

**IN THE MATTER OF A COMPLAINT FILED BY THE
TOWNSHIP OF MEDFORD**

Council on Local Mandates

Argued March 18, 2009

Decided March 18, 2009

Written Opinion issued June 1, 2009

Syllabus

(This syllabus was prepared for the benefit of the reader and is not part of the opinion of the Council. The syllabus does not purport to summarize all portions of the opinion.)

Medford Township filed a Complaint with the Council alleging that recent legislation (L. 2008, c. 46) amending the Fair Housing Act (FHA) and regulations promulgated by the New Jersey Council on Affordable Housing (COAH) impose unfunded mandates on local entities. Medford's contention is that it cannot satisfy its FHA and COAH obligations except with municipally sponsored, 100 percent affordable, supportive or special needs housing and that the newly-imposed statutory and regulatory obligations to provide municipal funding or bonding for such developments should be declared unfunded mandates within the meaning of N.J. Const. art. VIII, § 2, ¶ 5(a) and N.J.S.A. 52:13H-2.

After directing the Attorney General to file an answer on behalf of the State and COAH as Respondents, the Council advised the parties that the Complaint appeared to present two independently dispositive issues: (1) whether the challenged provisions are exempt from Council action because they "implement the provisions of [the New Jersey] Constitution," see N.J. Const. art. VIII, § 2, ¶ 5(c)(5), and (2) whether they "impose direct unfunded mandates rather than speculative obligations." The Council ordered the parties to move simultaneously for summary judgment on those two issues.

After full briefing, the cross-motions for summary judgment were argued before the Council on March 18, 2009. Following a brief recess, the Council Chair announced that the Council determined that the challenged provisions are exempted from Council action because they "implement" provisions of the New Jersey Constitution. This opinion explains and memorializes that decision.

HELD: The Council unanimously grants summary judgment in favor of Respondents.

The FHA was enacted, and COAH was created, at the urging of the New Jersey Supreme Court for the express purpose of fulfilling the State constitutional requirement, set forth in the

“Mount Laurel” decisions, Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975) and 92 N.J. 158 (1983), that municipal land use regulations provide a reasonable opportunity for low and moderate income housing. The FHA and COAH amendments challenged here impose specific substantive requirements that bear directly on that constitutional mandate.

The Council rejects Medford’s argument that the challenged provisions do not “implement” the Constitution because they have not been shown to be “necessary” to satisfy the Mount Laurel command. Article VIII, section 2, paragraph 5(c)(5) of the New Jersey Constitution does not state or suggest any such limitation. Nor is there is any sound reason to imply one. The judiciary, not the Council, is responsible for determining what is constitutionally “necessary.” Moreover, the Council should not presume to narrow the discretion entrusted to the legislative and executive branches to fashion remedies for constitutional problems.

The Council also rejects Medford’s argument that the challenged amendments do not “implement” the Constitution because they create “unfunded mandates” in violation of the FHA finding that municipalities are “not mandated to expend their own resources to provide low and moderate income housing.” N.J.S.A. 52:27D-302(h). The amendments were adopted to implement Mount Laurel; even if they impose the mandates claimed by Medford, the Council is without authority to nullify them. Whether the amendments are constitutional and whether they appropriately advance their intended goal are questions for the Courts, not the Council.

The Council thus does not address Medford’s claim that the challenged provisions impose “unfunded mandates.” The Council grants the motion of the State and COAH for summary judgment, denies the motion of Medford for summary judgment, and dismisses the Complaint.

Council Members **Leanna Brown**, **Timothy Q. Karcher**, **Ryan J. Peene**, **Sylvia B. Pressler**, **Jack Tarditi**, and **Janet L. Whitman** join in the majority opinion.

Council Chair **Victor R. McDonald, III**, issues a separate opinion, concurring in the result, finding that the challenged FHA and COAH provisions are not legislative or regulatory mandates, for municipal participation in COAH is optional.

Council Member **Rita E. Papaleo** did not participate.

Richard W. Hunt argued the cause for Claimant Medford Township (*Parker McKay P.A.*, attorneys; Mr. Hunt, on the briefs).

George N. Cohen, Deputy Attorney General, argued the cause for Respondents State of New Jersey and New Jersey Council on Affordable Housing (Anne Milgram, Attorney General

of New Jersey, attorney; Nancy Kaplen, Assistant Attorney General, of counsel; Mr. Cohen, on the briefs).

Kevin D. Walsh argued the cause for amicus curiae Fair Share Housing Center (Adam M. Gordon and Mr. Walsh, on the briefs).

Michael R. Butler argued the cause for amicus curiae New Jersey State League of Municipalities (*Mason, Griffin & Pierson, P.C.*, attorneys; Edwin W. Schmierer, of counsel; Joseph P. Blaney and Mr. Butler, on the brief).

Ronald K. Chen, Public Advocate of New Jersey, argued the cause for amicus curiae New Jersey Department of the Public Advocate (Mr. Chen, on the brief).

Christopher J. Norman, Township Solicitor, argued the cause for amicus curiae Mount Laurel Township (*Norman Kingsbury & Norman, LLC*, attorneys; Mr. Norman, on the brief).

OPINION

I

On August 15, 2008, Medford Township (Burlington County) filed a Complaint with the Council on Local Mandates seeking a declaration that certain recent legislation (L. 2008, c. 46) amending the Fair Housing Act (FHA), N.J.S.A. 52:27D-301 et seq., and rules promulgated by the New Jersey Council on Affordable Housing (COAH) impose unfunded mandates on local entities. Upon COAH's adoption of revised rules effective October 20, 2008, Medford filed a second Complaint which supersedes the first. That Complaint challenges the following statutes and regulations:

N.J.S.A. 52:27D-329.1 (L. 2008, c. 46, effective July 17, 2008), an amendment to the FHA directing COAH "to ensure that at least 13 percent of the housing units made available for occupancy by low-income and moderate income households will be reserved for occupancy by very low income households" as defined by N.J.S.A. 52:27D-304 and providing that "a municipality shall not receive bonus credits for the provision of housing units reserved for occupancy by very low

income households unless the 13 percent target has been exceeded within that municipality.”

N.J.A.C. 5:97-6.7(d) (40 N.J.R. 3374(a), 5965(a), effective October 20, 2008), a COAH regulation regarding municipally sponsored and 100 percent affordable developments, requiring that the “minimum documentation” for approval of such projects include “[d]etailed information demonstrating that the municipality or developer has adequate funding capabilities” and directing that, if an application for outside funding is pending, “a stable alternative source such as municipal bonding shall be provided in the event the funding request is not approved.”

N.J.A.C. 5:97-6.10(e) (40 N.J.R. 3374(a), 5965(a), effective October 20, 2008), a COAH regulation regarding supportive and special needs housing, requiring that the “minimum documentation” to be submitted by a municipality for approval of such projects include “[a] municipal resolution appropriating funds or a resolution of intent to bond in the event of a shortfall of funds.”

N.J.S.A. 40:55D-8.4 and -8.7(a) (L. 2008, c. 46, sections 35 and 38, effective July 17, 2008), an amendment to the Municipal Land Use Law imposing a fee for certain non-residential construction of two and one-half percent of the equalized assessed value of the land and improvements, in the case of all new non-residential construction (or of the increase in equalized assessed value, in the case of additions to existing structures), which fee is payable either to the municipality or to the State Treasurer and credited to the Urban Housing Assistance Fund or the New Jersey Affordable Housing Trust Fund established under the FHA.

Medford’s Complaint alleges, in sum, that the municipality cannot satisfy its FHA and COAH obligations except with municipally sponsored, 100 percent affordable, supportive or special needs housing and that the newly-imposed obligations to provide municipal funds or bonding for

such developments accordingly should be declared to be unfunded mandates within the meaning of N.J. Const. art. VIII, § 2, ¶ 5(a) and N.J.S.A. 52:13H-2.¹

In keeping with its notice requirements, on December 17, 2008, the Council advised the appropriate State officials of the filing of the consolidated Complaint and directed the Attorney General to file an answer on behalf of the State and COAH as Respondents. At the same time, the Council advised the parties that, based on its preliminary review of the Complaint, two independently dispositive issues appeared to be presented: (1) whether the challenged statutes and regulations “are exempt from Council action because they ‘implement the provisions of [the New Jersey] Constitution’ and are within the jurisdiction of the Courts, rather than this Council” (see N.J. Const. art. VIII, § 2, ¶ 5(c)(5)); and (2) whether the challenged provisions “impose direct unfunded mandates rather than speculative obligations.” The Council directed the parties to move simultaneously for summary judgment on those two issues and fixed a schedule for the filing of briefs. Leave to appear as amici curiae was granted to the Fair Share Housing Center, the New Jersey State League of Municipalities, the Public Advocate and Mount Laurel Township.

With full briefing by all participants, the cross-motions for summary judgment were argued before the Council on March 18, 2009. Following a brief recess, the Council Chair announced that the Council determined that the challenged statutes and regulations are exempted by N.J. Const. art. VIII, § 2, ¶ 5(c)(5) from Council action because they “implement the provisions of [the New Jersey] Constitution.” This opinion explains and memorializes that decision.

¹ Medford, along with a number of other municipalities, is currently pursuing an Appellate Division proceeding in which it advances a wide variety of challenges to the COAH regulations. See In re Adoption of N.J.A.C. 5:96 & 5:97 by the New Jersey Council on Affordable Housing, Docket Nos. A-5382-07T3 and A-5423-07T3.

II

In Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975), the New Jersey Supreme Court announced the State constitutional requirement that municipal land use regulations provide a reasonable opportunity for low and moderate income housing. Eight years later, in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983), the Court sought to “strengthen” and “clarify” that ruling but, noting the “social and economic controversy (and its political consequences)” it had spawned, urged that enforcement of the Mount Laurel doctrine “is better left to the Legislature,” because “achieving a political consensus . . . might lead to significant legislation enforcing the constitutional mandate better than we can.” Id. at 212.

The Legislature accepted that invitation and enacted the FHA in 1985. In its introductory findings, the Act recites the Mount Laurel holdings and the Court’s stated preference for legislative action in the field, and finds that “[t]he interest of all citizens . . . would be best served by a comprehensive planning and implementation response to this constitutional obligation.” N.J.S.A. 52:27D-302. The following section of the Act, “Legislative declarations and intention,” declares that “the statutory scheme set forth in this act . . . satisfies the constitutional obligation enunciated by the Supreme Court.” N.J.S.A. 52:27D-303. The FHA then establishes COAH (N.J.S.A. 52:27D-305) and gives COAH duties to determine housing regions, to estimate present and prospective need for low and moderate income housing, and to adopt “criteria and guidelines” for determining present and prospective municipal fair shares of the housing need in a given region. N.J.S.A. 52:27D-307.

The legislative history and language thus are explicit and unambiguous: the aim of the FHA and the role of COAH are to effectuate the Mount Laurel constitutional obligation. See In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1, 21 (App. Div. 2007) (“The FHA created COAH to provide an administrative mechanism for implementing the Mount Laurel doctrine”). The FHA and COAH amendments at issue here are clearly designed to advance that end, for they impose specific substantive requirements bearing directly on the provision of reasonable opportunities for low and moderate income housing. Compare, e.g., In re Monmouth-Ocean Educational Services Commission et al., decided August 20, 2004, Opinion at 14-15 (holding that the State failed to make “a specific, precise, fact-based showing” that a legislative mandate for radon testing in public schools “furthered an element of a [constitutionally-required] thorough and efficient education”). The unavoidable conclusion, then, is that the challenged provisions “implement the provisions of [the New Jersey] Constitution” and thus are exempted from action by this Council. N.J. Const. art. VIII, § 2, ¶ 5(c)(5).²

The Council rejects Medford’s argument that the challenged statutory and regulatory provisions cannot be said to “implement” Mount Laurel in the absence of a showing that they are “necessary” to satisfy the constitutional command. The language of the paragraph 5(c)(5) exemption does not include or suggest any such limitation; to the contrary, it exempts from Council action all statutes and regulations that “implement” the New Jersey Constitution, not just those that are themselves constitutionally necessary. Moreover, there is no sound reason for the Council to imply such a limitation. The Council cannot pass judgment on what is

² As detailed above, N.J.S.A. 40:55D-8.4, one of the statutes challenged by Medford, amends the Municipal Land Use Law. The record does not demonstrate that the amendment implements the Mount Laurel doctrine. But Medford does not argue that, standing alone, the amendment imposes any “mandate” on the municipality; it urges only that the non-residential construction fees imposed by the amendment are insufficient to fund the “mandates” assertedly imposed by the FHA and COAH amendments.

constitutionally “necessary,” a responsibility of the judiciary. Nor should the Council presume to narrow the discretion traditionally entrusted to the legislative and executive branches to fashion remedies for constitutional problems. See, e.g., Van Dalen v. Washington Tp., 120 N.J. 234, 246 (1990) (declaring COAH to be “entitled to a reasonable degree of latitude, consistent with the legislative purpose”).

Similarly unpersuasive is Medford’s argument that the challenged statutory and regulatory provisions do not “implement” Mount Laurel because they impose “unfunded mandates” in violation of the FHA provision that “nothing in [the Act] shall require a municipality to raise or expend municipal revenues in order to provide low and moderate income housing.” N.J.S.A. 52:27D-311(d); see also N.J.S.A. 52:27D-302(h) (municipalities “are encouraged but not mandated to expend their own resources to help provide low and moderate income housing”). The challenged provisions represent the efforts of both the Legislature and COAH to satisfy the constitutional requirements. The constitutional and statutory exemption from Council action accorded to such efforts deprives the Council of the authority to nullify them even if they were to constitute “unfunded mandates.” Whether the challenged provisions appropriately advance their intended goal is a question to be resolved by the Courts, not this Council. See, e.g., In re Adoption of N.J.A.C. 5:9.4 and 5:95, supra, 390 N.J. Super. at 10-11 (addressing claims that COAH regulations were “contrary to, and ill-designed to respond to, the constitutional mandate to provide affordable housing to the residents of this State”).

III

Having determined that the statutory and regulatory amendments challenged by Medford implement the New Jersey Constitution and thus are exempted from Council action by

N.J. Const. art. VIII, § 2, ¶ 5(c)(5) and N.J.S.A. 52:13H-3(e), the Council does not address the claim that the amendments impose “unfunded mandates.” The Council unanimously grants the motion of the Respondents State of New Jersey and the New Jersey Council on Affordable Housing for summary judgment, denies the motion of Claimant Medford Township for summary judgment, and dismisses the Complaint.

So ordered.

Concurring Opinion

Victor R. McDonald, III, concurring.

Article VIII, section 2, paragraph 5 of the New Jersey Constitution grants the Council on Local Mandates the exclusive authority to determine whether or not “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” is an unfunded State mandate. This language allows the Council to review only mandates emanating from the legislative and executive branches of State government.

In Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975), the New Jersey Supreme Court announced the State constitutional requirement that municipal land use regulations must provide a reasonable opportunity for low and moderate income housing. This is clearly a mandate from the judiciary, whose decisions are beyond the constitutional authority of the Council to review.

While the Council is precluded from nullifying judicial mandates, it is not precluded from determining whether statutes, rules or regulations in fact implement a mandate or decision of the judiciary. See In re Highland Park Board of Education and Borough of Highland Park, decisions

issued on August 5, 1999 (“Highland Park I”) and May 11, 2000 (“Highland Park II”), for discussion of the Thorough and Efficient Clause of the Constitution and the Council’s authority to rule on statutes and regulations affecting education issues.

The Council thereafter thrice ruled on challenges to statutes and regulations affecting education. See In re Highland Park Board of Education and Borough of Highland Park, decided January 31, 2003, ruling that a regulation creating regional charter schools was not an unfunded mandate based on insufficient proofs of additional direct expenditures; In re Monmouth-Ocean Educational Services Commission et al. (“Monmouth-Ocean”), decided August 20, 2004, nullifying a statute mandating radon testing in public school classrooms; and In re Special Services School Districts of Burlington, Atlantic, Cape May and Bergen Counties (“Special Services School Districts”), decided July 26, 2007, nullifying a Department of Education regulation reducing the maximum age span in elementary school special education classes. The teaching of those cases is that the mere assertion that a statute, regulation, or rule implements a judicial mandate does not itself exempt that statute, rule or regulation from the Council’s jurisdiction.

In this case, Medford asserts that the municipality cannot satisfy its Fair Housing Act (FHA) and Council on Affordable Housing (COAH) obligations except with municipally sponsored, 100 percent affordable, supportive or special needs housing. Medford argues that the newly-imposed obligations to provide municipal funds or bonding for such developments accordingly should be declared to be unfunded mandates, *i.e.*, laws, rules, or regulations that “do[] not authorize resources, other than the property tax, to offset the additional direct expenditures required for [their] implementation.” N.J. Const. art. VIII, § 2, ¶ 5.

In each of the five rulings in which the Council has invalidated a statute, rule or regulation, clear and convincing evidence was presented that counties, municipalities or boards of education would incur expenditures in order to implement the challenged provisions. Proof was also presented to the Council that compliance with the statute, rule or regulation under challenge was not optional.

In Highland Park II, supra, the Council struck down an unambiguous directive from the Department of Education that boards of education increase funding for charter schools.

In Monmouth-Ocean, supra, the Council struck down a statute that indisputably would have cost boards of education substantial sums in order to test classrooms for radon.

In In re Counties of Morris, Warren, Monmouth, and Middlesex, decided September 26, 2006, the Council struck down an order of the Department of Transportation that counties and municipalities pick up dead deer, a service previously provided by and paid for the State, without being compensated for their costs.

In Special Services School Districts, supra, the Council struck down the regulation reducing the maximum age span in elementary school special education classes upon overwhelming and irrefutable evidence of the costs it would have imposed on property taxpayers.

Finally, in our most recent case, In re Mayors of Shiloh Borough and the Borough of Rocky Hill et al., decided October 22, 2008, the Council struck down provisions of the Fiscal Year 2009 Appropriations Act that would have required 89 rural municipalities to assume portions of the cost of State Police services, the amounts of which were expressly calculated and acknowledged by the State.

In the present case, in marked contrast to the earlier cases, Medford has presented no evidence of a legislative or regulatory mandate, much less an unfunded mandate. Neither Medford nor its amici can point to any provision of either the FHA or the COAH regulations that requires a municipality to participate in the COAH process. Indeed, the State and its amici have demonstrated that there are several alternatives available to Medford to comply with the Supreme Court mandate to provide a reasonable opportunity for low and moderate income housing. The fact that over 44% of New Jersey's municipalities have elected to not participate in COAH fatally undermines Medford's assertion that the FHA or the COAH regulations are unfunded mandates as defined by N.J. Const. art. VIII, § 2, ¶ 5. Simply stated, where there is choice, there is no mandate.

It is for these reasons that I join with my colleagues in granting the motion of the Respondents State of New Jersey and the New Jersey Council on Affordable Housing for summary judgment, denying the motion of Claimant Medford Township for summary judgment, and dismissing the Complaint.

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The majority opinion was adopted by the Council and issued on June 1, 2009. Council Members Leanna Brown, Timothy Q. Karcher, Ryan J. Peene, Sylvia B. Pressler, Jack Tarditi, and Janet L. Whitman join in the majority opinion. Council Chair Victor R. McDonald, III, concurring in the result, issued the separate opinion. Council Member Rita E. Papaleo did not participate.