

# 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*

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## AFFORDABLE HOUSING LITIGATION UPDATE

### ENGLEWOOD CLIFFS LOSES IMMUNITY FROM BUILDER'S REMEDY LAWSUITS

#### THE BOROUGH WILL SEEK EMERGENCY RELIEF AND APPEAL JUDGE FARRINGTON'S RULINGS

On August 27, NJ Superior Court Judge Farrington stripped the Borough of immunity from builder's remedy lawsuits, and on September 27 denied the Borough's request to limit the loss of immunity to only the Normandy property at 800 Sylvan Avenue. The Court's rulings would now allow any developer to seek Court approval to construct high-density housing in Englewood Cliffs provided it includes a substantial affordable housing component. In a builder's remedy lawsuit, a Court-imposed remedy can overrule local zoning and land use codes. Even if a property is currently zoned for corporate use, the Court can approve its use for residential development if the developer agrees to allocate 15 to 20% of the total units for affordable housing. According to the Fair Share Housing Center, only three communities in the State of New Jersey have been stripped of immunity by the Courts.

On July 10, the Borough's affordable housing attorney, Jeffrey Surenian, stated that ninety percent of the 330 communities in the State that faced affordable housing litigation settled their obligation rather than risk the uncertain outcome of litigation. During his presentation, he cautioned the public that the *"risk of going to trial is overwhelming."*

### NORMANDY FILES BUILDER'S REMEDY LAWSUIT AGAINST ENGLEWOOD CLIFFS

On August 30, Normandy (800 Sylvan Avenue LLC) filed a new builder's remedy lawsuit against Englewood Cliffs seeking Court permission to build an unspecified number of housing units at 800 Sylvan Avenue. In its previous lawsuit, Normandy proposed 600 to 835 units. On August 27, the Court found that Normandy has already met two of the three requirements for a successful builder's remedy lawsuit. On September 27, the Court allowed the Fair Share Housing Center to formally intervene in these actions.

### WHY DID ENGLEWOOD CLIFFS LOSE IMMUNITY?

The August 27 Court ruling is extensive. **No single action** by the Borough resulted in the Court finding that there is *"no evidence that the Borough was now moving forward in a constructive manner to meet its Constitutional obligation to provide affordable housing."* The Court opinion set forth a litany of the Borough's inaction and failures. See complete Court Opinion at: <https://ecfrg.org>. The Court found the following:

(1) The Borough failed to present to the Court an updated affordable housing plan and vacant land assessment which was due December 2017.

(2) Almost 8 months of mediation (March to October 2018) did not result in any settlement agreement despite the *"extraordinary efforts of the Special Master and a mediation attempt spanning several months and essentially accommodating the Borough in terms of a confidentiality agreement..."*

(3) Numerous deficiencies in the Borough's December 10, 2018 Plan to build 77 affordable housing units on Hudson Terrace, including the omission of *"800 Sylvan's property despite the fact that 800 Sylvan appears to be the only remaining location in the Borough available for significant affordable housing development."*

(4) No concrete plan for actually funding or building the 77 units on Hudson Terrace.

- (5) No action to cure deficiencies reported in the Special Master's 2016 Report.
- (6) Failure of the Borough to provide a single unit of affordable housing between 1985 and 2018.
- (7) Failure to rezone the new LG USA Headquarters (formerly Prentice Hall) site in 2016 for affordable housing when it rezoned the LG USA site. The Court opinion stated that without judicial intervention, it was concerned that the 800 Sylvan Avenue site would *"go the way of the Prentice Hall site if the builder's remedy does not go forward."*
- (8) Failure of the Council to move forward with a settlement agreement due to public pressure and sentiment.

### **THE COURT OPINION MENTIONS KRANJAC'S OPPOSITION AND THE RECALL EFFORT**

The August 27 Court opinion includes the following statements:

*"...the Court has been made aware that two Council members have reportedly had recall petitions commenced against them allegedly related to their support of the memorandum of understanding and that the Mayor has been consistently opposed to the resolution of this litigation....It is clear to the Court that the Borough of Englewood Cliffs has chosen to pursue a path of resistance....The governing body says it wishes to express its commitment to providing affordable housing in a manner of its own choosing, but the manner of its choosing has been to stall, procrastinate, and evade its obligations. The result of allowing this Borough to provide affordable housing in a manner of its own choosing has not produced a single unit of affordable housing." See complete Court opinion at <https://ecfrg.org>.*

### **BOROUGH LOSES RIGHT TO DESIGN ITS OWN AFFORDABLE HOUSING PLAN 143 UNITS OR MORE OF AFFORDABLE HOUSING MAY BE REQUIRED**

On August 27, the New Jersey Superior Court also ruled that the Borough can no longer decide where affordable housing will be built in Englewood Cliffs, or the size of such housing. Instead, the Court-appointed Special Master will now make **all** affordable housing recommendations to the Court. The Special Master has already released a report which states that the Borough must provide 143 affordable housing units. That is nearly double the 77 units proposed in the Borough's 100% affordable housing project on Hudson Terrace. The Special Master will advise the Court where the affordable housing units should be built and the size of permitted construction. The August 27 Court opinion states that **an acceptable affordable housing plan cannot ignore the 800 Sylvan Avenue property**. The Borough will appeal the ruling.

### **TRIAL TO BEGIN ON OCTOBER 11**

The trial, which is scheduled to begin on October 11, will determine the number of units the Borough will be required to provide to meet its fair share affordable housing obligation. The Borough has submitted a plan (the Hudson Terrace Project) providing for the equivalent of 77 units. The Special Master believes the correct number is 143. Normandy and the Fair Share Housing Center are likely to argue that more than 200 units are required.

### **WHY IS ALL OF THIS HAPPENING NOW?**

From the time New Jersey enacted municipal affordable housing requirements until 2017, Englewood Cliffs had no vacant and available land where developers could profitably build affordable housing. Because there was no vacant and available land, the calculation of the Borough's affordable housing obligation was always less than ten units. That changed in the fall of 2017 when the Planning Board members appointed by Mayor Kranjac denied Normandy's application to build a corporate project at 800 Sylvan Avenue. In response to the unexpected and unprecedented denial, Normandy decided to develop the 800 Sylvan Avenue site for housing. Normandy told the Court that its land was now available for inclusion in the calculation of the Borough's affordable housing requirement. This resulted in an immediate tenfold increase, if not more, in the Borough's fair share obligation. In addition, because the 800 Sylvan Avenue site is not zoned for residential use, Normandy also sued under the affordable housing law for "builder's remedy" relief. Builder's Remedy allows a Court to overrule local zoning restrictions for a developer who will build 15 to 20% affordable housing as part of its building plan. Denial of a corporate plan on our Trillion Dollar Mile increased our affordable housing obligation and precipitated the builder's remedy and affordable housing lawsuits the Borough is now fighting.

## **FACT CHECK**

**1. The Court gave multiple reasons for the loss of immunity. See the article which starts on the first page which lists eight of the reasons cited by the Court, and the complete Court opinion at <https://ecfrg.org>.**

**2. The Democrats did not have continuous control of the Council for the past forty years.** In 1994, 1995, 1996, 2010, 2011, 2016, 2017 and 2018, the Council majority control resided with Republicans. No affordable housing was built by either political party because the Borough had no large tracts of vacant and available land. The Borough's affordable housing obligation number remained in the single digits through 2017.

**3. There is no evidence that Normandy intended to build residential housing at 800 Sylvan Avenue before its corporate application was denied.** The Planning Board tried but failed to convince Superior Court Judge Farrington that Normandy had always intended to build residential units on its property at 800 Sylvan Avenue.

The Court was not persuaded and stated on February 22, 2019:

***"The Court rejects these [Planning Board's] arguments as calculated to inflame local citizens... Arguments of this ilk, and the unprofessional attacks on the applicant [Normandy] or their counsel are both unproductive and unpersuasive."***

See complete February 22, 2019 decision at <https://ecfrg.org>.

A transcript of a December 7, 2017 meeting indicates that Normandy concluded that the Planning Board's denial of two of the critical requirements to create a marketable corporate building on 800 Sylvan Avenue gave them no alternative but to pursue a different direction. Although they always had alternative plans, they had decided to pursue corporate development. But, the Planning Board turned it down **"...and so we decided to move on."** See full transcript at <https://ecfrg.org>.

**4. The Mayor and Council members cannot claim they were uninformed about settlement negotiations.** The Mayor and Council members attended numerous, lengthy, behind closed doors, private executive session discussions with the affordable housing attorneys while the public waited in the council chamber for public meetings to begin. The agenda for each meeting lists the subject of the executive sessions to be the affordable housing lawsuits.

**5. Ongoing settlement negotiations were not a secret.** A March 7, 2019 Court Order set forth a detailed timeline and ordered mediation on April 1 and 2. At the March 20, 2019 Mayor and Council meeting, some residents spoke out about the negotiations, and gave their opinions. The April 2019 edition of *Eye on the Cliffs*, mailed to every home, reported that there were settlement negotiations. The non-binding Memorandum of Understanding was the result of these negotiations.

**6. The Council never had a final settlement agreement to approve.** One of the Borough's affordable housing attorneys, Thomas Trautner, stated in Court on September 27 that Normandy and the Fair Share Housing Center were incorrect when they told the Court that all parties had agreed to the terms of settlement. **He said there was "no conclusive settlement to be voted upon."**

**7. The Council called the July 10, 2019 public meeting to obtain public opinion before taking further action on a settlement agreement which would obligate the Borough.** On October 3, 2019, the Borough's other affordable housing attorney, Jeffrey Surenian, wrote to the Court that the purpose of the July 10 meeting was to **"eliminate any possible perception that the authorization to sign an agreement or adopt an ordinance was a rubber stamp procedure where the public's concerns would be meaningless."** See link to the October 3, 2019 Surenian Letter at <https://ecfrg.org>.

**8. There is no evidence that there was any effort to push through a settlement agreement.** There is a proposed procedural memorandum that lays out how both a settlement agreement and necessary amendments to Borough zoning ordinances can be accomplished, allowing for full public input on both related actions, by overlapping the timelines instead of making them sequential. New Jersey law sets forth the detailed procedure for amending a zoning ordinance, which includes introduction at a public meeting, referral to the Planning Board for review and recommendation, and a public hearing with written published notice. Following the public hearing, the zoning ordinance amendment may be adopted. Approval of a settlement agreement requires only that it be adopted at a public meeting.

**9. The Special Master, the expert appointed by the Court, determined that the affordable housing obligation of the Borough is 143 units, almost twice the 77 units proposed by the Borough in December 2018. The Court repeatedly stated that a defect in the Borough Plan was the failure to include the 800 Sylvan Avenue site.** In its August 27 decision, the Court found that the 77 units of affordable housing proposed to be built by the Borough on Hudson Terrace was an insufficient number. The Court specifically faulted the Borough's 2018 Plan because it conspicuously did not include any housing at 800 Sylvan Avenue. One of the reasons cited by the Court for the withdrawal of immunity from builder's remedy lawsuits was the failure to include the property at 800 Sylvan Avenue in the 2018 Borough Plan.

**10. The impact on our home values and taxes is not known.** If the Borough were to build its own 143 units of 100% affordable housing, our property taxes could increase to pay for land acquisition, demolition, construction and annual operating deficits, as well as costs related to the construction of a new Police Station. There would no tax revenue generated from a Borough-owned project. On the other hand, a private developer, such as Normandy, would build and pay for the required affordable housing on its own land **AND** also pay substantial property taxes to the Borough. The downside is that for every unit of affordable housing that a developer builds, the developer is authorized to build up to 4 units of market rate housing.

**11. Under the most recent Court decision, the Court, and not the Mayor and Council of Englewood Cliffs, will decide how many affordable housing units are required and where they will be built.**

**(SEE COMMENTARY ON NEXT PAGE)**

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## **THE BOROUGH IS NOW IN LITIGATION FIGHTING 800 SYLVAN**

Commentary: EC for Responsible Government supports the efforts of the Mayor and Council to reverse the Court's revocation of our immunity from builder's remedy lawsuits, and to restore the Borough's right to develop its own Affordable Housing Plan. The loss of immunity from builder's remedy lawsuits means the Borough is now exposed not only to Normandy's (800 Sylvan's) new builder's remedy lawsuit, but to that of any developer who wants to construct lucrative high-density residential housing in areas currently zoned for corporate or commercial use, or who seeks to build high-density housing in an area currently restricted to single family homes. The Court found that Normandy has already met two of the three required legal conditions for a successful builder's remedy lawsuit, which it filed on August 30, 2019.

By losing the ability to develop its own Affordable Housing Plan, the Borough has lost the right to determine where affordable housing will be built in Englewood Cliffs and who will build it. The Court observed that the Borough's latest Affordable Housing Plan does not provide for any affordable housing at 800 Sylvan Avenue, and stated that the failure to include the 800 Sylvan Avenue site is a defect in the Borough's Plan. The Court said it was apprehensive that without a builder's remedy, the 800 Sylvan Avenue property will go the way of the former Prentice Hall site (which is now the site of the new LG USA Headquarters). In 1997, the Borough refused to rezone the Prentice Hall site for affordable housing and it has remained a corporate site.

Affordable housing is the Borough's obligation under the State Constitution. The New Jersey Supreme Court has affirmed at least four times since 1975 that every community must provide its fair share. No governor or legislature has changed the law. Not Kean. Not Florio. Not Christie. Not Murphy. Unfortunately, builder's remedy relief was designed to encourage affordable housing through private profit incentives. The law turns a blind eye to the impact on schools, infrastructure, taxes, traffic, or quality of life. That is why 90 percent of the communities in the state that faced affordable housing litigation settled their obligation rather than risk a Court order.

EC for Responsible Government cautions residents not to be misled or given unrealistic hope by the political rhetoric of this election season. Signing petitions may make residents feel empowered, but petitions will not change the state's affordable housing law or affect the Court's decisions in the ongoing litigation. Residents should also not expect that Normandy will be deterred by expensive or lengthy litigation. Since 1996, Normandy has invested over \$2.6 billion in institutional capital. It stands to make an estimated \$100 million profit from a dense residential project at 800 Sylvan Avenue. From the viewpoint of Normandy, this action is only about making money, not the public good or concern for the disadvantaged.

The Borough will continue to wage a costly legal battle in Court, but the Mayor and Council must also work together to find a solution that the Court will accept. The Borough is committed to defending our rights, but no one has proposed an alternative to litigation or to the abandoned Memorandum of Understanding. Political tirades which express personal beliefs, and allegations of corruption targeted at elected officials and others, are counterproductive and damage the Borough's credibility and reputation. Our elected officials owe the community their best efforts, not self-serving political rhetoric which does nothing to advance the Borough's legal position or protect the community we love.