

# *EYE ON THE CLIFFS*

EC for Responsible Government

Website: <https://ecfrg.org>

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## **AFFORDABLE HOUSING LITIGATION UPDATE**

Just over one year ago, at the Public Hearing on July 10, 2019, the Borough's Affordable Housing Attorney, Jeffrey Surenian, advised the public that "the risks of proceeding to trial were overwhelming." Despite his warning, residents urged the Mayor and Council to continue to litigate to stop the proposed housing development at 800 Sylvan Avenue.

As of today, after one year of litigation, 800 Sylvan has not been stopped. Instead of the 400 residential units it had agreed to under the terms of the Memorandum of Understanding (MOU), 800 Sylvan is now authorized to build 600 units. The court has further ordered the Borough to provide an additional 174 affordable housing units. Construction by the Borough of these additional units could cost as much as \$45 million. Construction by private developers, on the other hand, could generate as many as 874 new residential units, in addition to the 600 units approved at 800 Sylvan Avenue. The potential impact of so many new homes on Borough services and the schools is staggering.

### **COURT RULES THAT THE BOROUGH MUST PROVIDE 174 AFFORDABLE HOUSING UNITS IN ADDITION TO 167 AFFORDABLE HOUSING UNITS AT 800 SYLVAN AVENUE**

**January 17, 2020:** New Jersey Superior Court Judge Farrington found the Affordable Housing Plan submitted by the Borough to the court in December 2018 to be "constitutionally non-compliant" and deficient. The court directed the Borough, by April 16, 2020, to revise its zoning ordinances to permit 174 units of affordable housing, including the 57 units at Hudson Terrace, in addition to 167 units at 800 Sylvan Avenue. The court stated that it would consider voiding all the Borough's zoning ordinances if the Borough failed to comply with this court order.

The Borough Plan was to build 57 affordable housing units in the vicinity of the Police Station and Borough Hall along Hudson Terrace. Residents had hoped that the Borough

Plan would be sufficient to meet the Borough's affordable housing obligation and that no additional residential housing would be required at 800 Sylvan Avenue. The court did not agree. The court ruled that the Borough's obligation would not be met by building only 57 affordable housing units. In a 131-page opinion, the court found that the current affordable housing obligation of the Borough is **174** affordable housing units. In addition, the court ruled that up to an additional 167 affordable housing units could be built at 800 Sylvan Avenue. <https://ecfrq.org>

In determining how many affordable housing units must be built, the court evaluated each parcel of vacant land in the Borough to determine how many units of affordable housing could realistically be built in Englewood Cliffs. The court also factored in 136 units which it attributed to the site of the new LG Headquarters.

The court noted that by not reaching a settlement with the owners of 800 Sylvan Avenue and the Fair Share Housing Council (FSHC), the Borough forced the court to determine how the Borough should satisfy its affordable housing obligation. Judge Farrington took issue with the Borough's refusal to include the 800 Sylvan Avenue property in its Affordable Housing Plan.

In 2019, the Borough had attempted to reach a settlement with 800 Sylvan and FSHC, the terms of which were set forth in a confidential MOU. Certain details of the MOU were described to residents at a Public Meeting on July 10, 2019.

### **COURT ORDER compared to the abandoned MOU/SETTLEMENT**

<b>Affordable Housing Units</b>	<b>Court Order</b>	<b>MOU/ Settlement</b>	<b>Difference</b>
<b>Approved for 800 Sylvan Avenue</b>	167	80	+ 87
<b>Additional Units required to be built</b>	174	15	+ 159
<b>Affordable Units at 20-32 Sylvan and 4 Bayview Avenues</b>	6	-	+ 6
<b>Total Affordable Housing Units required to be built in Englewood Cliffs</b>	<b>347</b>	<b>95</b>	<b>+252</b>

As shown above, if the Borough had agreed to a settlement, the total affordable housing units required would have been limited to 95. However, following the July 10, 2019 Public Meeting and at the urging of residents, the Borough decided to continue to litigate, instead of approving the MOU. The Borough is now faced with an obligation that has increased from 95 to as many as 347 affordable housing units.

Approval of the MOU by the Council would have been the first step required to proceed to a final settlement agreement. The settlement agreement would have been subject to multiple public hearings on proposed new zoning ordinances, a public fairness hearing, and the court's final approval.

A settlement would also have significantly limited the possibility of any additional high-density residential construction in the Borough until at least 2025. Over 300 communities, 90 percent of the affected towns in New Jersey, have settled their affordable housing obligations rather than litigate.

## **THE PLAN TO CONSTRUCT 600 UNITS AT 800 SYLVAN AVENUE, INCLUDING 120 AFFORDABLE HOUSING UNITS, IS APPROVED**

**February 12, 2020:** In its Builder's Remedy lawsuit, 800 Sylvan sought approval to build 600 units on its property, including 120 affordable housing units. In its January order, the court had approved a total of 835 units for 800 Sylvan Avenue, including 167 affordable housing units. Notwithstanding the court's approval of a larger number of units, 800 Sylvan petitioned the court for significantly fewer units than the court had attributed to the 800 Sylvan site. On February 12, the court approved 800 Sylvan's reduced plan for 600 units. <https://ecfrq.org>



Architect's rendering of 600 Unit site plan for 800 Sylvan Avenue apartment houses and townhouses.

The plan for 800 Sylvan Avenue, as approved by the court, includes:

- ✚ 520 market rate rental apartments, including 120 affordable housing units.
- ✚ 80 market rate 3-bedroom townhouses.
- ✚ Vehicular entrance onto Floyd Street near the North Cliff School



Architect's rendering of apartment buildings proposed to be constructed at 800 Sylvan Avenue.

*(Source: Senlac Ridge Partners website. 800 Sylvan Avenue, which had been owned by Normandy Real Estate Partners, is now owned by Senlac Ridge Partners).*

## **COURT TAKES AWAY ZONING AUTHORITY FROM PLANNING BOARD. SPECIAL HEARING OFFICER APPOINTED**

**April 17, 2020:** Court strips Englewood Cliffs Planning Board of powers.

In response to the Borough's failure to comply with the court's January 17, 2020 order to revise its zoning ordinances to provide for 174 units of affordable housing (in addition to 167 units at 800 Sylvan Avenue), the court removed jurisdiction and decision-making authority regarding zoning, land use, site plan and subdivision approval from the Englewood Cliffs Planning Board, and voided all zoning ordinances in the Borough until the court orders otherwise. <https://ecfrq.org>

In place of the Englewood Cliffs Planning Board, the court appointed Retired Judge, Hon. Maurice J. Gallipoli, as Special Hearing Officer, to act on zoning and land use matters including rezoning and site plan approval for the 800 Sylvan Avenue residential project. Jurisdiction for renovations to existing homes remains with the Planning Board.

### **SPECIAL MASTER AND SPECIAL LEGAL COUNSEL DIRECTED TO DEVELOP A 174 UNIT AFFORDABLE HOUSING PLAN**

**June 8, 2020:** The Court orders Special Master, Mary Beth Lonergan, and Special Master/Counsel, Leslie London Esq., to develop and begin to implement an affordable housing plan for Englewood Cliffs that will yield 174 affordable housing units in addition to the 120 units approved at 800 Sylvan Avenue and the 6 units approved on the properties at 20-32 Sylvan and 4 Bayview Avenue in the southern part of Sylvan Avenue. Their work is to be finalized by December 31, 2020. <https://ecfrq.org>

They were directed by the court to:

1. Seek developers for both the Borough site (along Hudson Terrace) and the possible development of **another** 100% affordable housing site at a different location.
2. Find additional sites within the Borough that might be redeveloped with an affordable housing component and seek private developers to build on these sites. (*State law permits a private developer to construct four market rate units for each affordable housing unit that is built*).
3. Propose zoning changes, throughout the Borough, necessary to facilitate the construction of 174 new units on the sites they identify.
4. Determine if deed restrictions on the Borough site at Hudson Terrace or other fiscal or physical impediments, will impair development of any of the 57 affordable housing units the Borough proposed to construct on that site.

## **BOROUGH FILES MOTION TO RECONSIDER**

The Borough has been prevented from appealing the court orders because a “final” judgment is required for an appeal to proceed to the next judicial level. None of the court orders are “final” judgments.

Accordingly, on June 29, the Borough filed a Motion to Reconsider which seeks to have Judge Farrington render a “final” judgment. The Borough’s Motion will be heard in September. <https://ecfrg.org>

### **New Jersey law does not permit the courts to compel a town to spend its money to build affordable housing**

In its Motion, the Borough’s primary legal argument is that the court’s decision to compel the Borough to build 174 new affordable housing unit exceeds the court’s authority. New Jersey law does not permit the courts to compel a municipality to spend its money to build affordable housing. The New Jersey Fair Housing Act, the statute which authorizes affordable housing, specifically states that municipalities can be “*encouraged, but not mandated to expend their own resources to help provide low and moderate income housing.*”

The Motion argues that the cost of 174 borough financed affordable housing units could be as much as \$20 to \$45 million, and there is no basis in the law to compel the Borough to spend its own money to sponsor 100 percent affordable housing.

### **The Borough cannot fully satisfy the 174 unit affordable housing obligation**

The Motion also argues that it is not possible to fully satisfy the 174 unit obligation through traditional inclusionary development because to do so could result in a total of up to 1,504 new residential units (comprised of 874 units to generate 174 affordable units, in addition to the 600 units to generate 120 affordable units at 800 Sylvan Avenue, and the 30 units to generate 6 affordable units at 20-32 Sylvan and 4 Bayview Avenues). Englewood Cliffs currently has approximately 1,924 residential units. The number of homes in the community would almost double. As stated in the Borough’s Motion, the impact on municipal services and schools would be “crushing”.

## **TAXPAYER COST OF LITIGATION ALREADY EXCEEDS \$2.7 MILLION**

In 2019 and 2020, the Borough’s affordable housing litigation expenses exceed \$2.7 million. Of this amount, more than \$1.4 million in expenditures have been incurred since July 10, 2019, when the Borough opted not to approve the MOU and instead to continue to litigate. The Borough’s 2020 Adopted Budget includes \$1.325 million for affordable housing litigation. The \$1.325 million is an estimate.

## **BOROUGH COUNCIL TO EXPLORE POSSIBILITY OF SETTLEMENT NEGOTIATIONS WHILE IT CONTINUES TO VIGOROUSLY LITIGATE**

The Borough's efforts to achieve a satisfactory resolution of its affordable housing obligation through litigation have thus far been unsuccessful. Faced with a succession of unfavorable and adverse court decisions, as well as the ever-increasing costs of litigation, the Borough Council announced at its June Meeting that it had decided to explore the possibility of settlement with 800 Sylvan and FSHC. The Council also affirmed its commitment to continue the litigation, stating that the two paths can be pursued simultaneously.

Attorney Albert Wunsch, who was born and raised in our community and whose family has lived in Englewood Cliffs since 1854, has been authorized by the Council to explore the possibility of a settlement with 800 Sylvan and FSHC. The Borough's affordable housing attorney, Jeffrey Surenian, has informed Judge Farrington of Wunsch's appointment and the council's desire to see the case settle if possible.

**COMMENTARY:** *The Borough is substantially worse off today than it was one year ago when the decision was made to abandon a potential settlement and continue to litigate. In 2015, when the litigation began, the Affordable Housing obligation of the Borough was only 9 units. Sylvan Avenue was lined with corporations and businesses.*

*Now, 600 residential units at 800 Sylvan Avenue, including 120 affordable housing units, have been approved by the court, and the court requires an additional 174 affordable housing units to be built in the Borough. The court has also ruled that the court, and not our local Planning Board, will evaluate and rule on future zoning and land use applications, voiding the zoning of the Borough.*

*Englewood Cliffs is unfortunately perceived as having a long history of exclusionary zoning. No New Jersey court will exempt Englewood Cliffs from the affordable housing laws and requirements that apply to every other municipality in the state. Even if the Borough succeeds on appeal in reversing parts of Judge Farrington's over-reaching orders, no court can overlook the fact that the Borough has no affordable housing and that there is a developer with a 20 acre site at 800 Sylvan Avenue who is ready, willing and able to build 120 affordable housing units.*

*Dense residential development is coming to 800 Sylvan Avenue. Continued litigation will most significantly determine only how many of the 174 additional affordable housing units must be built in the Borough. It is time for the Mayor and Council to vigorously pursue a possible settlement with the Fair Share Housing Center and 800 Sylvan, in order to reduce the number and limit the impact of the amount of housing units that may otherwise have to be built in Englewood Cliffs to comply with a court order.*

*The Borough's elected officials should not gamble on the number of affordable housing units that a dispassionate court will eventually order. The risk to our community is too great. Although it may not be a popular alternative, a reasonable settlement similar to the MOU, may be the best result that Englewood Cliffs can hope for.*

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