

EYE ON THE CLIFFS

"Let us not seek the Republican answer or the Democratic answer, but the right answer. Let us not seek to fix the blame for the past. Let us accept our own responsibility for the future." John F. Kennedy

August 29, 2019

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Special Electronic Edition

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Eye on the Cliffs is a publication of EC for Responsible Government, a non-partisan not-for-profit residents group whose goal is to educate the community about local issues. We do not endorse any political party or candidate. We began as a group of residents who joined with the conservation community to seek a reduction in the height of the LG USA headquarters. We learned that residents working together can make a difference. The quotation above from John F. Kennedy is our mantra. We are also inspired by the words of Abraham Lincoln: *"Let people know the facts and the country will be safe."*

AFFORDABLE HOUSING LITIGATION NEWS UPDATE:

ENGLEWOOD CLIFFS LOSES IMMUNITY FROM BUILDER'S REMEDY LAWSUITS COURT SAYS BOROUGH'S AFFORDABLE HOUSING PLAN WILL NOW BE DESIGNED BY THIRD PARTIES, THE SPECIAL MASTER AND THE COURT

On August 27, 2019, in the first judicial proceeding following the Mayor and Council's August 14 decision to continue the Borough's affordable housing litigation rather than to settle with all parties, Superior Court Judge Christine Farrington made two unexpected rulings. The Court (1) revoked Englewood Cliffs immunity from builder's remedy lawsuits, and (2) removed from the Borough's control the ability to determine the elements of its affordable housing plan, which will now be designed by *"third parties, the Special Master and the Court."*

The Court found that *"the Borough has acted in bad faith and determined to be non-compliant, and immunity from the builder's remedy action is revoked."* The Court cited the Borough's willful refusal to comply with its affordable housing burden for the past forty years, and also found no evidence that the Borough was now moving forward in a constructive manner to meet its constitutional obligation to provide affordable housing. The Court cited defects in the Borough's calculation of its realistic development potential as reflected in its December 10, 2018 Plan to construct 57 units on Hudson Terrace. The Court noted that the Borough had excluded 800 Sylvan Avenue from its affordable housing plan despite Normandy's commitment to build 120 units of affordable housing on the 800 Sylvan Avenue site, and that the 800 Sylvan site *"appears to be the only remaining location...available for a significant affordable housing development."* The Court expressed concerns that *"Sylvan would go the way of the Prentice Hall site."*

The Court commented on the July 10 public hearing held at the Upper School and noted that the Borough Council failed to adopt a settlement agreement and ordinances consistent with the "Memorandum of Understanding" ("MOU") that had been entered into in April 2019. The Court stated that *"it had been made aware that two council members had recall petitions commenced against them allegedly related to their support of the MOU and that the Mayor has been consistently opposed to the resolution of this litigation."*

The Court quoted from the Mayor and Council resolution adopted July 29, when the Borough reaffirmed *"its commitment to providing affordable housing in a manner of its choosing and that the best way for the Borough to satisfy its obligation would not be to rezone the Sylvan Avenue site for residential housing."* The Court further found that the Borough *"provides no concrete plan for funding or building affordable units within that range."* (referring to the number of units the Court may find satisfactory). The Court found that Englewood Cliffs has *"chosen to pursue a path of resistance"* and that the Court's *"earlier reliance on commitment of municipal elected officials to carry out their constitutional duties to provide opportunity for the construction of affordable housing was apparently misplaced."*

The Court also noted that the settlement negotiations *"were all for naught in the face of public opposition."* The Court found that the Borough has stalled, procrastinated and evaded its obligations and has not produced a single unit of affordable housing. The Court then found that the Borough *"has lost the ability to determine the elements of its affordable housing plan" and directed that it would be designed by third parties, the Special Master and the Court."*

It is expected that the Borough will seek to stay Judge Farrington's rulings and appeal such rulings to the Appellate Court.

(All of the language quoted above is from notes taken by Carin Geiger during the August 27 judicial proceeding)

AN EYEWITNESS ACCOUNT OF THE AUGUST 27, 2019 COURT PROCEEDINGS

The proceeding before Judge Farrington on August 27th was a hearing on the Borough's motion to extend the Borough's temporary immunity from builder's remedy lawsuits. To overcome such motion, Normandy (the owner of 800 Sylvan Avenue) and the Fair Share Housing Center had to prove that the Borough has not been compliant with its constitutional obligation to provide affordable housing. Jeffrey Surenian, the Borough's principal defense attorney, argued that Englewood Cliffs has demonstrated its determination to be compliant with its constitutional affordable housing obligation, and that immunity should be extended. Surenian said that the 2015 Supreme Court *Mount Laurel IV* decision protected Englewood Cliffs from a builder's remedy lawsuit because of a timely filing the Borough had made that year, and that the Borough should be allowed to chart its own destiny. Surenian said it was the Borough's right to decide how it would meet its affordable housing obligation, and that under the law the Borough could consider sites such as 800 Sylvan Avenue but decide not to use them. He then enumerated each of the measures taken by the Borough which indicated that the Borough intended to be constitutionally compliant and to meet its affordable housing obligation.

Thomas Carroll, the principal attorney for Normandy Real Estate Partners, disagreed. He described the Borough's failure to meet its affordable housing obligation over the last forty years, including its refusal in 1997 to rezone the site of LG's new headquarters for affordable housing. Carroll then turned his focus on current political conditions in Englewood Cliffs. He recited to the Court each of Mayor Mario Kranjac's public statements which have echoed the theme of "*we need to fight.*" He repeated Kranjac's statement that "*in terms of litigation I always say, look, we need to fight for what's right and I'd rather have a judge order me to do something stupid than do it myself.*" Mayor Kranjac's negative comments about affordable housing and Kranjac's comments about "*toxic alliance*", "*land grabs*" and "*socialism*" were also repeated.

Attorney Carroll noted Kranjac's "*sabotage of the recent settlement negotiations*" and the Mayor's subjecting compliance to "*a public plebiscite.*" He noted the political pressure put on the Council, including the recall petitions which were filed. Mr. Carroll also quoted former Councilman Mark Park's public statement at the July 10 hearing: "*Why don't you keep fighting with them? Time is on our side...if we spend five or six years, they will then go back and develop a commercial unit.....keep continuing the legal fight with them....time is on our side*" as evidence of the determination of the community and its elected officials to continue litigating rather than be constitutionally compliant with its affordable housing obligations. Mr. Carroll said Englewood Cliffs cannot be constitutionally compliant without 800 Sylvan Avenue. He stated that the Borough had never acted in good faith, and that given the current climate in the community there is no expectation that it will ever do so.

Kevin Walsh, the Director of the Fair Share Housing Center, said Englewood Cliffs has about 5300 homes and not a single unit of affordable housing. He spoke of the past refusal of the Borough to designate the LG site for affordable housing. He also stated that 4-1/2 years have passed since the *Mount Laurel IV* 2015 Supreme Court decision, and that Englewood Cliffs still has done nothing. He also mentioned the Mayor's comments and the inadequate "*low-balled*" Borough plan to build 57 units at Hudson Terrace, as reasons the Court should find adequate basis for taking over the Borough's land use authority.

Albert Wunsch III, representing the Borough, defended the Mayor stating that the Mayor has always affirmed that he will obey the law. Wunsch added that the Mayor is not the governing body, and only the governing body can make decisions. Wunsch told the Court that what the Mayor says is his own personal beliefs, and not those of the Englewood Cliffs Council, and assured the Court that the Mayor and the Council would meet their affordable housing obligation in their own way. He stated that the Borough wants the ability to fashion its own plan, meeting its constitutional obligation, without using the property at 800 Sylvan Avenue. Wunsch reiterated that the Borough wants home rule and that is its right.

The Special Master, Mary Beth Lonergan told the Court that she believed that temporary immunity should be extended. She argued that trial will take place in 45 days and that she did not find the Borough to be "*constitutionally non-compliant.*" She did not think it was "*reasonable to withdraw immunity.*"

The Court stated that its decision will not be based on the statements of Mario Kranjac made at public meetings, but did note that Mayor Kranjac has consistently been opposed to residential development at 800 Sylvan Avenue.

(All of the language quoted above is from notes taken by Carin Geiger during the August 27 judicial proceeding)

Commentary:

WHAT THE COURT'S DECISION MEANS FOR ENGLEWOOD CLIFFS

EC for Responsible Government had reported in its August 2019 issue of Eye on the Cliffs that the risks of proceeding to trial were overwhelming and identified specific risks, including the possible loss of immunity, which the Borough might face if it proceeded to trial. Elected officials made the decision to continue to litigate after the public outcry at the July 10 public hearing. Judge Farrington's rulings are the immediate result of the Borough's decision to continue to litigate. She denied the Borough's claim that it has the right to comply with its affordable housing obligation in the manner it chooses. Judge Farrington's rulings disregard the Borough's commitment to satisfy its affordable housing obligation by spending local property tax dollars to acquire more land and build the number of affordable housing units that may be required.

It is expected that the Council will appeal Judge Farrington's rulings to the Appellate Court. Unless the Appellate Court grants a "stay" of Judge Farrington's rulings, the Borough could be vulnerable to more developer builder's remedy lawsuits. Most significantly, the loss of immunity now clears a path for Court approval of the plan proposed by Normandy in its builder's remedy lawsuit to construct up to 600 residential units at 800 Sylvan Avenue, including 90 to 120 affordable housing units.

No builder's remedy lawsuits to construct affordable housing were ever filed against Englewood Cliffs until 2017, after the Planning Board rejected Normandy's proposal to develop a corporate headquarters at 800 Sylvan Avenue.

The Memorandum of Understanding ("MOU") which was entered into by all litigants in April would have extended the Borough's immunity from any other builder's remedy lawsuits until 2025. The MOU had provided for 400 residential units on the 800 Sylvan Avenue site, including 94 market rate town-homes and 80 affordable housing units, all built by Normandy at its own expense. The MOU would have limited the Borough's current affordable housing obligation to an additional 15 units.

Notwithstanding the August 27 rulings, a trial is scheduled to begin on October 11, 2019. The purpose of the trial is to determine the current affordable housing obligation of Englewood Cliffs, which is the number of units the Borough is required to provide. The number has yet to be enunciated by the Court. The Special Master had recommended 143 units, and Normandy and the Fair Share Housing Center are asking for more. The trial will determine how many units of affordable housing must be built in Englewood Cliffs.

It is unclear how the Borough will be impacted by the Court's ordering the Borough's affordable housing plan to be designed by third parties, the Special Master and the Court. If Normandy is permitted to build up to 120 affordable housing units at 800 Sylvan Avenue, it is not unlikely that the Borough may yet be required to build some additional number of affordable housing units on Hudson Terrace.

The Court's decision to take away local control of the Borough's affordable housing plan is a severe measure that would appear to permit outsiders to shape the Borough's destiny. Unless the Borough is successful on appeal of Judge Farrington's rulings, the Borough is facing an unprecedented loss of zoning and land use planning and control with respect to its affordable housing obligation.

A CHRONOLOGY OF AFFORDABLE HOUSING IN ENGLEWOOD CLIFFS

1975: New Jersey Supreme Court in the historic *Mount Laurel* decision affirms that all developing communities in the state must provide their “Fair Share” of Affordable Housing.

1985: The State legislature enacts the Fair Housing Act which created the Council on Affordable Housing (“COAH”). COAH created rules and procedures for communities to follow to satisfy their constitutional affordable housing obligation. Communities were required to file a Housing Element and Fair Share Plan (“Plan”) with COAH and received either “substantive certification” or risked a “builder’s remedy” lawsuit. The Plan for each community included a calculation of its affordable housing burden using many factors. The key factor of how much affordable housing each community has to actually provide was based on the availability of suitable vacant land. This is known as the “Vacant Land Adjustment”.

1986 through 1997: When applied to Englewood Cliffs by our Borough Planner, the Vacant Land Adjustment established our affordable housing realistic development potential (“RDP”) to be fewer than ten (10) units.

March 13, 1997: The Borough files its Plan with COAH complying with regulations then in effect. Its obligation was projected to be four (4) units.

November 5, 1997: COAH approves the four (4) unit obligation but informs Englewood Cliffs that the 28 acre Prentice Hall property, vacant at the time, had to be rezoned as available for affordable housing. The Borough refused to comply. COAH denied the Borough substantive certification leaving the Borough vulnerable to a “builder’s remedy” lawsuit. Citicorp had, by this time, occupied the site. Later, LG USA purchased the site for its new headquarters. The 28 acres of land COAH wanted for affordable housing has remained as a corporate site. The Borough’s realistic affordable housing obligation remained small until November 2017 when Normandy intervened in the Declaratory Judgment action.

1997-2017: No “builder’s remedy” lawsuits were filed against the Borough because there was no large tract of vacant developable land.

1999 to 2015: COAH is in turmoil and its rules and regulations consistently being challenged in the courts.

2015: New Jersey State Supreme Court rules that COAH is dysfunctional and returns jurisdiction of affordable housing back to the trial courts. These courts were given responsibility to determine each community’s affordable housing obligation and whether they were in compliance with State law. The Fair Share Housing Center is involved in each of these determinations. Englewood Cliffs, along with approximately 300 other municipalities that had not received substantive certification from COAH, filed a Declaratory Judgment action with the court. Filing the action in the time required ensured that the Borough would have temporary immunity from builder’s remedy lawsuits until the court could rule. Immunity continued until December 31, 2017. A “Special Master” was assigned by the court to review the Borough’s 2015 Plan, which indicated an adjusted affordable housing obligation of nine (9) units.

2016 to 2017: Meetings held between Borough and Special Master. Borough fails to meet court deadlines for updated Plan and vacant land inventory submission. On December 31, 2017, Borough’s immunity lapses, but is later extended by the court.

Rendering of Normandy’s proposed corporate office building at 800 Sylvan Avenue, which was denied by the Planning Board.



October 8, 2017: After four hearings, the Englewood Cliffs Planning Board, in a 4 to 3 vote, denies Normandy's application for a corporate office building on its 800 Sylvan Avenue property. Chairman Russell Porrino, JP Lee, Mary O'Shea and Aurel Villari, each appointed by Mayor Kranjac, vote to reject the corporate project primarily because the proposal included (1) a parking garage in the front, (2) shared parking with the Unilever facility which is situated on 8 acres of the 28 acre site, and (3) subdivision of the 28 acres into two separate properties, dividing Unilever's 8 acre leased property from the rest of the proposed corporate site. Mario Bei, a Kranjac appointee who has since resigned, and Ron Kilmartin and Jeff Chinman, appointed by former Mayor Parisi, voted to approve the application.

November 29, 2017: Normandy intervenes in the pending 2015 Englewood Cliffs case to which the Fair Share Housing Center ("FSHC") is already a party. It argues that Englewood Cliffs now has 20 acres of vacant land that must be considered in any determination of the Borough's fair share requirement. The FSHC agrees. They assert that Englewood Cliffs affordable housing burden has increased from nine (9) units to at least 129 units because the 20 acres of vacant developable land at 800 Sylvan Avenue must now be considered as vacant and available for affordable housing.

December 7, 2017: Normandy and the Mayor, Carrol McMorrow and Russell Porrino hold a confidential meeting. Normandy informs them that it has changed direction after the denial of its corporate proposal and wants to build residential units on its property.

December 22, 2017: Normandy files court appeal seeking to reverse the Planning Board's denial of its corporate office building application. The purpose of the appeal is to overturn the Planning Board denial of Normandy's application to build a corporate office building on its property at 800 Sylvan Avenue. Resident Carin Geiger later obtains intervenor status to appeal the Planning Board's denial of Normandy's corporate plan. EC for Responsible Government supports Geiger's intervention in the lawsuit to reverse the Planning Board's denial of Normandy's corporate application in order to allow corporate development at 800 Sylvan Avenue.

January 2, 2018: Normandy files a "builder's remedy" lawsuit seeking to build 600 units at 800 Sylvan Avenue including 15 to 20% affordable housing.

WHAT IS A BUIDER'S REMEDY? HOW DOES IT RELATE TO LOSS OF IMMUNITY?

A builder's remedy lawsuit is a process created under the New Jersey Supreme Court's Mt. Laurel Doctrine which allows a developer to file a lawsuit when it believes a borough has not provided its fair share of affordable housing. A builder's remedy can be approved by the court if the court finds a borough to be "constitutionally non-compliant" and revokes a borough's immunity from builder's remedy lawsuits. A builder's remedy permits the developer to construct higher density housing on its property than that permitted by a borough's zoning ordinance as long as it includes a substantial affordable housing component (inclusionary development). This court-imposed remedy can be completely inconsistent with local zoning and land uses. Essentially, the borough loses local control over its own zoning ordinances.

March 2018: Court establishes schedule for mediation in the Borough's affordable housing lawsuit.

April 13, 2018: Judge Toskos dismisses Normandy's builder's remedy lawsuit. Normandy files an Appeal with the Appellate Court.

October 1, 2018 Mediation fails. Borough fails to reach a settlement with Normandy and the Fair Share Housing Center.

December 10, 2018: Borough submits Plan for affordable housing to the Court, as directed. Borough commits to building 57 units of affordable housing near Hudson Terrace which would satisfy a 77 unit obligation. Cost is estimated at \$12.7 million. No affordable housing at 800 Sylvan Avenue is included in the Borough Plan.

January 2019: Planning Board and the Mayor and Council approve the previously submitted December 2018 Plan.

February 22, 2019: Judge Farrington approves Normandy's shared parking and proposed subdivision in the corporate application that had been denied by the Planning Board, and orders a limited remand to the Planning Board to reconsider its denial of Normandy's proposed parking structure and modification of a deed restriction.

March-April 2019: The Planning Board files both an Interlocutory Appeal to Appellate Court and an Appeal seeking to reverse Judge Farrington's decision which would have permitted Normandy's corporate plan. All parties also filed motions for reconsideration.

Winter-Spring 2019: Englewood Cliffs Council establishes a new Affordable Housing subcommittee to reopen settlement negotiations with Normandy, the FSHC and the Court's Special Master.

April 2019: A non-binding Memorandum of Understanding (MOU) is approved by all parties subject to final approval by the Englewood Cliffs Council after a public hearing. Negotiations continue to finalize details of a proposed settlement agreement and the legal steps necessary to effectuate it if approved by the Council.

June 7, 2019: Appellate Court stays Normandy's builder's remedy lawsuit until August 1 pending settlement discussions.

July 10, 2019: Public Hearing held at Upper School. The Borough's affordable housing attorneys and planners explained that a settlement agreement would allow the Borough to shape its destiny rather than have the Court dictate how the Borough would satisfy its affordable housing obligation.

A crowd of approximate 300 residents attend, and many members of the public speak in support of continuing to litigate, rallied and encouraged by Mayor Kranjac. Attorney Jeffrey Surenian, the affordable housing specialist representing the Borough, cautions the Borough that it is his professional opinion that the **"risks of proceeding to trial are overwhelming"** and urges the Borough to settle its affordable housing litigation in order to manage these risks.

July 29, 2019: Council votes to proceed to trial based on its belief that residents want to fight in court and not enter into a settlement which would have permitted dense residential housing at 800 Sylvan Avenue.

August 20, 2019: Special Master Mary Beth Lonergan, the Court's expert, releases her findings regarding the Borough's affordable housing obligation. She calculates the Borough's immediate affordable housing burden to be 143 units, which is more than double the number of units provided in the Borough's December 10, 2018 Plan. She reaffirms the Borough's unmet need is an additional 441 units, and recommends that the Borough be given 90 days to bring the December 10, 2019 Plan into compliance with her recommendation. She also recommends that immunity from builder's remedy lawsuits be extended until the October 11, 2019 trial.

August 27, 2019: Court revokes Borough's immunity from builder's remedy suits, and removes from the Borough's control the ability to determine the elements of its affordable housing plan. Court says that the Borough's affordable housing plan will now be designed by third parties, the Special Master and the Court.

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