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Reply to: Oakland Office

February 27, 2023

Via email to filings-clmand@treas.state.nj.us
jsweeneylaw@comcast.net
The Honorable John A. Sweeney, A.J.S.C. (Ret.), Chairman
New Jersey Council on Local Mandates
135 West Hanover Street, 4th Floor
P.O. Box 627
Trenton, New Jersey 08625-0627

Re: In the Matter of a Complaint Filed by the Borough of Leonia and a Complaint Filed by the Borough of Fort Lee (Consolidated)
Complaint No. COLM 0011-22

Dear Judge Sweeney:

Please accept this letter in lieu of a formal brief on behalf of Claimants, Borough of Leonia and Borough of Fort Lee, in opposition to the motion to dismiss the consolidated case filed by the State of New Jersey in the above-captioned matter.

PLEADING SUMMARY

On August 5, 2022, Governor Murphy signed L. 2022, c. 92 ("the Act") into law. N.J.S.A 40A-1 to -3. In essence, the Act requires the owners of a business, owners of a rental unit or units, and the owners of a multi-family homes of four or fewer units, one of which

is owner occupied, to maintain liability insurance in a minimum amount. N.J.S.A. 40A:10A- 1. The Act further requires the property owner to annually register a certificate of insurance with the municipality and the municipality to issue a "certificate of registration." N.J.S.A. 40A:10A-2. The Act provided no funding from the State to support the enforcement of the Act by municipalities. Instead, the Act states that municipalities may enact an ordinance establishing a "reasonable administrative fee" for the municipality's registration of each certificate of insurance submitted to it as required by the Act and permits summary proceedings to collect fines between $500 and $5,000 against owners who do not comply with the Act. N.J.S.A. 40A:10A-2(b). This provision took effect November 3, 2022.

The Act imposes an unfunded mandate upon the Claimants and all municipalities since the "administrative fee" authorized in the Act designed to allow the municipality to recover costs essentially operates as annual tax on all business owners and owners of rental units and multifamily properties. In addition, the costs to ensure compliance with the Act, including maintaining an insurance registry and dedicating resources to monitoring and enforcing compliance on an annual basis, far exceeds the permitted fees and penalties under the

Act so as to make these funding sources completely illusory. Accordingly, the Act constitutes an unfunded mandate and the Council on Local Mandates should deny the State's motion to dismiss Leonia and Fort Lee's complaints.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Act requires all owners of a business and all owners of a rental unit or units, to maintain liability insurance for negligent acts and omissions in an amount of no less than $500,000 for combined property damage and bodily injury to, or death of one or more persons, in any one accident or occurrence. N.J.S.A 40A:10A- 1(a). In addition, the Act requires that all owners of a multifamily home which contains four or fewer units (one of which is owner-occupied), shall maintain liability insurance for negligent acts or omissions in an amount of not less than $300,000. N.J.S.A 40A:10A-1(b). Under the Act, those business owners and rental unit owners must annually register a certificate of insurance with the municipality demonstrating compliance with the Act. N.J.S.A 40A:10A-2(a). In turn, the municipality is to issue a certificate of registration. N.J.S.A. 40A:10A-2(b). Further, the municipality "may . . . establish a reasonable administrative fee for the certificate of registration" required by the Act. N.J.S.A 40A:10A-2(b). Finally, the municipal

governing body may collect, through a summary proceeding, a fine of not less than $500 but no more than $5,000 against an owner who fails to comply with the provisions of the Act. Ibid.

On or about November 22, 2022, the Borough of Leonia filed a complaint with the Council on Local Mandates that "demands judgment by the Council" that the Act is an unfunded mandate in violation of N.J. Const. art. VIII, § 2, ¶ 5 and N.J.S.A. 52:13H-2. Leonia alleges that the Act imposes "an undue burden on the municipality by requiring the borough to create and maintain an unfunded business registry." (Leonia Complaint, section 3). The complaint alleges that the State "did not take into account the funds necessary to create and maintain a business insurance registry which cost will now be a burden on the municipality." Ibid. Finally, the complaint alleges expenditures to be incurred by Leonia in the amount of $3,213 in 2022 and $5,400 in 2023 and 2024. (Leonia Complaint, section 4).
On December 29, 2022, Fort Lee filed a complaint also alleging that the Act is an unfunded mandate "because it does not authorize resources, other than property tax, to offset the additional direct expenditures required for its implementation." (Fort Lee Complaint, section 2). Similar to Leonia, Fort Lee alleges that the Act imposes "an undue burden on the municipality by requiring the borough to

create and maintain an unfunded business registry.” (Fort Lee Complaint, section 3). Fort Lee also alleges anticipated expenditures to meet the requirements of the Act in the amount of “$35,000 (salary and benefits) for time devoted by administrative assistant annually.” (Fort Lee Complaint, section 4). The Leonia and Fort Lee Complaints were consolidated into one matter by order of the Council date January 23, 2023.

The State filed a motion to dismiss the Claimants’ complaints.

ARGUMENT

STANDARD OF REVIEW

The Act is an unfunded mandate in violation of N.J. Const. art. VIII, § 2, ¶ 5 and N.J.S.A. 52:13H-2 since it operates essentially as an additional property tax on all business owners and all owners of rental and multifamily units by requiring the annual payment of an administrative fee associated with registering a certificate of insurance. In addition, the Act is an unfunded mandated because the funding mechanisms set forth in the Act are illusory because they cannot possibly cover the significant costs which will be incurred by the Claimants and all other municipalities to maintain an insurance registry and ensure compliance on an annual basis.

Council review is guided by a December 7, 1995 constitutional amendment, which states:

> any provision of law enacted on or after July 1, 1996, and with respect to any rule or regulation issued pursuant to law originally adopted after July 1, 1996, except as otherwise provided herein, any provision of such law, or of such rule or regulation issued pursuant to a law, which is determined in accordance with this paragraph to be an unfunded mandate upon . . . counties . . . because it does not authorize resources, other than the property tax, to offset the direct expenditures required for the implementation of the law or rule or regulation, shall, upon such determination cease to be mandatory in its effect and expire.
> N.J. Const. art. VIII, § 2, ¶ 5(b).

An unconstitutional, "unfunded mandate" exists when: (1) the law imposes a "mandate" on a unit of local government; (2) direct expenditures are required for the implementation of the law's requirements; and (3) the law fails to authorize resources, other than the property tax, to offset the additional direct expenditures on the unit of local government. *See* In re Ocean Twp. (Monmouth Cnty.) & Frankford Twp., Council on Local Mandates, (August 2, 2002), available at http://www. state.nj.us/localmandates/decisions.html.

The Local Mandates Act, N.J.S.A. 52:13H-1 to -22, created the Council to resolve any dispute regarding whether a law or rule or regulation issued pursuant to a law constitutes an unfunded mandate.

See N.J.S.A. 52:13H–12. The Council evaluates whether a challenged rule, regulation or statutory provision constitutes an unfunded mandate upon the claimant county, municipality or school district, or multiple counties, municipalities or school districts. Ibid.; In re Highland Park Bd. of Educ. & Highland Park, Council on Local Mandates, (January 31, 2003), available at http://www.state.nj.us/localmandates/decisions.html (*quoting* N.J.S.A. 52:13H–12). This safeguard aligns with the constitutional provisions and Local Mandates Act, which are specifically designed "to prevent the State government from requiring units of local government to implement additional or expanded activities without providing funding for those activities." See N.J.S.A. 52:13H-1(b).

With regard to the standard applied to the State's Motion to Dismiss, the Council discussed the standards it would use in considering requests for summary disposition (dismissal or summary judgment). The Council noted the judicial standard of refusing summary judgment where " 'the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.' " Highland Park I at 12, *citing* Brill v. Guardian Life Ins. Co., 142

N.J. 520, 523 (1995). The Council also stated that it would proceed "with great caution" when considering requests for summary disposition, because its rulings are not subject to judicial review. Highland Park I at 13. Accordingly, the State's Motion to Dismiss can only be granted if the Council concludes that no further factual information would be relevant to its decision. In re Ocean Twp. (Monmouth Cnty.) & Frankford Twp. at 5.

THE ACT OPERATES AS AN ADDITIONAL PROPERTY TAX ON THE VAST MAJORITY OF PROPERTY OWNERS AND IS, THEREFORE, AN UNCONSTITUTIONALLY UNFUNDED MANDATE

The State has relied heavily on the Council's decision in Ocean Township (Monmouth County) and Franklin Township to support the conclusion that an administrative fee is an appropriate source of funding. However, that decision can easily be distinguished from this matter since the application of the Act in this matter is far more wide ranging that the law at issue in Ocean Township (Monmouth County) and Franklin Township.

In that decision, the Council granted a motion to dismiss the complaint, finding there was no unfunded mandate where an amendment to the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-18, required an application for a zoning permit be granted or denied within ten business days. Ocean Township (Monmouth County) and Frankford

Township at 10. In coming to this determination, the Council distinguished the law at issue from "a municipality-wide "assessment" to defray the cost of a mandated capital facility" since:

> It is triggered by an individual property owner's decision to undertake some type of development activity, it is charged only to that individual and, because the fee is limited to the "reasonable . . . costs" of issuing the requested permit, it is charged in exchange for something of specific value to the individual in question. Moreover, although a property tax is assessed yearly, it is completely improbable that any single property owner would have occasion to request zoning permits for the same property on a recurring basis.
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> Ocean Township (Monmouth County) and Frankford Township at 8.

However, these differences do not apply with regard to the law at issue in this matter. In this matter, the fee is not triggered by an individual property owner's decision to undertake some activity for which the property owner will receive something of value. Instead, it applies to **all** business owners, **all** owners of rental units and **all** multifamily property owners. In addition, nothing of value is received by the property owners such as a timely permit which allows improvement of their property. Moreover, unlike the fee in Ocean Township (Monmouth County) and Frankford Township, which is

extremely unlikely to be assessed on a recurring basis, the fee in this matter will **necessarily** be assessed every year.

The Council in Ocean Township (Monmouth County) and Frankford Township noted that these differences were "crucial for purposes of the State's Motion to Dismiss" and, as such, the "fee is not the functional equivalent of a general property tax… does not look like a property tax, it does not operate like one either; it is not a disguised mechanism for mandating a financial burden on an entire community, the abuse sought to be prevented by the Constitution." Ibid. The Council further noted that

> As Claimants themselves note, §18 authorizes a "user fee," meaning that it is paid only by those individuals who "use" the permit review system. Thus, by definition, §18 does not authorize a charge to be spread uniformly across all of the property-owning taxpayers of the municipality. Rather, it authorizes a payment for a specific service rendered only to those property-owners who need (and benefit from) the specific work done by the municipal employees involved.
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> Ibid.

In this matter, however, no specific work is being done by the municipality for specific individuals. Instead, the charge is spread across a wide swath of property owners, which, in certain municipalities will make up nearly all of the property owners, is

charged on an annual basis and provides nothing of value to property owners.

The Council in Ocean Township (Monmouth County) and Frankford Township stated that it is obligated to enforce the “property tax” clause of the Constitution indirectly as well as directly, should there be local revenue sources that are functionally the equivalent of a property tax even though denominated something else. Ibid at 7-8. Clearly, the Council is required to do so in this matter in light of the stark differences between the fee which was approved in that matter and the fee which is necessary to fund the requirements of the Act in this matter.

Clearly, unlike the administrative fee in Ocean Township (Monmouth County) and Frankford Township, the fee in the Act operates as a property tax since it has a wide ranging impact on property owners, does not provide such owners anything of value and must be paid on an annual basis. As such, the Act is an unfunded mandate in violation of the “property tax” provision of the Constitution. N.J. Const. art. VIII, § 2, ¶ 5(b). Accordingly, the State’s Motion to Dismiss must be denied.

THE ACT REPRESENTS AN UNFUNDED MANDATE BECAUSE THE FUNDING PROVISIONS THEREIN ARE SO INSUFFICIENT AS TO BE ILLUSORY

The method of funding provided by the Legislature in the Act are so insufficient in light of the extensive costs to municipalities to monitor compliance with the Act and enforce its provisions, that it must be considered illusory.

While N.J.S.A 52:13H12(a) states that the Council "shall not have the authority to determine whether the funding of any statute . . . is adequate," the Council addressed that language by stating:

> there would be little substance in the constitutional "State mandate/State pay directive" if the Legislature could avoid it by expressly electing to provide a specified partial amount of funding and leave an acknowledged balance of the cost to be shouldered by the local units. As stated in [other matters], the Council cannot allow the constitution "to be frustrated by giving blind deference to the Legislature's method of funding the costs of a mandate, if that method is seriously flawed to the point of being illusory."
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> In re Complaint Filed By Deptford Township, Council on Local Mandates, February 17, 2016, available at https://www.state.nj.us/localmandates/decisions/Deptford-colm-0003-15.html (citations omitted).

In addition, in the Complaint of Shiloh Borough, the Council held that the $12.5 million mandate was "unfunded" because it was only

partially offset by the $5 million appropriation based on this same reasoning. Complaint of Shiloh Borough Council on Local Mandates, December 12, 2008, available at https://www.state.nj.us/localmandates/decisions/12-12-08ShilohOpinion.html.

Since the Act requires a municipality to ensure compliance by all business owners, all owners of rental units and all owners of multi-family units on an annual basis, which will necessitate creating an insurance registry, an administrative fee is wholly insufficient to cover the municipalities' costs. In addition, since municipalities will incur additional costs to undertake enforcement actions for non-compliance, the fines permitted under the Act will only defer such enforcement costs and not the costs associated with maintaining compliance on an annual basis.

The Claimants have set forth estimates regarding the costs incurred by the municipalities under the Act. The State has not directly addressed those figures in its Motion to Dismiss, nor has it submitted any figures of its own. Moreover, it has not offered any explanation of, or justification for, the Legislature's provisions in the Act to fulfill its funding obligation. Rather, it presents only general statements that the potential costs "will likely vary from

one municipality to another" and that "whatever the real costs are, they may be recovered through… the collection of an administrative fee." The State ignores the fact that there a limits to the amount of funds that can be generated by a "reasonable administrative fee" which is especially pertinent when, as acknowledged by the State, the costs may vary between municipalities. This potential for a significance difference between the costs and the potential revenue generated under the Act compels the conclusion that the authorized funding is constitutionally inadequate

It must also be noted that, to the extent the Council requires additional factual information regarding the potential costs and revenue related to enforcing the Act, the State's Motion must be denied. *See* In re Ocean Twp. (Monmouth Cnty.) & Frankford Twp. at 5. In this matter, the State's Motion to Dismiss was filed shortly after the Complaints were filed and there has been no opportunity for additional factual information to be provided or for a hearing to be conducted. Additional information regarding the costs of compliance with the Act as well as information regarding the amount of revenue that can be expected from the administrative fees and fines could assist the Council in determining whether the funding provisions of the Act are illusory. In such circumstances, the Council must

proceed with “great caution” before granting a summary motion for dismissal.

CONCLUSION

In light of the foregoing, the State’s Motion to Dismiss must be denied.

Respectfully Submitted,
s/ Brian M. Chewcaskie___________

Brian M. Chewcaskie

CC: George N. Cohen
Deputy Attorney General