

IN THE MATTER OF A COMPLAINT FILED BY

ROXBURY TOWNSHIP

Council on Local Mandates

Argued June 22, 2011

Decided August 19, 2011

Written Opinion issued December 21, 2011

Syllabus

The Township of Roxbury filed a complaint with the Council on Local Mandates seeking a declaration that N.J.A.C. 7:14A-15.15, a regulation promulgated by the New Jersey Department of Environmental Protection, constitutes an unfunded mandate insofar as it requires the municipality to act as the enforcement agent to ensure compliance with DEP requirements that (1) outside dumpsters and other refuse containers exposed to stormwater are covered at all times and (2) existing private catch basins are retrofitted in conjunction with any repair or reconstruction of private property.

On the parties' cross-motions for judgment, the Council held that the municipal dumpster-covering obligation is an unfunded mandate and thus void, but that the retrofitting obligation is not an unfunded mandate.

The Council rejects DEP's argument that the municipal enforcement obligations are not unfunded mandates because they are "required to comply with federal laws or rules or to meet eligibility standards for federal entitlements." N.J. Const. Art. VIII, §2, ¶5(c)(1); N.J.S.A. 52:13H-3a. The DEP stormwater control provisions are not federally mandated; DEP has authority to translate broad federal standards into specific pollution control measures and acknowledges that the challenged regulations represent its own determinations as to how best to deal with stormwater discharges. As the Council has held in prior matters, such executive decisions as to how to allocate the costs of a State program are interdicted by the New Jersey Constitution and the Local Mandates Act.

The Council also rejects DEP's arguments that N.J.A.C. 7:14A-15.15 is not an unfunded mandate because (1) it imposes similar obligations on non-government entities (see N.J.Const. Art. VIII, §2, ¶5(c)(2); N.J.S.A. 52:13H-3b)), (2) Roxbury has an essentially similar Garbage and Refuse Ordinance, (3) the costs of enforcement could be paid from sources other than the local property tax, and (4) DEP has ordered no "particular manner" of enforcement.

Finally, the Council finds that enforcement of the dumpster-cover ordinance will entail additional municipal expenditures, but that enforcement of the retrofitting ordinance will not result in any additional expenditures. Accordingly, the N.J.A.C. 7:14A-15.15 directive concerning the adoption and enforcement of the dumpster-cover ordinance is declared to be an unfunded mandate and that concerning the adoption and enforcement of the retrofitting ordinance is declared not to be an unfunded mandate.

Council Chair John A. Sweeney and Members Leanna Brown, Timothy Q. Karcher, Nirmal Mulye, Jack Tarditi and Janet L. Whitman join in the opinion. Members John Rafferty, James Toolen and Sharon L. Weiner did not participate in the proceedings or the decision.

Fred Semrau argued the cause for complainant Township of Roxbury (Dorsey & Semrau, attorneys).

Jane F. Engel, Deputy Attorney General, argued the cause for respondent New Jersey Department of Environmental Protection (Paula T. Dow, Attorney General, attorney)

OPINION

I

On September 27, 2010, the Township of Roxbury filed a complaint with the Council on Local Mandates seeking a declaration that N.J.A.C. 7:14A-15.15, a regulation promulgated by the New Jersey Department of Environmental Protection (DEP), constitutes an unfunded mandate insofar as it requires the municipality to act as the enforcement agent to ensure compliance with DEP requirements that outside dumpsters and other refuse containers exposed to stormwater are covered at all times and that existing private catch basins are retrofitted in conjunction with any repair or reconstruction of private property.

By letter of October 8, 2010, the Council notified the appropriate State officials of the filing of the complaint, directed the Attorney General to file an answer on behalf of the State and fixed a schedule for the further proceedings. The Attorney General answered on behalf of the DEP, the parties ultimately cross-moved for judgment, with full briefing, and the Council heard oral argument on June 22, 2011. On October 13, 2011 the parties were informed that the Council found that (1) the municipal enforcement obligation with respect to the covering of refuse containers constituted an invalid unfunded

mandate and (2) the municipal enforcement obligation with respect to retrofitting private catch basins was not an unfunded mandate. This opinion explains and memorializes those rulings.

II

N.J.A.C. 7:14A-15.15 is one of a number of regulations implementing the DEP's Pollution Discharge Elimination System (NJPDES) stormwater regulation program. That program is conducted pursuant to a federal-state system that requires municipalities to obtain DEP approval for discharges from municipal storm water systems. See N.J.S.A. 58:10A-1 et seq.; 33 U.S.C. §1251 et seq.; 42 U.S.C. §300f et seq. In 2004, DEP issued to Roxbury Township a MS4 Tier A general permit allowing, and fixing standards for, the discharge of pollutants from its municipal storm sewer system.

That permit was renewed as of March 1, 2009, but with several new conditions, two of which provoke this proceeding. Part I of the new permit directs that the municipality "shall adopt and enforce" ordinances requiring (1) "dumpsters and other refuse containers and other refuse containers that are outdoors or exposed to stormwater to be covered at all times" (Section F.5.f) and (2) "retrofitting of existing storm drain inlets to meet the standard [attached] which are in direct contact with repaving, repairing . . . , reconstruction, resurfacing . . . , or

alterations on property not owned or operated by the municipality" (Section F.5.h).

Roxbury adopted the ordinances thus required, but then filed its present complaint, which challenges N.J.A.C. 7:14A-15.15 insofar as it requires the municipality to "adopt and enforce" ordinances implementing those new terms of the 2009 permit. Roxbury estimates its additional direct expenditures for enforcement of the dumpster ordinance at \$36,000 and for enforcement of the retrofitting ordinance at \$10,200.

III

The Council rejects DEP's argument that the municipal enforcement obligations imposed by N.J.A.C. 7:14A-15.15 are not unfunded mandates because they "are required to comply with federal laws or rules or to meet eligibility standards for federal entitlements." N.J.Const. Art.VIII, §2, ¶5(c)(1); N.J.S.A. 52:13H-3a.

The authorities cited by DEP do not demonstrate that the stormwater discharge component of the NJPDES is mandated by federal law or regulation. Indeed, DEP suggests in its brief that "a likely consequence" of an adverse ruling in this matter "is the withdrawal of New Jersey from the stormwater discharge component of the Federal NJPDES program as it pertains to counties and municipalities." Moreover, DEP acknowledges that

the federal programs allow DEP to translate broad federal standards into specific pollution control measures and that N.J.A.C. 7:14A-15.15 represents DEP's determination as to how best to satisfy the stormwater discharge component of the NJPDES. DEP has presented neither argument nor authority for the proposition that federal law or regulation requires municipalities to adopt or foot the cost of enforcement of such ordinances. Nor does DEP argue that imposing the costs of enforcement on municipalities is required to meet eligibility standards for federal entitlements.

Requiring municipalities to adopt and enforce the new terms of the MS4 Tier A general permit thus must be recognized as DEP's autonomous judgment as to how the costs of a State program should be allocated among different levels of government. As the Council recently held in I/M/O Atlantic County (November 16, 2011), that is the very kind of decision that is interdicted by the Local Mandates Act. See also I/M/O Counties of Morris, Warren, Monmouth and Middlesex (December 22, 2006).

IV

The Council rejects the remaining arguments offered by DEP in support of the viability of N.J.A.C. 7:14A-15.15, save one.

Although non-government entities are also subject to DEP requirements governing stormwater discharges, they are not burdened by the ordinance adoption and enforcement obligations

imposed on municipalities; the unfunded mandate exemption for regulations "imposed on both government and non-government entities in the same or substantially similar circumstances" (N.J. Const. Art. VIII, §2, ¶5(c)(2); N.J.S.A. 52:13H-3b) accordingly does not apply.

While Roxbury presently has a Garbage and Refuse Ordinance, it is not fully congruent with N.J.A.C. 7:14A-15.15; moreover, it is subject to amendment or repeal at the discretion of the municipality. The revised regulation concerning dumpsters and other refuse containers must fairly be characterized as a new DEP mandate.

N.J.A.C. 7:14A-15.15 does not authorize municipalities to impose a fee on owners of dumpsters and other refuse containers to offset the costs of the inspections that an enforcement program would necessitate, nor has DEP otherwise demonstrated that such a fee would be lawful and effective. Compare I/M/O Ocean Township (August 2, 2002). Nor is there a sound basis to conclude that that penalties assessed against ordinance violators would suffice to offset the additional municipal costs.

The fact that DEP does not require the mandated ordinances to be enforced in "a particular manner" and that it neither requires nor expects any municipality to hire new enforcement officers does not justify the conclusion that N.J.A.C. 7:14A-

15.15 will result in no additional direct expenditures for Roxbury. Neither DEP nor Roxbury can properly treat the enforcement obligation with benign neglect. With respect to the dumpster ordinance, it can fairly be inferred that enforcement will entail some additional costs. Dumpsters and like receptacles are ubiquitous, easily and inexpensively placed and moved, and subject to frequent and momentary invasions from many sources. Effective enforcement of the new regulation would presumably require frequent surveys of local properties and regular inspections of waste receptacles. DEP's assurance that Roxbury's existing workforce has sufficient free time to do that work is without foundation.

With respect to the retrofitting ordinance, however, the Council finds that Roxbury has failed to show that its enforcement will cause additional direct expenditures for the municipality. As above noted, the retrofitting obligation arises only upon "repaving, repairing . . . , reconstruction, resurfacing . . . , or alterations on [private] property." Projects of that kind are relatively few in number and are ordinarily the subjects of local permits, inspections and approvals of the municipal engineer, building inspector or other local official. N.J.A.C. 7:14A-15.15 requires that the existing municipal oversight of such projects be supplemented only to assure that the clear space in the storm drain inlets is 2

inches high rather than 5 inches. There is no reason to conclude that additional direct municipal expenditures will be required to do that limited task.

* * * *

The Council accordingly holds that (1) the N.J.A.C. 7:14A-15.15 directive that a municipal ordinance be enacted and enforced requiring outside dumpsters and other refuse containers exposed to stormwater to be covered at all times constitutes an unfunded mandate and shall cease to be mandatory in its effect and expire and (2) the N.J.A.C. 7:14A-15.15 directive that a municipal ordinance be enacted and enforced requiring existing private catch basins to be retrofitted in conjunction with any repair or reconstruction of private property does not constitute an unfunded mandate. N.J. Const. Art. VIII, §II, ¶5(a); N.J.S.A. 52:13H-2.