

State of New Jersey Council on Local Mandates Complaint

The form is to be completed and signed by the Claimant's attorney or other authorized representative, identified under Part I (B).

I (A). Information regarding the Claimant (include title if a County Executive or Mayor):

Name of Claimant (and title if applicable):

Bethlehem Township, Hunterdon County

Claimant contact information:

Mailing Address:

405 Mine Road

City:

Asbury

State: New Jersey

Zip Code:

08802

Phone:

9087354107

Fax:

908-735-0485

E-mail address:

clerk@bethlehemnj.org

I (B). Name of person preparing this document, and title or relationship to Claimant (e.g., legal counsel, business administrator, superintendent):

Name:

Michael P. O'Grodnick, Esq.

Title/Relationship:

Township Attorney

Contact information for person identified in Part I (B):

Mailing Address:

56 East Main Street, Suite 301

City:

Somerville

State: New Jersey

Zip Code:

08876

Phone:

9085260707

Fax:

9087258483

E-mail Address:

ogrodnick@centraljerseylaw.com

II. The Complaint:

1. Claimant alleges that the following statute, rule, or regulation is an unfunded mandate in violation of the New Jersey Constitution, article VIII, § 2, ¶ 5 and N.J.S.A. 52:13H-2, because it does not authorize resources, other than the property tax, to offset the additional direct expenditures required for its implementation:

Please see attached addendum.

2. The above-cited statute, rule, or regulation became effective on:

Please see attached addendum.

3. The following is the basis for the claim made herein that the statute, rule, or regulation identified in paragraph II (1) is an unfunded mandate:

Please see attached addendum.

Note: The text provided in paragraph II (3) is to be used for the Pleading Summary published on the Council's web site. If more space is needed, please attach additional sheet(s).

4. State Claimant's estimate of the additional direct expenditures required to implement the statute, rule or regulation identified in paragraph II (1), together with:
- (a) a description of the frequency of the estimated expenses (i.e. annual, monthly), and
 - (b) a specification of the basis for the estimate.

Please see attached addendum.

Note: If more space is needed, please attach additional sheet(s).

5. Does Claimant seek injunctive relief? No ☐ Yes ☒

If yes, on attached sheet(s), provide a description of the nature and extent of imminent irreparable injury that will result to Claimant in the absence of injunctive relief.

6. Claimant attaches:

- ☒ Resolution (of county/municipal governing body or of board of education), which is incorporated herein by reference, *or*
- ☐ Copy of notice of intention to file a complaint provided to governing body.

WHEREFORE, Claimant demands judgment by the Council that the statute, rule, or regulation identified in paragraph II (1) above is an unfunded mandate pursuant to the New Jersey Constitution, Art. VIII, § 2, ¶ 5 and N.J.S.A. 52:13 H-2, and that it shall cease to be mandatory in effect and expire.


[Signature of person preparing this document].

Date: 09172024

Michael P. O'Grodnick, Esq.

Name (typed or printed) of person signing

Title (typed or printed) of person signing

Total number of attached pages:

8

Print Form

ADDENDUM

ADDENDUM

ADDENDUM A

Attachment to Complaint – Paragraph II(3):

Background of Affordable Housing in Bethlehem Township

Bethlehem Township (the “Township”) supports the provision of fair, realistic access to housing for all citizens of the State of New Jersey. The Township does not question the validity of the *Mount Laurel I* or *Mount Laurel II* decisions. The Township does not question the intent of the Fair Housing Act. The Township does not believe the quality of housing should decline with affordability; and, as such, the Township has taken significant steps to promote the development of environmentally conscious, high-quality affordable housing so that citizens of all income levels may live in the Township with dignity.

The Township is a small rural community of roughly 20.8 square miles and has per the 2020 census has a population of 3,745. The Township has no sewer or water utility service. Bethlehem Township is further regulated by the Highlands Act. Bethlehem Township in Hunterdon County has 12,146 acres in the Preservation Area and 1,141 acres in the Planning Area of the Highlands Region.

One recent example of the Township’s commitment to affordable housing is an agreement with Hunterdon County ARC to construct a Group Home in Heritage Park with a 2 to 1 set aside, 12 residents accounting for 24 units. DEP held up the permits, and once DEP issued permits, the ARC lost funding. In 2018, the Township offered an RFP for a group home, but the sole proposal backed out as we could not provide adequate water service, largely as a fire suppression, according to their plans. The Township continues to entertain partners. The Township further agreed to include accessory units to be deed restricted. The Township has offered funding up to \$25,000 per unit for deed restricted accessory units.

Statute at Issue

The Township challenges P.L. 2024, c.2, as same constitutes an unfunded mandate, the costs of which are to be shouldered solely by municipalities. On March 20, 2024, Governor Murphy signed legislation, S. 50/A. 4 (2024), into law, P.L. 2024, c.2 (the “Statute”), which, *inter alia*, amends the Fair Housing Act to abolish the New Jersey Council on Affordable Housing (“COAH”) and establishes new statutory scheme for how municipalities calculate, certify, challenge and implement their affordable housing obligations.

The Township asserts that the Statute will impose direct expenditures upon municipalities without appropriations and will compel municipalities to utilize taxpayer funds to comply with the following, *inter alia*: (1) determine municipal present and prospective need; (2) revise municipal housing element and fair share plan; (3) defend municipal housing element and fair share plan against “exclusionary zoning litigation” in the Affordable Housing Dispute Resolution Program and/or with the Administrative Office of the Courts; (4) obtain a compliance certification; (5) defend exclusionary zoning litigation immunity; and (6) report to the Department of Community Affairs (collectively referred to herein as the “Statutory Obligations”).

Constitutional Obligations

In 1975, the New Jersey Supreme Court ruled that municipalities have a constitutional obligation to provide a realistic opportunity for the construction of their fair share of affordable housing. See Southern

Burlington N.A.A.C.P. v. Mount Laurel, 67 N.J. 151, 174 (1975) (“We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing.”) (known as “*Mount Laurel I*”).

In 1983, the New Jersey Supreme Court upheld the *Mount Laurel I* decision, clarified that only municipalities containing “growth areas” are subject to affordable housing obligations, and created the “builder’s remedy” suit, which encouraged builders to commence litigation against municipalities to defend the constitutional rights of low- and moderate-income households in return for having their properties rezoned for high density multi-family housing which contain an affordable housing element. See Southern Burlington N.A.A.C.P. v. Mount Laurel, 92 N.J. 158, 352 (1983) (“The actual construction of [affordable] housing will continue to depend, in a much larger degree, on the economy, on private enterprise, and on the actions of the other branches of government at the national, state and local level.”) (known as “*Mount Laurel II*”).

In 1985, in response to the *Mount Laurel I & II* decisions, the State Legislature enacted the Fair Housing Act (the “FHA”), N.J.S.A. 52:27D-301 et seq., which provided an alternative administrative process in which municipalities could elect to participate and created COAH. Under the FHA, a municipality that received substantive certification of its affordable housing plan from COAH would be immune from builder’s remedy suits. See N.J.S.A. 52:27D-322 (1985).

From 1987 through 1999, COAH adopted regulations establishing “First Round” and “Second Round” affordable housing obligations for each municipality. From 2004 to 2008, COAH adopted additional “Third Round” rules, which were challenged in the courts and, as a result, in 2008, the FHA was amended. COAH thereafter promulgated draft “Third Round” rules but never formally adopted same and COAH became defunct.

Since 2015, the courts again became the forum for municipal compliance with affordable housing obligations. Under the court-run-process for Third Round compliance, municipalities seeking protection from builder’s remedy suits were required to satisfy the following: (1) prepare and adopt a housing element and fair share plan (“HE&FSP”); (2) file a declaratory judgment action with the court seeking declaration that the HE&FSP was compliant with the New Jersey Constitution; (3) negotiate with Fair Share Housing Center and other intervenors, before a court-appointed Special Master, to reach a settlement agreement; (4) prepare an updated HE&FSP as recommended by the Special Master and ordered by the courts; (5) adopt the updated HE&FSP; and (6) obtain a judgment of compliance and repose from the court.

The *Mount Laurel I* or *Mount Laurel II* decisions and subsequent legal progeny, obligate municipalities to use zoning powers to affirmatively provide a “realistic opportunity” for the production of affordable housing (referred to herein as “Constitutional Obligations”).

Review of Unfunded Mandates

The Township challenges the Statute because of the Township’s interest in protecting its residents from an unfunded mandate. At the November 1995 general election, voters approved an amendment to the New Jersey Constitution providing that, in certain cases, new statutes and new administrative rules and regulations promulgated by State agencies shall not impose unfunded mandates on counties,

municipalities or school districts. The Constitutional “State Mandate, State Pay” amendment provides in relevant part:

With respect to any provision of a law enacted on and after January 17, 1996, and with respect to any rule or regulation issued pursuant to a law originally adopted after July 1, 1996, and 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 boards of education, counties, or municipalities because it does not authorize resources, other than the property tax, to offset the additional 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, § II, ¶5 (a).

In response to the Constitutional amendment, the Legislature enacted the Local Mandates Act, N.J.S.A. 52:13H-1 to -20 (the “LMA”), which created the Council on Local Mandates (the “Council”) to resolve disputes possible unfunded mandates and establishing rules for same.

Pursuant to the LMA, it is the duty of the Council “to review, and issue rulings upon, complaints filed with the council by or on behalf of a . . . municipality . . . or more than one municipality, . . . that any provision of a statute enacted on or after January 17, 1996 . . . constitutes an unfunded mandate upon the . . . municipality, . . . or more than one municipality . . . because it does not authorize resources to offset the additional direct expenditures required for the implementation of the statute or the rule or regulation.” N.J.S.A. 52:13H-12(a).

The Council previously held that it did not have jurisdiction to review legislation amending the Fair Housing Act (“FHA”) and COAH regulations due to the exemption in the Local Mandates Act for laws, rules, or regulations that “implement the provisions of the New Jersey Constitution[.]” N.J.S.A. 52:13H-3(e). See In re Township of Medford, decided March 18, 2009, Opinion Issued June 1, 2009.

Statutory Obligations

The present challenge to the Statute can be distinguished from Medford. In Medford, the Township could not overcome the threshold issue that the challenged amendments to the FHA and COAH regulations implemented a constitutional provision to provide affordable housing. There, the challenge centered on the costs of compliance with amendments to the FHA and COAH regulations, which provided additional mechanisms for implementing affordable housing. There, the Council found that the amendments to the FHA and COAH regulations were exempt from Council action because they implemented provisions of the New Jersey Constitution. There, the amendments to the FHA and COAH regulations did not require municipalities to participate in the COAH process but were established to implement additional opportunities for compliance with constitutional affordable housing obligations.

Here, municipalities have no way to comply with the Statutory Obligations mandated by the Statute without directly expending funds. The distinction is between Constitutional Obligations and Statutory Obligations.

The Statute provides Statutory Obligations that are distinct from the Constitutional Obligation to provide affordable housing. The Statute amends the Legislative Findings of the FHA to state that COAH's "inability to function led to a 'gap period' that frustrated the intent of the Legislature and compliance with constitutional and statutory obligations, and that it is necessary to establish definitive deadlines for municipal action and any challenges to those actions to avoid such a 'gap period' from being repeated in the future." P.L. 2024, c.2, Second Reprint ¶ 1 (page 4, lines 6-11).

Analysis

The Township does not challenge its constitutional obligation to provide affordable housing. Rather, the Township challenges the Statutory Obligations created by the Statute, which do not directly implement provisions of the New Jersey Constitution. The Statute imposes a series of obligations upon municipalities without choice. Where there is no choice, there is a mandate. The Statute's lack of choice in deciding how to fulfill municipal Constitutional Obligations with respect to affordable housing, leads to the direct expenditure of municipal funds.

The structure of the Statute requires municipalities to begin expending funds immediately in order to comply with Statutory Obligations regarding the calculation and certification of present and prospective need and the revision of its housing element and fair share plan.

Direct Costs

The Statute provides funding for State costs associated with the administration of the Statute. See P.L. 2024, c.2, Second Reprint ¶ 38 (page 74, lines 47-48; page 75, lines 1-9). In doing so, the State understood that there would be direct costs to be incurred from the Statute. However, the Statute does not provide any funding source for municipal costs associated with the administration of the Statute.

The Legislative Fiscal Estimate for the Statute, prepared by the Office of Legislative Services (the "OLS"), found that:

- "The [Statute] will also result in an indeterminate impact to municipal costs associated with the requirement that a municipality determine its affordable housing obligation and establish a housing element and fair share plan. The OLS notes that municipalities have incurred significant costs in the third round of affordable housing obligations through the court process that followed the Council on Affordable Housing becoming defunct." Legislative Fiscal Estimate [Second Reprint] to A. 4, p. 2 (Mar. 21, 2024).
- "Municipalities would be required to bear the costs for their role in resolving disputes. Municipalities would be permitted to utilize monies from their Municipal Affordable Housing Trust Funds to resolve disputes under the Affordable Housing Dispute Resolution Program, but would not be permitted to utilize these monies for certain court costs that may arise outside of the program." Legislative Fiscal Estimate [Second Reprint] to A. 4, p. 6 (Mar. 21, 2024).
- "Municipalities would be required to bear the costs for their role in resolving disputes. Municipalities would be permitted to utilize monies from their Municipal Affordable Housing Trust Funds to resolve disputes under the Affordable Housing Dispute Resolution Program, but would not be permitted to utilize these monies for certain court costs that may arise outside of the program." Legislative Fiscal Estimate [Second Reprint] to A. 4, p. 6 (Mar. 21, 2024).

- “Municipalities may also incur administrative costs associated with requirements to report to the Department of Community Affairs annually on any collection and expenditure of development fees as well as on number affordable of housing units actually constructed, construction starts, certificates of occupancy granted, the start and expiration dates of deed restrictions, and residential and non-residential development fees collected and expended, including purposes and amounts of such expenditures, along with the current balance in the municipality’s affordable housing trust funds.” Legislative Fiscal Estimate [Second Reprint] to A. 4, p. 6 (Mar. 21, 2024).

The State did not make any preparation for the cost of municipalities to comply with the Statutory Obligations. The State did not take into account the funds necessary for municipalities to comply with the Statutory Obligations, which cost will now be a direct burden on the municipality.

Specifically, the Township has already spent and continues to spend municipal funds for professional planning services to calculate present and prospective need as defined under the Statute and to modify its housing element and fair share plan based on the new statutory requirements. The Township further anticipates expending funds for certifying its present and prospective need, defending challenges to such certification and implementing affordable housing under the Statute’s new scheme.

Conclusion

The Township understands that fulfilling its Constitutional Obligations may require the expenditure of funds. However, the Township opposes the mandatory expenditure of funds to comply with Statutory Obligations that do not directly implement provisions of the New Jersey Constitution. The State has hastily introduced and enacted the Statute in the name of constitutionally mandated affordable housing without considering or budgeting for municipalities’ direct costs to comply with same. The Statute’s veil of constitutionality cannot overcome the direct financial burden that the unfunded Statute will have on the same communities that the Statute aims to protect.

Attachment to Complaint – Paragraph II(4):

Expenditures as follows:

2024: Approximately \$25,000 for professional planning and legal compliance

2025: Approximately \$25,000-\$75,000 for professional planning and legal compliance

Direct costs for planning and legal professionals and marketing related to deed restrictions

Additional administrative costs are approximately \$5,000

Basis for the estimates is similarly situated rural municipalities

Attachment to Complaint – Paragraph II(5):

The Township seeks injunctive relief to prevent the enforcement of the Statute on the grounds that imminent irreparable injury will result in the absence of injunctive relief. Specifically, the Township will suffer financial detriment with respect to compliance with the Statute, which will prevent the Township from being able to promote the development of environmentally conscious, high-quality affordable housing in accordance with the Township’s Constitutional Obligations.

RESOLUTION

RESOLUTION

August 1, 2024

Resolution #2024.79

**RESOLUTION OF THE TOWNSHIP OF BETHLEHEM AUTHORIZING
COUNCIL ON LOCAL MANDATES COMPLAINT**

WHEREAS, on March 20, 2024, Governor Murphy signed P.L.2024, c.2 (Bill S50/A4), which, among other things, amends the Fair Housing Act to abolish the New Jersey Council on Affordable Housing ("COAH") and establish new requirements for how municipalities' affordable housing obligations are calculated, certified, challenged and implemented; and

WHEREAS, the Township of Bethlehem (the "Township") shall seek relief from P.L.2024, c.2, which imposes requirements that the Township determine its own present and prospective fair share affordable housing obligation; revise its housing element and fair share plan; defend its housing element and fair share plan against "exclusionary zoning litigation" in the Affordable Housing Dispute Resolution Program and/or with the Administrative Office of the Courts; obtain a compliance certification; defend exclusionary zoning litigation immunity; and report to the Department of Community Affairs; all of which constitute an unfunded State mandate in contravention of the New Jersey Constitution, see N.J. Const. art. VIII, § II, ¶ 5(a); and

WHEREAS, pursuant to N.J.S.A. 52:13H-12, the Township may file a complaint with the New Jersey Council on Local Mandates to challenge P.L.2024, c.2 as an unfunded mandate; and

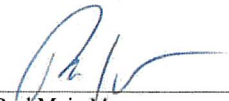
WHEREAS, the Mayor and Committee believe it is in the best interest of the citizens of the Township that the Township Attorney be authorized to file a Council on Local Mandates Complaint with respect to the financial burden imposed on the municipality to comply with the requirements of P.L.2024, c.2.

NOW, THEREFORE, BE IT RESOLVED, by the Mayor and Committee of the Township of Bethlehem as follows:

1. The aforesaid recitals are incorporated herein as if fully set forth at length.
2. The Township Attorney is hereby authorized to file a Council on Local Mandates Complaint at the earliest possible time.
3. The Township Attorney is further authorized to take all necessary actions to bring the Complaint to a satisfactory resolution.

ATTEST:


Christine Dispenza, RMC / CMR
Municipal Clerk


Paul Muir, Mayor

CERTIFICATION

I, Christine Dispenza, Municipal Clerk of the Township of Bethlehem, County of Hunterdon, do hereby certify the foregoing to be a true and correct copy of a resolution adopted by the Governing Body at a meeting held on August 1, 2024.


Christine Dispenza, RMC/CMR
Municipal Clerk