

Hemant Mehta,

Plaintiff,

v.

Gloria K. Oh, Edward F. Aversa, Jimmy Song,  
Deborah Tsabari and the Borough of Englewood  
Cliffs,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
BERGEN COUNTY- LAW DIVISION

Docket No. BER-L-

**BRIEF IN SUPPORT OF VERIFIED COMPLAINT IN LIEU OF PREROGATIVE WRITS  
AND FOR DECLARATORY JUDGMENT VOIDING COUNCIL VOTE, AND FOR  
TEMPORARY RESTRAINTS**

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**ORAL ARGUMENT REQUESTED**

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### **NATURE OF THE ACTION/BACKGROUND**

The facts contained in the Verified Complaint, submitted herewith, are hereby incorporated by reference herein.

By way of a brief background, the Borough of Englewood Cliffs (the “Borough”) has been engaged in a declaratory concerning its Affordable Housing (Mount Laurel) obligations for the past five years (“Mt. Laurel Action”). During the course of the action, 800 Sylvan Avenue, LLC (“800 Sylvan”) intervened, and then brought a separate builder’s remedy lawsuit against the Borough, seeking to convert its commercial building located at 800 Sylvan Avenue, Englewood Cliffs (“800 Sylvan Site”) into an 600-unit residential behemoth by including 15% affordable housing.

Defendants engaged in many examples of unethical conduct, including but not limited to forming a litigation subcommittee devoid of authority to bind the Borough, intentionally barring the Mayor of the Borough from any participation in the litigation, and engaging in secretive settlement discussions. The full scope of this conduct cannot be brought to light unless an investigation is conducted. To that end, Councilman Woo brought a Motion on June 10, 2020 seeking to investigate the Defendants and their role in the Mt. Laurel Action. Instead of recusing themselves, Defendants voted against an investigation into themselves, a clear example of a conflict of interest.

Plaintiff seeks, by way of an action in lieu of prerogative writ, to void the unlawful vote, hold a re-vote, and bar the Defendants from any activity which would constitute a conflict of interest, namely any participation in the Mt Laurel Action, Fair Share Plan and 800 Sylvan Site. Additionally, through this Order to Show Cause, Plaintiff seeks to impose both permanent and

temporary restraints barring Defendants from participation in any activities which would constitute a conflict of interest.

**POINT ONE**

**TEMPORARY RESTRAINTS ENJOINING DEFENDANTS FROM PARTICIPATION IN ANY MATTERS CONSTITUTING A CONFLICT OF INTEREST IS REQUIRED FOR THE REASONS SET FORTH IN *CROWE V. DEGIOA*.**

It is well settled law that the granting of emergent relief is governed by the standards set forth in *Princeton Insurance Company v. 349 Associates, LLC*, 147 N.J. 337 (1997) as well *Crowe v. Degioia*, 90 N.J. 126, 132-134 (1982). As set forth in the aforementioned case law, a preliminary injunction should not issue except where necessary to prevent irreparable harm, where Plaintiff's claim is not unsettled, and where all material facts are uncontroverted. Furthermore, the final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief. *See Crowe v. Degioia* at 132-134.

The requested relief herein is to prevent the Defendants from engaging in voting that would constitute a conflict of interest. Such activity harms not only the Borough as a whole, but all of its constituents. It undermines the democratic process. If the Defendants are not investigated, there could be a loss of evidence, and more crucially, a loss of the public's trust in the municipal government and its representatives. Additionally, if Councilmember Tsabari and Councilmember Aversa engage in settlement negotiations with 800 Sylvan, and bind the Borough to a deal which benefits the Defendants over the citizens of Englewood Cliffs, such a result would be impossible to undo. Moreover, it has become clear that the council intends to engage in further settlement discussions. There is a regularly-scheduled meeting to take place on July 8, 2020, and upon information and belief, this meeting will discuss the 800 Sylvan Site and/or the Mt. Laurel Action.

Without an investigation into the Defendants' conduct, this participation will further erode public confidence in the Council and in the Borough's ability to protect their rights.

Plaintiff's claim is not unsettled. It is well-recognized that a conflict of interest prevents a councilmember from voting. This principle well-established in the common law and relevant caselaw, and further codified Local Government Ethics Law, N.J.S.A. 40A:9-22.5.

According to the Ethics Law's legislative findings, it was enacted "to provide a method of assuring that standards of ethical conduct and financial disclosure requirements for local government officers and employees shall be clear, consistent, uniform in their application, and enforceable on a statewide basis...." N.J.S.A. 40A:9-22.2e. The statute itself declares that "[w]enever the public perceives a conflict between the private interests and the public duties of a government officer or employee, [public] confidence [in elected and appointed representatives] is imperiled." N.J.S.A. 40A:9-22.2c.

The Ethics Law is clear in its mandate: "No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity of independence of judgment." N.J.S.A. 40A:9-22.5d. The term "involvement" is more expansive than "interest" in this context; personal involvement includes the *potential* for bias, rather than the existence of a current bias.

The statute serves to refine the definition of a conflict of interest which already existed under the common law, namely that the circumstances could reasonably be interpreted to show that a situation had a "likely capacity" to tempt the agent/employee to "depart from [their] sworn public duty, thus eroding confidence by the public that [they] would make [their] own independent

judgment.” *Randolph v. City of Brigantine Planning Bd.*, 405 N.J.Super. 215, 228 (App. Div. 2009).

Whether an interest is sufficient to disqualify a governmental actor is “necessarily a factual one and depends upon the circumstances of the particular case.” *Wyzykowski v. Rizas*, 132 N.J. 509, 523 (1993). In evaluating whether a conflict exists, “actual proof of dishonesty need not be shown.” *Id.* at 524. The question “is whether there is a potential for conflict, not whether the public servant succumbs to the temptation or is even aware of it.” *Griggs v. Borough of Princeton*, 33 N.J. 207, 219 (1960). The statutory bar is “not confined to instances of possible material gain[,] but... extends to any situation in which the personal interest of a board member in the matter before it, direct or indirect, may have the capacity to exert an influence on his action in the matter.” *Randolph*, 405 N.J.Super. at 225 (App. Div. 2009) (internal citations omitted).

The Motion was whether to allow an investigation into the same individuals who were voting, who not surprisingly voted no to an investigation of themselves. It is a clear conflict of interest under any definition advanced herein, as well as common sense.

To councilmembers Deborah Tsabari and Edward Aversa, a conflict of interest should be implied where the councilmember is voting regarding property within 200 feet of where the councilmember has an interest in property. As the Supreme Court of New Jersey has explained, the Legislature included two notice provisions in N.J.S.A. 40:55D-12-62.1, which is “tantamount to a declaration of interest in the zoning treatment of a particular property on the part of those owning other property within 200 feet.” *Grabowski v. Township of Montclair*, 221 N.J. 536, 558-59 (NJ 2015). As the Court described, “If an official with a direct or indirect interest in a property within the Legislature’s 200-foot radius participates in a zoning decision, his or her participation

may determine the outcome of the dispute, obviating the need for the property owner to formally take a position for or against the application” and the 200 foot measure is an impartial measure of an official’s interest in the property. *Id.* at 559.

Councilmember Tsabari owns property that is within 200 feet of the 800 Sylvan Site, 106 Hollywood Avenue, Englewood Cliffs, NJ, and is therefore ineligible to participate in any official capacity with respect to the 800 Sylvan Site, the Fair Share Plan, and/or the Mt. Laurel Litigation concerning this site. Councilmember Aversa has a financial interest in a dental office/practice at 617 East Palisade Avenue, Englewood Cliffs, NJ, located within 200 feet of an overlay zone that was included in the Fair Share Plan adopted by the Borough. Councilmember Aversa is therefore ineligible to participate in any official capacity with respect to the 800 Sylvan Site, the Fair Share Plan, and/or the Mt. Laurel Litigation concerning the site.

To the factor regarding whether the facts are controverted, the relevant facts at hand are 1) that a vote took place, 2) that the Defendants voted against the investigation, 3) that Defendants Councilmembers Tsabari and Edward Aversa have an interest property within a 200 foot radius of the 800 Sylvan Site and/or overlay zone of the Fair Share Plan. There are objective facts, with no interpretation necessary.

Finally, the relative hardship strongly weighs in favor of relief in this case. Plaintiff is not seeking to stop all votes by the Defendants. Plaintiff solely requests that Defendants not participate in matters concerning the 800 Sylvan Site and/or Mt. Laurel Action until after the investigation has taken place, or at the least, that the Defendants abstain from voting in matters directly related to their own interests, such as whether an investigation can occur. Plaintiff further requests that Defendants Councilmember Tsabari and Councilmember Aversa be prohibited from participating

at all regarding 800 Sylvan, given the conflict of interest that exists.

These are small concessions when compared to the immense harm that will occur if our public officials are permitted to do whatever they please and never be held to any standard. The citizens of Englewood Cliffs deserve to know what happened “behind closed doors” during the Mt. Laurel Action, particularly if the Defendants intentionally prevented the Mayor from participating.

Per the Verified Complaint, an investigation into this matter is necessary. Defendants engaged in an affirmative effort to conceal their activities from the Mayor and from the public. Defendants formed a subcommittee and used same to participate in litigation, contrary to the Bylaws of Englewood Cliffs, and engaged in covert settlements with 800 Sylvan. Allowing the Defendants to continue in this manner would be to tacitly endorse the lack of oversight or boundary by these government officials.

It is respectfully submitted that the Verified Complaint, the within application for the Order to Show Cause, and the supporting brief submitted to this Court satisfy the test for emergent relief. Absent the entry of the equitable relief requested herein, more votes will be cast that are in violation of the applicable ethics laws, unauthorized settlement discussions will continue and there will be continued erosion of the democratic process. Conversely, the possible harm to the Defendants is limited, because it only limits their ability to participate in actions that represent a conflict. Accordingly, there will be irreparable harm unless the Order to Show Cause is entered.

**POINT TWO**

**PLAINTIFF IS ENTITLED TO A DECLARATORY JUDGMENT OR PREROGATIVE WRIT INVALIDATING JUNE 10, 2020 VOTE AGAINST AN INVESTIGATION INTO THE DEFENDANTS' CONDUCT.**

A complaint in lieu of prerogative writs encompasses the former writs of certiorari, quo warrant to, prohibition, and mandamus. *Application of Livolsi*, 85 N.J. 576, 593-594 (1981). The state constitution was amended in 1947 to grant “actions in lieu of prerogative writs” as of right; previously, the writs were discretionary and our courts could decline to hear them. *Id.*; NJ Const. Art. VI, § V, par. 4. Thus, where a “traditional prerogative writ” would have provided “a remedy,” there is a viable “action in lieu of prerogative writs” as of right. *Id.*

Here, the writ of certiorari applies to Plaintiff’s claims. This writ is traditionally “used...to review the actions of inferior tribunals such as administrative agencies.” *Application of Livolsi* supra at 594. “The historic function of the common-law writ of [c]ertiorari is to supervise and review the proceedings of all inferior tribunals not proceeding according to the course of the common law, for the correction of jurisdictional excesses and errors of law revealed by the record. In New Jersey, from early times, [c]ertiorari performed the function of a writ of error where error would not lie.” *Fischer v. Twp. of Bedminster, Somerset County*, 5 N.J. 534, 539 (1950). “Essentially, a writ of certiorari sanctioned a review of judicial, administrative agency, municipal or other proceedings.” *O’Neill v. Washington Twp.*, 193 N.J.Super. 481, 486 (App. Div. 1984).

While a complaint in lieu of prerogative writs is generally not available where a plaintiff has another adequate remedy at law, *O’Neil* supra, there is no other remedy available here. The relief sought in the prerogative writ claims is review and invalidation of Defendants’ actions underlying the prerogative writ claims, not damages. The Declaratory Judgment Act is not, in and

of itself, an “adequate remedy” because “declaratory relief” is discretionary and “can [generally] be denied where another remedy would be more effective or appropriate,” *966 Video, Inc. v. Mayor & Twp. Comm. of Hazlet Twp.*, 299 N.J.Super. 501, 512 (Ch. Div. 1995), whereas the prerogative writ claims are as of right.

Here, Plaintiff seeks to compel public officials to do their jobs ethically and in accordance with the applicable regulations. It is within the Court’s power to grant this relief, and it is necessary to a healthy system of government that councilmembers are subjected to “checks and balances” and to basic oversight.

An influx of 600 units means a considerable change to both the character of Englewood Cliffs, as well as the financial condition of the Borough. It would mean that schools and other services would be stretched beyond their capacity. Taxes would need to increase to account for the additional citizens. This directly impacts Plaintiff and his family, as residents of the Borough.

### **CONCLUSION**

For the reasons set forth above, Plaintiff respectfully requests:

(i) An Order striking the existing June 10, 2020 vote and prohibiting Defendants from voting on the Motion to Investigate the Defendants and other Councilmembers;

(ii) An Order finding that Councilmember Tsabari’s ownership of property within the 200-foot restriction constitutes a conflict of interest which prevents her involvement in the Mt. Laurel Action, the Fair Share Plan, and the 800 Sylvan Site.

(iii) An Order finding that Councilmember Aversa’s interest in property within the 200-foot restriction constitutes a conflict of interest which prevents his involvement in the Mt. Laurel Action, the Fair Share Plan, and the 800 Sylvan Site.

(iv) Temporary restraints be imposed prohibiting Defendants from participating in matters in which they have a conflict of interest, including the 800 Sylvan Site and/or Mt. Laurel Action. Participation shall include but not be limited to voting on any motion, advising counsel, engaging in settlement discussions authorizing expenditure of Borough funds or giving an official opinion on same, endorsing the position of any party, and making a public statement in favor of or against the Borough's position.

Respectfully submitted,

NORGAARD, O'BOYLE & HANNON  
*Attorneys for Plaintiff, Hemant Mehta,*

Dated: 6/30/20

By: /s/ Karl J. Norgaard, Esq.  
KARL J. NORGAARD, ESQ.