apartments.

Upon cross-examination by Mr. Bauers, Mr. Bernard testified the development would comply with the Uniform Housing Affordability Controls (UHAC) regulations with the appropriate bedroom and income mix. He testified the phasing requirement would be complied with and affirmative marketing would be undertaken. The deed restrictions would comply with the regulations.

On cross examination by Mr. Reagan, Mr. Bernard agreed that access to Floyd Street through the townhomes development would be shorter and could be located between the buildings and CNBC.

He testified the rents for the units would cover the amenities and the affordable units would not be charged for their use.

When the trial continued February 5, 800 Sylvan recalled Mr. Johnson in conjunction with concerns expressed by the Special Master relative to recreation on the proposed site plans. Mr. Johnson identified DS-74 as the Concept Site Plan for Plan A which he testified was last revised on February 4, 2020. He testified the sheet did not change Concept A plan previously submitted as to site metrics, location or footprints, all of which remained the same. He testified the revised sheet highlighted outside recreation areas.

He testified Building A had three open air courtyards. The central courtyard has a pool and deck area of approximately 2800 square feet with seating areas for sunbathing, barbequing, outdoor seating and dining. It includes a natural gas fireplace and would be adjacent to interior Club Room, gaming room and private dining. He testified inside there would be golf and soccer stimulators. There would be direct connectivity between outdoor and indoor recreation. He identified a toddler play area, adjacent to an indoor play area, geared to children 2-7 years of age and a passive play/fitness area with artificial turf approximately 40'X 50', or 2000 square feet, and suitable for light ball play volleyball, bocce, outdoor movie

screenings, and outdoor yoga. An indoor area was proposed to be 500 square feet and geared to children 1-6. He testified each residential unit on the courtyard has private patio area screened with hedges. These private areas were netted out of the public recreational areas.

Mr. Johnson testified Building B has a courtyard behind the main entry. The plan proposes 8500 square feet of internal recreation for Building B in addition to the open-air courtyard and 2800 square foot pool area.

He testified to the west of Building B a multi-purpose recreation area of approximately 8800 square feet was proposed, inclusive of a toddler playground area. The multi-purpose recreation area was proposed to be 160 feet long and 30-70 feet wide.

He testified the revised drawing showed the proposed sidewalk extending to the multi-purpose recreation area. He testified the sidewalk was further proposed to be extended out to Floyd Street for access to Borough recreation areas. He testified the developer also proposed a sidewalk along Floyd Street and extending behind the CNBC building

Mr. Johnson testified the proposal for both Building A and Building B included a hotel style lobby with charging ports, wifi, workspaces and fireplace.

He testified the club room would also include a fireplace, wifi and direct access to outdoor areas. The private event room was proposed to be between 800-900 square feet. Both buildings would also have state of the art fitness centers of 1500-2000 square feet. He testified the proposed amenities are above market standards.

On cross-examination by Mr. Bauers, Mr. Johnson testified that the residents of both buildings would have cross access, including to the pools. The residents of the townhouses would have access to outdoor areas.

He reaffirmed that the plan for integrating the affordable housing units was to spread them throughout the two buildings on a pro-rata share meaning there would be more units in Building A than Building B.

In response to cross-examination by Mr. Trautner on behalf of the Borough, Mr. Johnson testified that the calculations used in designing the recreation spaces were based in part on bedroom distribution. He testified for one-bedroom units the occupancy would typically be one or two persons. He testified there was no calculation made for school age children.

800 Sylvan rested and the court called Special Master Mary Beth Lonergan to testify.

Ms. Lonergan testified that the Supreme Court in Mt. Laurel II, South Burlington County N.A.A.C.P. v. Township of Mount

Laurel, 92 N.J. 158 (1983) ruled a builder's remedy should be granted unless because of environmental or some other reasons it would be against sound planning. She testified the revised plans proposed by 800 Sylvan meet the sound planning criteria and there were no environmental or other reasons which dictated against the granting of the remedy.

Ms. Lonergan noted, as did Mr. Bernard, that 800 Sylvan's site is in Planning Area I which is the preferred location for inclusionary and redevelopment sites pursuant to the State Development Plan

Ms. Lonergan recommended that water and sewer capacity should be reserved for this inclusionary development and other affordable sites in the Borough and the court so orders.

Ms. Lonergan testified that she is comfortable with the site access and urged the Borough to support 800 Sylvan's proposal to apply to NJDOT for a left turn lane from northbound Sylvan Avenue into the site.

Ms. Lonergan testified that she supports the introduction of single-family attached townhouses as they will make the overall development of the site more feasible. She further endorsed that townhouse use as a transitional use, agreeing that they would help buffer the massing of the apartments from the single-family homes.

Ms. Lonergan testified the height and massing of proposed Building A and Building B were consistent with surrounding area massing.

She testified that removal of the front yard parking restriction would result in a lower rear parking deck structure and that proposed structure would be below the tree line and effectively buffered from the single-family homes on Hollywood Avenue. The Special Master testified it made sense for the court to remove the restriction which is in keeping with appropriate buffering and landscaping.

Ms. Lonergan testified she appreciated the Floyd Street pedestrian and bicycle access and stated the enhanced access from the site to the Borough park was an important component to her finding that the proposed active and passive recreation was sufficient for the site.

Ms. Lonergan endorsed the developer's plan that the affordable units would be fully integrated on every floor without identification from halls or exterior doorways.

She testified as to the UHAC standard and state law and agreed that the actual income breakdown by very low or moderate income could be worked out with FSHC and herself and the developer on a later date.

She testified that she supported the proposed building setbacks between the Unilever building and proposed residential

apartments. She further supported the potential emergency access between residential complex and Unilever stating this issue is appropriate for determination at site plan review, as was the full sidewalk plan, landscaping and buffering.

Ms. Lonergan testified that as a result of the plan revisions testified to by Mr. Johnson relative to active and passive recreation spaces, she had no concerns regarding open space and recreation of a substantial planning nature and testified 800 Sylvan had adequately addressed recreation. She opined that Dr. Kinsey's finding regarding a Wall Township application which concerned a very isolated site, and referred to by Mr. Mistretta, did not have application in this matter. She testified that she had searched for nationwide standards, and did not find anything specific for this site, as the national standards are geared to what a municipality should be providing to its residents as a whole. She testified it is common for a town to reserve land for open space. However, she testified because this is an important inclusionary development site for the Borough, and one of a very few sites which may be developed, she did not think the focus should be on green fields or a 30% open space requirement. She testified she concluded from Mr. Johnson's testimony that the proposed development would have approximately 1 ½ acres for active and passive recreation.

She testified that important to making the determination that 800 Sylvan has addressed active and passive recreation appropriately was consideration of the location of the site which is directly across the street from school area, and a short distance from the only Borough owned play area not associated with a school.

Ms. Lonergan concluded that the 800 Sylvan site does address sound land use planning concerns and she saw no environmental or other substantial planning concerns that should prohibit 800 Sylvan from being awarded a builder's remedy.

On cross examination by Mr. Bauers the Special Master testified that the most recent version of UHAC was adopted in 2004. The State Fair Housing Act was amended in 2008 and increased the amount of very low-income housing to 13% of all affordable units. Very low income means at or below 30% of the median income.

On cross examination by Mr. Trautner regarding the applicability of the Wall Township case and Dr. Kinsey, the Special Master referred to Dr. Kinsey's report from 2005, pages 18 and 19, and read two paragraphs into the record in which Dr. Kinsey commented on that the apartments proposed were isolated from safe access to offsite recreation.

Essentially for the reasons testified to by Special Master Lonergan and supported by the other expert witnesses produced by

800 Sylvan, particularly Mr. Bernard, and undisputed by the Borough and the Planning Board which produced no witnesses to the contrary, the court finds 800 Sylvan Avenue LLC is entitled to a builder's remedy. As noted by Ms. Lonergan, our Supreme Court in Mount Laurel II wrote at page 330:

As previously explained, builder's remedies will no longer be "rare" and will be granted as a matter of course where (i) the plaintiff-developer will provide a substantial amount of lower income housing, and (ii) the proposed project accords with sound land use planning. . .

The court finds that 800 Sylvan proposes to provide a substantial amount of lower income housing and the proposed project accords with sound land use planning.

The court further finds, based upon the unrefuted testimony of the Special Master and Mr. Bernard that Plan A, which includes an area of front yard parking with the concomitant result of reducing the height of the proposed parking deck, is the plan which best meets sound land use planning criteria.

800 Sylvan Avenue LLC the conclusion of its case moved to conform its pleadings to remove the parking restriction which may prohibit the front yard parking called for in DS-36 from being constructed.

800 Sylvan argued that the restriction was imposed by the planning board as a condition related to the construction of an office building on the site. 800 Sylvan further argued that

circumstances had changed by virtue of the proposed project and that the Borough had permitted front yard parking on various other sites on Sylvan Avenue.

The Borough and the Planning Board objected.

This court previously addressed the issue of the restriction in a prerogative writ action on February 22, 2019, 800 Sylvan Avenue LLC v. Planning Board of Englewood Cliffs, BER-L-9088-17, wherein the court found on page 28-30 that the restriction was imposed by the Planning Board as a condition of approval for a prior approval on the property and contained in the prior approving resolution. The court found 800 Sylvan was entitled to apply to the Board to reconsider the previously imposed restriction which could be modified by the Planning Board. 800 Sylvan argues the restriction is not analogous to the restriction in Soussa v. Denville Twp. Planning Bd., 238 N.J. Super. 66 (App. Div. 1990), citing an unpublished Appellate Division case in which the Appellate Division found an approval, which included a condition of no further improvements to increase lot coverage or disturbance of the "Crest Line," in a resolution which was recorded not to be analogous to Soussa, but only a notice to future owners that they would be prohibited from future development which would increase lot coverage or disturbed area without first seeking approval from the zoning board. The Borough argues that the restriction is analogous to

the one in Soussa and 800 Sylvan is required to bring an action to quiet title. In Soussa, in return for approval granting for major subdivision approval for nine building lots, the Soussas agreed that a remaining 20.22-acre tract of land would be unavailable for future subdivision and development on that tract would be limited to a single one-family residence. The Soussas executed a new deed with the restrictive covenant which conveyed the property from the Soussas as grantors to themselves as grantees. Subsequently, the Soussas filed an application for subdivision which the Board declined to hear based upon the deed restriction. The court in Soussa found that although an applicant is free to make a new application to a board which had previously denied the application and such is not barred by res judicata, the restriction in the deed in Soussa read the restriction was required so "that there be adequate protection afforded the township and the general public. . ." The court found that language intended to make the public of the Township a third-party beneficiary of the covenant in the deed and the Township was entitled to maintain an action to enforce it and was a necessary party to any action to lift the restriction.

The court has no evidence before it that the parking restriction was other than that contained in a prior resolution of approval which was recorded. There is to the court's knowledge no separate deed and no language which would suffice

to make the Borough a third-party beneficiary of any covenant in a such a deed. Accordingly, the court finds the restriction does not require an action to quiet title and could be modified by the joint land use board and therefore the court, or the Special Hearing Officer should one be appointed.

The court grants 800 Sylvan LLC's motion to conform its pleadings.

800 Sylvan joined by FSHC made request for the appointment of a special hearing officer to undertake the role of the joint land use board alleging the board has been compromised and has demonstrated it is opposed to affordable housing being constructed in the Borough.

The Borough and Planning Board opposed.

The court has granted all parties the opportunity to brief the issues and will address the application by separate order.

The appropriate order has been entered.


CHRISTINE FARRINGTON, J.S.C., ret'd, t/a