

**IN THE MATTER OF A COMPLAINT FILED BY OCEAN TOWNSHIP
(MONMOUTH COUNTY) AND FRANKFORD TOWNSHIP**

Council on Local Mandates

Argued May 14, 2002

Decided August 2, 2002

Syllabus

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

Ocean Township (Monmouth County) and Frankford Township (“Claimants”) filed a Complaint with the Council, in which they contend that an Amendment to the Municipal Land Use Law (“Amendment A-2403” or “A-2403”), effective July 3, 2001, violates the constitutional prohibition against unfunded mandates codified in the Local Mandates Act (“LMA”). Amendment A-2403 provides that any application for a zoning permit be granted or denied within ten business days or be deemed approved. Claimants allege that Amendment A-2403 imposes additional direct expenditures on municipalities and they therefore urge the Council on Local Mandates (“Council”) to declare that the A-2403 is an unconstitutional unfunded mandate. Respondent State of New Jersey filed a Motion to Dismiss the Complaint, arguing that the Legislature has provided a funding mechanism for any costs mandated by Amendment A-2403 -- the pre-existing authorization contained in the Municipal Land Use Law that allows municipalities to establish reasonable permit fees to cover administrative costs for the permit process.

The Council, in its majority ruling, grants the State’s Motion to Dismiss, concluding that the pre-existing authorization for municipalities to establish permit fees satisfies the Legislature’s obligation under the LMA to authorize a resource, other than the property tax, to offset any mandated costs.

- (a) The constitutional prohibition against unfunded mandates does not require the Legislature to provide State funding for every mandate that is imposed on a municipality. The Council may find that there is an *unconstitutional* unfunded mandate only if the statute, rule or regulation does not authorize resources, other than the property tax, to offset the additional expenditures required to implement the mandate.
- (b) Here, the Legislature met its obligation to authorize a resource other than the property tax to fund the mandate, because a provision in the pre-existing law permits municipalities to collect a fee to offset administrative costs related to issuance of permits, and that fee is not a property tax either in form or function.

- (c) The Council rejects Claimants' argument that the Legislature is required, in all cases, to specify the funding resource it authorizes for a new mandate, with explicit language within the text of the new statute; to impose such a rule in this case would result in illogical redundancy.
- (d) The Council also finds no basis for Claimants' arguments that the pre-existing fee authorization is deficient because (1) it is limited to covering "administrative" costs and therefore excludes "professional" costs of zoning officials; and (2) the fee must be uniformly set at a high level to cover the newly mandated municipal duty.

The Respondent's Motion to Dismiss is GRANTED and the Complaint herein is DISMISSED with prejudice.

Council Members **Ronald J. Riccio** and **Janet L. Whitman**, **dissenting**, would deny the Motion to Dismiss and allow Claimants a full fact-finding hearing. After such a hearing, the Council could better determine whether a new resource to cover the cost of the new mandate is required, drawn from a State, rather than local, source. The Council might also determine, after a hearing, that the State must identify the resource it authorizes either in the text of the new mandate or in an uncodified supplemental paragraph.

Council Chair **Marie L. Garibaldi**, and Council Members **Dominick A. Crincoli** and **Timothy Q. Karcher** join in the majority opinion. Council Members **Ronald J. Riccio** and **Janet L. Whitman** join in the separate dissenting opinion. Council Members **Karen A. Jezierny**, **Eric E. Martins**, **Thomas H. Neff**, and **Kimberly Deal Phillips** did not participate.

Lisa Kent argued the cause for Claimants Ocean Township (Monmouth County) and Frankford Township (*Courter, Kobert, Laufer & Cohen*, attorneys; *Ms. Kent* on the briefs).

Ryan A. Harris, Deputy Attorney General, argued the cause for Respondent State of New Jersey (*John J. Farmer, Jr.*, Attorney General of New Jersey, attorney; *Mr. Harris* on the brief).

Kerry Brian Flowers, argued the cause for amicus curiae New Jersey Builders Association (*Krugman & Kailes*, attorneys).

William John Kearns, Esq., argued the cause for amicus curiae New Jersey State League of Municipalities (*Kearns, Vassallo, Guest & Kearns*, attorneys).

Decision

Effective July 3, 2001, the Municipal Land Use Law, N.J.S.A. 40:55D-18, was amended by L. 2001, c. 49, § 1, Bill Number A-2403 (“Amendment A-2403”). Amendment A-2403 provides that any application for a zoning permit be granted or denied within ten business days or be deemed approved (“the 10-day rule”). On October 17, 2001, Ocean Township (Monmouth County) and Frankford Township (“Claimants” or “Townships”) filed a Complaint with the Council on Local Mandates (“Council”) demanding judgment that Amendment A-2403 constitutes an unfunded mandate in violation of the Constitution of New Jersey, art. VIII, § 2, ¶ 5, as implemented by N.J.S.A. 52:13H-1 to -22.

On November 21, 2001, the Attorney General of the State of New Jersey, on behalf of the State, filed an Answer to the Complaint and a Motion to Dismiss. The New Jersey Builders Association (“the Builders Association”) and the New Jersey State League of Municipalities (“the League”) each filed a Request for an Order permitting it to appear as *amicus curiae*.

The Council granted leave both to the Builders Association and the League to appear as *amicus curiae* and to present oral argument. Argument was held on May 14, 2002.

I

Claimant, Ocean Township (“Ocean”) is self-described as “a highly desirable destination and place to live because of its proximity to Manhattan, excellent highways, and the New Jersey shore.” Complaint, ¶ 16. Although the Township also characterizes itself as a “‘mature’ suburb,” it has room for additional growth and for commercial redevelopment. Id. at ¶¶ 16-18. Zoning applications increased

56% between 1999 and 2000. Id. at ¶ 20. Ocean asserts that Amendment A-2403 caused it to convert its part-time zoning official to full time, at an additional cost of \$12,194 (41%) over the prior year, plus additional costs for benefits payable to a full time employee. Id. at ¶¶ 27, 29. Ocean does not charge any fee for a zoning permit application.

Claimant, Frankford Township (“Frankford”) describes itself as “a large, sparsely populated rural township in northwestern New Jersey.” Complaint, ¶ 31. Frankford also reports that “[t]he volume of zoning and land use review is increasing every year,” with a 23% increase in zoning applications between 1998 and 1999. Id. at ¶¶ 33-34. During the past three years, it has processed five major and 17 minor subdivisions, and in 2001 it heard a conceptual plan for a 74-unit subdivision. Id. at ¶ 33. Frankford shares a zoning official with neighboring municipalities and pays for 2.5 hours of the official’s time per week. Id. at ¶¶ 36, 38. It asserts that the time devoted to zoning matters has increased since Amendment A-2403 but also acknowledges that it has not yet had to hire any additional staff or increase staff hours. Id. at ¶¶ 39-40, 42. Frankford charges a \$15.00 application fee for any zoning permit application.

II

Article VIII, section II, paragraph 5 of the New Jersey Constitution (“Amendment”) provides that any provision of a law enacted on or after January 17, 1996, or of any rule or regulation, issued pursuant to a law originally adopted after July 1, 1996, which is determined by the Council to be an unfunded mandate shall cease to be mandatory in its effect and shall expire. See N.J. Const. art. VIII, § 2, ¶ 5(a). The Legislature adopted the Local Mandates Act, N.J.S.A. 52:13H-1 to -22 (“LMA”), to implement the provisions of the Amendment, effective May 8, 1996.

To make out a claim of unconstitutionality under the Amendment, the Claimants must prove the following three distinct issues:

First, that the Legislature has imposed a “mandate” on a unit of local government;

Second, that “additional direct expenditures [are] required for the implementation of the law”;

and

Third, that the statute, rule or regulation fails to “authorize resources, other than the property tax, to offset the additional direct expenditures.” Amendment at ¶ 5(a).

III

At issue is the State’s Motion to Dismiss. In In re Board of Education and the Borough of Highland Park (“Highland Park I”), decided August 5, 1999, 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. The State’s Motion to Dismiss can be granted only if the Council concludes that no further factual information would be relevant to its decision.

While recognizing that “great caution” is the standard to be applied under Highland Park I, the Council concludes nevertheless, as a matter of law, that the Legislature has provided a constitutionally

adequate funding resource to offset any additional direct expenditures that might result from the adoption of Amendment A-2403. That conclusion makes it unnecessary to decide whether, as the Townships contend, Amendment A-2403 constitutes a mandate and if so whether it is a mandate imposing additional direct expenses on municipalities. Accordingly, the State's Motion to Dismiss is granted.

IV

The State contends that Amendment A-2403, amending N.J.S.A. 40:55D-18,¹ contains authorization both before and after the amendment for a municipality to "establish reasonable fees to cover administrative costs for the issuance of such permits . . ." (the "§18 reasonable fee"). Therefore, the State argues, Ocean, Frankford, or any other municipality can cover its purported costs of complying

¹ As amended, N.J.S.A. 40:55D-18 in its entirety reads as follows; the amendatory material added by Amendment A-2403 that is the subject of this Complaint is underlined:

§18. Enforcement. The governing body of a municipality shall enforce this act and any ordinance or regulation made and adopted hereunder. To that end, the governing body may require the issuance of specified permits, certificates or authorizations as a condition precedent to (1) the erection, construction, alteration, repair, remodeling, conversion, removal or destruction of any building or structure, (2) the use or occupancy of any building, structure or land, and (3) the subdivision or resubdivision of any land; and shall establish an administrative officer and offices for the purpose of issuing such permits, certificates or authorizations; and may condition the issuance of such permits, certificates and authorizations upon the submission of such data, materials, plans, plats and information as is authorized hereunder and upon the express approval of the appropriate State, county or municipal agencies; and may establish reasonable fees to cover administrative costs for the issuance of such permits, certificates and authorizations. The administrative officer shall issue or deny a zoning permit within 10 business days of receipt of a request therefor. If the administrative officer fails to grant or deny a zoning permit within this period, the failure shall be deemed to be an approval of the application for the zoning permit. In case any building or structure is erected, constructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality or an interested party, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises. N.J.S.A. 40:55d-18, as amended by L. 2001, c. 49, §1, effective July 3, 2001.

with the 10-day rule without resort to raising taxes by charging a \$18 reasonable fee, or by increasing a fee that is already charged.

The Claimants disagree and assert that the \$18 reasonable fee is neither a *new* source of revenue nor a source of revenue provided by the *State*. They contend that in order to comply with the Amendment, the Legislature must identify a new State resource, and that it must do so within the text of Amendment A-2403 itself. Claimants argue that to permit reliance on an already-existing source of revenue would open up an unintended loophole in the constitutional scheme.

We reject Claimants' contention that the Amendment categorically requires State funding of a local mandate. There would have been no reason for the framers of the constitutional language to specifically exclude reliance on property taxation, the essential local tax resource, to fund new mandates had it been thought that only State revenue sources could be used. Moreover, the Constitution speaks of *authorizing* a resource, not literally of providing one, suggesting the ordinary legislative process of delegating to municipalities the power they need to impose taxes or fees. There is reason to give the Legislature this flexibility to authorize local resources: were the State to directly pay the cost of complying with the 10-day rule, it could potentially claim the right to oversee the municipality's administration of its zoning process, a disregard of local prerogatives that New Jersey has traditionally disfavored.

Of course, the Legislature might choose to comply with the Amendment by providing direct State funding. Indeed, in some circumstances there may not be a practicable source of local revenue for the Legislature to authorize, and in that case it may have no choice but to authorize State funding. Moreover, there may be local revenue sources that are functionally the equivalent of a property tax even

though denominated something else, such as a municipality-wide “assessment” to defray the cost of a mandated capital facility. The Council is obligated to enforce the “property tax” clause of the Constitution indirectly as well as directly, should such a case come before it.

The §18 reasonable fee is different, however, and the difference is crucial for purposes of the State’s Motion to Dismiss. The fee is not the functional equivalent of a general property tax. 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. In short, the §18 reasonable fee not only 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.

We also find no merit in Claimants’ contention that the §18 reasonable fee is simply a disguised form of property taxation, in which case it clearly would have violated the LMA. 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.

V

The Townships also claim that the Legislature must authorize a *new* source of revenue to satisfy a mandate. They contend that if the resource authorized by the Legislature did no more than drain money out of an existing account to pay for the new mandate, the municipality would still bear the burden of the mandate, albeit indirectly, when it made up the lost revenue elsewhere. The Council agrees with the Claimants that it would normally be preferable for the legislation imposing the mandate to also specify explicitly the new resource that is authorized to pay for it. That approach would minimize both uncertainty and controversy. However, as the present case demonstrates, to impose the categorical rule that Claimants recommend creates a bizarre result. Amendment A-2403 consists of the following two sentences:

The administrative officer shall issue or deny a zoning permit within 10 business days of receipt of a request therefor. If the administrative officer fails to grant or deny a zoning permit within this period, the failure shall be deemed to be an approval of the application for the zoning permit.

The Legislature chose to insert Amendment A-2403 immediately after the following clause in N.J.S.A. 40:50D-18:

[A]nd may establish reasonable fees to cover administrative costs for the issuance of such permits, certificates and authorizations. (§18 reasonable fee clause).

Therefore, N.J.S.A. 40:D-18, in pertinent part, as amended, reads:

[A]nd may establish reasonable fees to cover administrative costs for the issuance of such permits, certificates and authorizations. The administrative officer shall issue or deny a zoning permit within 10 business days of receipt

Claimants however assert that to authorize a source of revenue for Amendment A-2403 the Legislature has to provide additional language in Amendment A-2403, identical or substantially similar, to the §18 reasonable fee clause, leading to the following:

[A]nd may establish reasonable fees to cover administrative costs for the issuance of such permits, certificates and authorizations. The administrative officer shall issue or deny zoning permits within 10 days of receipt of a request therefor and may establish reasonable fees to cover administrative costs for the issuance of such permits.

It is a well-established principle of statutory construction that a statute must be read in its entirety and, if possible, full effect should be given to every word of a statute. See Gabin v. Skyline Cabana Club, 54 N.J. 550, 555 (1969) (“We cannot assume that the Legislature used meaningless language.”). Claimants’ interpretation makes the first §18 reasonable fee clause meaningless, or the second §18 reasonable fee clause redundant. It makes little sense to restate in the next sentence what the Legislature has stated already in the immediately preceding sentence. The Legislature did not intend such an illogical result. The Legislature knew the language in the statute it amended and the language of the amendment.

Accordingly, we conclude that because Amendment A-2403 amended a section of the Municipal Land Use Law that already contained a fee-for-service provision within the same paragraph of text, the Legislature saw no need for any further amendment, concluding that the elastic “reasonable fee” language of the existing §18 sufficed.

VI

Similarly, we find no merit in Claimants’ contention that even if the Legislature may rely on an existing revenue source to comply with the LMA, the §18 permit fee does not accomplish that purpose, because it does not offset all of the costs of Amendment A-2403’s new mandate. Claimants assert that

§18 is textually limited to defraying only the “administrative” costs of operating the zoning permit system. They rely on a dictionary definition of “administrative” to conclude that a §18 fee can cover a municipality’s managerial and clerical services, but not the “professional” services of the zoning official. No additional authorities are relied on. Other dictionary definitions are more expansive than Claimants’. See, e.g., Merriam-Webster Collegiate Dictionary at 15, 10th edition (1996), “Administration”: “performance of executive duties; the act or process of administering; the execution of public affairs as distinguished from policy-making.” See Honigfeld v. Byrnes, 14 N.J. 600 (1954) (fee charged for certificate of occupancy under predecessor statute, N.J.S.A. 40:55-47, properly based on services of building inspector; no suggestion of a distinction between professional and clerical services).

The relevant consideration is not whether one or the other of these definitions is more plausible, however. It is whether the Legislature intended a broad or narrow authorization to charge a §18 fee, and in this regard the Council will follow the settled judicial practice of construing a statute to avoid creating a constitutional problem, unless a contrary construction is persuasively required. State v. Muhammad, 145 N.J. 23, 41 (1996); Town of Secaucus v. Hudson County Bd. of Taxation, 133 N.J. 482, 492 (1993), cert. denied, 510 U.S 1110 (1994). There is no obvious reason why the Legislature would have chosen to authorize a fee that offsets part, but not all, of the zoning permit system, particularly given that professional services, those that Claimants assert are non-compensable, would foreseeably be the largest component of the costs of administering that system. Absent a showing by Claimants of an authoritative legislative statement or judicial interpretation limiting §18 fees as they propose, the Council will read §18 as authorizing municipalities to recover all of the reasonable costs of operating the zoning permit system.

Claimants further contend that the \$18 reasonable fee does not satisfy the LMA in that, in their view, such a fee would have to be set at a very high level to cover the actual cost of the service (including the additional cost of administering the permit fee system itself). They construct a worst-case hypothetical in which a municipality might have to charge a flat fee of well over \$100 to cover its assumed costs even to review applications for modestly-priced projects, a \$500 shed in their example. To the extent that the Claimants, in making this argument, are simply expressing a disagreement with the Legislature about an issue of policy – how to best finance the zoning permit system – the matter is beyond the Council’s jurisdiction. However, Claimants could be understood to be arguing that the authorization to levy a \$18 fee is illusory, that is, that it would have to be so large as to be impossible to impose as a practical matter, such as in the \$500 shed of their example. Thus, it could be argued, the authorized revenue source cannot possibly recoup all of the costs of complying with the 10-day rule and is, in the constitutional sense, inadequate to comply with the LMA.

As a threshold matter, and as observed by the State, the LMA provides that the Council does not have the authority to determine whether the funding of any statute is adequate. See N.J.S.A. 52:13H-12(a). The obvious purpose of this legislative provision (which, unlike most of the substantive provisions of the statute, does not parallel the constitutional language of the Amendment itself) is to prevent the Council from becoming involved in fiscal policymaking. It is equally obvious, however, that the Council cannot permit the purpose of the Amendment 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.

The Council, however, is not persuaded that the §18 fee is illusory as Claimants assert. The flaw in the Townships' reasoning is their assumption that any fee charged would have to be uniform across all applicants. Although §18 is silent on this matter, it is common practice under the analogous "reasonable fee" provision of §8 of the Municipal Land Use Law, N.J.S.A. 40:55D-8(b), to vary the fee according to the category of application, differentiating between residential and commercial projects, for instance. As Cox explains in his authoritative treatise, using review of variance applications as his example:

This kind of fee schedule takes into account the relative simplicity of residential variances, which generally take much less hearing time and require only simple resolutions in comparison with most commercial or industrial applications, particularly for d variances, which may be complex, very often fiercely contested by objectors, and therefore often involve voluminous expert testimony.

[Cox, New Jersey Zoning and Land Use Administration, §24-2 at 465 (Gann, 2000)].

See State v. C.I.B. International, 83 N.J. 262, 274-75 (1980) (exemption of one- and two-family homes from inspection requirement has rational basis). As with interpretation of the word "administrative" in §18, the Council will not rush to a conclusion that §18 requires imposition of a flat fee, absent an authoritative legislative or judicial statement to this end.

VII

Conclusion

The Council grants the State's Motion to Dismiss the Complaint brought by Ocean and Frankford Townships. Assuming for purposes of this Motion that Amendment A-2403 mandates additional direct municipal expenditures, the Council concludes that the permit fee authorized by N.J.S.A. 40:55D-18 satisfies the Legislature's obligation to authorize a resource to offset such mandated costs. The Claimants have not succeeded in raising any contestable issues of fact surrounding the

adequacy of the §18 reasonable fee.

In reaching this disposition, the Council emphasizes that it is not departing from its statement in Highland Park I that it will proceed with “great caution” in considering motions to dismiss. The zoning permit system of the Municipal Land Use Law, the 10-day mandate of Amendment A-2403, and the operation of the §18 permit fee constitute a web of circumstance that may not often be found. Although the Council concludes that the Amendment has not been violated by Amendment A-2403 under these narrow circumstances, it will carefully examine the allegations should a similar case arise in the future. The Council will not hesitate to require a fact-finding proceeding whenever one is necessary to answer the question whether resources independent of the local property tax have in fact been authorized, as the Constitution requires.

The Council rules as follows: The Complaint filed by Ocean Township (Monmouth County) and Frankford Township is dismissed with prejudice.

So ordered.

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The above decision was adopted by the Council and issued on August 2, 2002. Council Members Marie L. Garibaldi (Chair), Dominick A. Crincoli and Timothy Q. Karcher join in the written decision. Council Members Ronald J. Riccio and Janet L. Whitman join in the dissenting opinion that follows. Council Members Karen A. Jezierny, Eric E. Martins, Thomas H. Neff and Kimberly Deal Phillips did not participate in the decision.

Dissent

We would deny the Motion to Dismiss and permit the Claimants to offer their proofs at a full fact-finding hearing. On the record before us at this preliminary stage, consisting of the pleadings and certifications that have not been tested by cross-examination, the Townships have not made a persuasive showing that A-2403 mandates any direct additional expenditures by the Claimants. However, the standard established for summary disposition by the Council in Highland Park I – “great caution” – requires us to give them the benefit of the doubt and every opportunity to make their case.

We respectfully disagree with the Council’s conclusion that the preexisting authority to levy a permit fee that was contained in N.J.S.A. 40:55D-18 before the adoption of A-2403 satisfies as a matter of law the Legislature’s constitutional obligation to authorize a resource to offset any additional expenditures required for implementation of the law. Our disagreement with the Council is a narrow one. We believe it might frustrate the broad remedial purpose of the LMA to permit the Legislature to do no more than implicitly rearrange existing funding sources to pay for additional expenditures that may be required to implement a new law. At this juncture of the proceeding a full hearing would be helpful in determining that issue, especially where Claimants have no right to appeal the Council’s decision.

The dilemma of the Claimants illustrates the need for a full hearing. Each has made its own decision about how to finance its zoning permit system. The Frankford Township Council has established a modest permit fee, one that it presumably thinks best accords with the will of the people it serves, the citizens of Frankford. Ocean Township, by contrast, has decided to fund its permit system

wholly out of general municipal revenues, and levies no fee at all. It is not for us to say which of these decisions is correct (or, indeed, whether either of them is correct). It suffices that under our decentralized system of local control, reinforced by the LMA, each municipality should be free to make its own decision, subject only to the approval of its own voters.

By adopting A-2403, the Legislature may have interfered with this process. Not only has the Legislature mandated a “fast track” approval process for reviewing zoning permit applications (a policy choice it is entitled to make), but as interpreted by the Attorney General and accepted by the Council, it has told Ocean and Frankford that they *must* adopt a permit fee that they may not want to adopt and would not adopt but for the passage of A-2403, or bear the cost of an unfunded mandate.

To avoid this interference with local fiscal autonomy, we could potentially require after a full hearing that the Legislature expressly specify a genuinely new source of revenue to offset its mandate. It could also follow from such a determination that the revenue authorized by the Legislature must be drawn from a State, rather than local, source.

We could also potentially determine after a full hearing that the Claimants’ argument that the new resource must be contained within the same statute as the new mandate has merit. Requiring the Legislature to explicitly identify the resource it is “authorizing” would solve a practical legal problem. Claimants have the burden of proving, among other things, that the Legislature *failed* to authorize a resource. This requires Claimants to prove a negative, not the easiest of tasks. Were the Council to require that the source of offsetting funds be stated explicitly, the Claimant would know exactly what its burden of proof entailed, rather than being required to respond to imaginative *post hoc* rationalizations proposed by Respondents.

Nor need a requirement of specificity lead to pointless redundancy, even in a case such as this one where the Legislature's intended funding resource is authorized in the same statutory paragraph. The Legislature's *implied intent* to rely on the already existing permit fee is distinct from its *express authorization* of that fee. It is common legislative practice to include ancillary language in a bill as it moves through the process that is ultimately not codified in any part of the New Jersey Statutes. Here, the Legislature could easily have followed this practice, stating in an uncodified supplemental paragraph that it was expressly relying on the existing fee provision of §18 to satisfy the Amendment.

The Council after a full hearing could decide to recommend that the Legislature follow a practice of explicitly authorizing the resource to offset a local mandate in all cases rather than implicitly doing so as argued here. If the Legislature's intent truly is the one that is attributed to it by the Council's analysis, it would be a simple matter to readopt the bill with clear and constitutional language.

For the foregoing reasons we would deny the Motion to Dismiss and set the matter down for a full hearing. After a full hearing we believe the Council would be in a better position to resolve the important questions raised herein that bear directly on the scope, extent, and meaning of the LMA.