

**IN THE MATTER OF COMPLAINTS FILED BY THE MAYORS OF SHILOH
BOROUGH AND THE BOROUGH OF ROCKY HILL AND BY SOUTHAMPTON
TOWNSHIP, DEERFIELD TOWNSHIP, SHAMONG TOWNSHIP, UPPER
DEERFIELD TOWNSHIP, AND BUENA VISTA TOWNSHIP**

Council on Local Mandates

Argued October 22, 2008

Decided October 22, 2008

Written Opinion issued December 12, 2008

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.)

Shiloh Borough and a number of other municipalities filed Complaints with the Council alleging that the provisions of the Fiscal Year 2009 Appropriations Act regarding State Police patrol services to rural municipalities violates the constitutional prohibition of new unfunded mandates, N.J. Const. art VIII, § 2, ¶ 5, as implemented by the Local Mandates Act, N.J.S.A. 52:13H-1 to -22. The challenged provisions require each municipality receiving State Police rural patrol services to enter into a cost-sharing agreement with the State Treasurer or be treated as if it had entered into such an agreement. As directed by the Council, the Attorney General answered on behalf of the State. Upon the agreement of all parties that no disputes of material fact existed, the Council ordered cross-motions for summary judgment to be filed. After hearing argument on the cross-motions on October 22, 2008, the Council determined to decide the motions that day, with a formal opinion to follow in due course. The Council delivered its formal opinion on December 12, 2008.

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

Since 1921, the State Police have been required by statute to provide police services to rural sections; they presently serve 89 rural municipalities at an annual cost of approximately \$80 million, borne in full by the State. The Fiscal Year 2009 Appropriations Act directs, however, that State Police appropriations may not be used to provide police protection to a rural municipality unless it enters into a cost-sharing agreement with the State Treasurer or enters an agreement for shared police services with another municipality or government agency; if a municipality does not enter any such agreement, it is deemed to have entered into a cost-sharing agreement with the State Treasurer. The Treasurer has advised the affected municipalities that

they must bear a total of \$12.5 million of the State Police rural service costs, and has notified each municipality of the dollar amount of its obligation. The Appropriations Act thus imposes a mandate and new funding obligations on the rural communities. The State has not simply elected to reduce or eliminate a discretionary activity and leave municipalities free to decide whether and how to replace the State Police services.

The Council rejects the State's contention that the Appropriations Act "implement[s] the provisions of [the New Jersey] Constitution" and thus may not be considered an "unfunded mandate." N.J. Const. art. VIII, § 2, ¶ 5(c)(5). Although the Constitution requires that appropriations for State government be provided for in an annual general law, not every provision of such a law can be said to "implement" the Constitution; otherwise, the "State mandate/State pay" principle could be easily sidestepped simply by including the mandate in an annual appropriations act. The Appropriations Act was constitutionally required, but its provisions for funding State Police rural services do not "implement" the Constitution.

The Council also rejects the State's argument that the legislative mandate cannot be deemed "unfunded" because the rural municipalities are eligible for certain grants that assertedly offset the new municipal costs. Department of Community Affairs SHARE and COUNT grants are not new sources of funding to pay for the new mandate and in any event are only for planning of shared services; and the State Treasurer's authority to satisfy a municipality's cost-sharing obligation from any grant-in-aid or State Aid is not a grant of new funds but a garnishment of existing municipal funds.

The Appropriations Act does include an appropriation, not to exceed \$5 million, specifically earmarked "to satisfy in part" the \$12.5 million imposed on the rural communities under the cost-sharing agreements. However, the State's own figures show that, even offsetting the \$5 million earmark, the mandate imposed on rural municipalities is unfunded by \$7.5 million. While it has no authority to determine whether the legislative funding is inadequate (N.J.S.A. 52:13H-12(a)), the Council here simply recognizes the explicit terms and acknowledged consequences of the legislation.

The cost-sharing mandate is fairly characterized as "unfunded" notwithstanding that its \$12.5 million cost is partially offset by the \$5 million appropriation for grants to affected municipalities. The "State mandate/State pay" directive would have little meaning if the legislature could avoid it by expressly electing to provide a specified partial amount of funding for a mandate and leaving an acknowledged balance to be shouldered by the local units.

Claimants' motion for summary judgment is granted; the State's cross-motion is denied. The portion of the Fiscal Year 2009 Appropriations Act set forth in Addendum A to the Council's decision is found to be an unfunded mandate in violation of N.J. Const. art. VIII, § 2, ¶ 5. Accordingly, it shall cease to be mandatory in its effect and expire.

Theodore E. Baker argued the cause for Claimants Shiloh Borough, et al. (*Baker, Krell, Haag & Bertram*, attorneys; Mr. Baker, Michael S. Garofalo, *Laddey, Clark & Ryan*, attorneys, and Douglas L. Heinold and George M. Morris, *Parker McCay*, attorneys, as Lead and Associate Counsel for Claimants, on the briefs).

Brian Flanagan, Deputy Attorney General, argued the cause for Respondent State of New Jersey (Anne Milgram, Attorney General of New Jersey, attorney; Howard J. McCoach, Assistant Attorney General, of counsel and on the briefs).

William John Kearns, Jr., argued the cause for amicus curiae New Jersey State League of Municipalities (*Kearns, Vassallo & Kearns*, attorneys; Mr. Kearns on the brief).

OPINION

On July 2, 2008, the Mayor of Shiloh Borough and Southampton Township filed Complaints with the Council on Local Mandates alleging that provisions of the Fiscal Year 2009 Appropriations Act, L. 2008, c. 35, regarding State Police rural patrol services to municipalities are an unfunded mandate. The Complaints each assert that (1) the Appropriations Act requires each rural municipality served by the State Police pursuant to N.J.S.A. 53:2-1 et seq. to enter into a cost-sharing agreement or be treated as if it had entered into such an agreement; (2) an additional direct expenditure of funds through the municipality's budget is thus mandated; (3) the Appropriations Act does not authorize resources other than the property tax to offset those additional expenditures; and (4) the provisions accordingly should be declared to be an unfunded mandate within the meaning of N.J. Const. art. VIII, § 2, ¶ 5(a) and N.J.S.A. 52:13H-1 to -22.

In keeping with its notice requirements, on July 16, 2008, the Council advised the appropriate State officials of the Complaints and five others that soon followed and directed the Attorney General to file an Answer on behalf of the State. A number of municipalities filed

similar Complaints, and still other municipalities sought leave to appear as amici curiae. At a pre-hearing status conference on September 17, 2008, the Council deemed all municipalities' requests to appear to be Complaints and ordered all Complaints consolidated for disposition.¹ At the same conference, the Council granted the Requests to Appear as amici curiae filed on behalf of the New Jersey State League of Municipalities and Cumberland County.

On September 23, 2008, the Council entered a case management order reciting that all parties agreed that no genuine dispute of material fact exists and directing the parties to file and serve cross-motions, with supporting briefs, for summary judgment. The State and the Claimants' designated lead and associate counsel timely filed their papers and the Council heard oral argument on the cross-motions on October 22, 2008. Following argument and a brief recess, the Council Chair advised counsel that because the municipalities and the State "need to know where they stand" in their budgeting, the Council would render its decision that day, with a

¹ The twenty-eight municipalities that filed Complaints or Requests to Appear in this matter include: the Borough of Shiloh (Mayor of), the Township of Upper Deerfield, and the Township of Deerfield, Cumberland County (appearing by Theodore E. Baker, Esq.); the Township of Southampton, Burlington County (appearing by George M. Morris, Esq.); Edward P. Zimmerman, Mayor of the Borough of Rocky Hill, Somerset County (appearing by Albert E. Cruz, Esq.); the Township of Shamong, Burlington County (appearing by Douglas L. Heinold, Esq.); the Township of Buena Vista, Atlantic County (appearing by Mark Stein, Esq.); Thomas L. Sheppard, Mayor of the Township of Lawrence, Cumberland County (pro se); Joe Venezia, Mayor of the City of Estell Manor, Atlantic County (appearing by Alfred R. Scerni, Jr., Esq.); the Township of Millstone, Monmouth County (appearing by Duane O. Davison, Esq.); George Garrison, Mayor of the Township of Commercial, Cumberland County (pro se); Wrightstown Borough, Burlington County (appearing by Nicholas Costa, Esq.); the Township of Maurice River, Cumberland County (appearing by Edward F. Duffy, Esq.); the Township of Woodland, Burlington County (appearing by Anthony T. Drollas, Jr., Esq.); the Township of Mannington, Salem County (appearing by William L. Horner, Esq.); the Township of Alexandria, Hunterdon County (appearing by Valerie J. Kimson, Esq.); the Township of Wantage and the Township of Walpack, Sussex County (appearing by Michael S. Garofalo, Esq.); East Amwell Township, Hunterdon County (pro se); Harmony Township and White Township, Warren County (appearing by Brian R. Tipton, Esq.); the Township of Knowlton, Warren County (pro se); the Township of Pittsgrove, Salem County (appearing by Adam I. Telsey, Esq.); the Township of Holland, Hunterdon County (appearing by Richard Dieterly, Esq.); the Township of Green, Sussex County (pro se); the Township of Sandyston, Sussex County (pro se); Lafayette Township, Sussex County (pro se), and Millstone Borough, Somerset County (pro se).

formal opinion to follow in due course. The Council Chair thereupon announced that the Council determined that the portion of the Appropriations Act at issue “constitutes an unfunded mandate and therefore is null, void and unenforceable.”² This opinion explains and memorializes that determination.

I

The New Jersey Department (now Division) of State Police was established by statute in 1921. N.J.S.A. 53:2-1. That statute, which remains effective to this date, explicitly directs that State Police officers “shall primarily be employed in furnishing adequate police protection to inhabitants of rural sections.” In keeping with that statutory directive, the State Police presently provide police protection to eighty-nine rural municipalities, all at the sole cost of the State.

The Fiscal Year 2009 Appropriations Act abandons that funding arrangement. It directs, rather, that State Police appropriations may not be used to provide police protection to a rural community unless

the municipality enters into a cost sharing agreement by December 15, 2008 with the State Treasurer, in which the municipality agrees to provide a local share for full time police protection and such lesser amount for part time police protection, as determined by the State Treasurer; provided further that the amount of any such local share shall not result in more than a \$100 increase over 2007 average residential property taxes as calculated by the Division of Local Government Services.

The contemplated cost-sharing agreement is not optional, unless the municipality contracts for shared police services with another municipality or government agency:

² The full text of the provisions is set forth in Addendum A to this opinion.

If such a municipality has not entered an agreement for shared police services with another municipality or government agency, notified the State Treasurer in writing of such agreement, and provided an executed copy of such agreement to the Treasurer by December 15, 2008, such municipality shall be deemed to have entered into a cost sharing agreement effective July 1, 2008 with the State Treasurer as provided in this paragraph.

The fiscal impact of those provisions is detailed in the Attorney General's submissions to the Council. The cost of the rural State Police services in 2007 was approximately \$80 million. As instructed by the Fiscal Year 2009 Appropriations Act, the State Treasurer calculated and informed each of the affected rural municipalities of the amount of its cost-sharing obligation, should it choose not to enter an agreement for shared police services with another municipality or government agency. As the Treasurer explained to each municipality, "[t]he budget requires the Treasurer to calculate a local share that will result in the State receiving approximately \$12.5 million Thus, municipalities receiving State Police rural patrol service will be providing the State approximately 15.6% of the costs of the service (based on the 2007 cost)."

II

Article VIII, § 2, ¶ 5(a) of the New Jersey Constitution directs that any provision of a law enacted after January 17, 1996, or of any rule and 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 expire." An "unfunded mandate" is there defined as one that "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."

The Claimants assert, and the Attorney General does not argue to the contrary, that the Fiscal Year 2009 Appropriations Act provisions at issue represent a legislatively-imposed “mandate.” That conclusion is unavoidable. N.J.S.A. 53:2-1 has long imposed on the State Police the duty of furnishing police protection to rural communities. Under the Appropriations Act, the affected municipalities are required to provide police protection, either through the State Police or through shared police services with another municipality or government agency. This is not a situation in which the State has simply elected to reduce or eliminate a discretionary activity, leaving the municipalities free to decide whether and how to replace the State services. Compare In re Counties of Morris, Warren, Monmouth and Middlesex, decided September 26, 2006, Opinion at 9 (addressing the State’s argument that it had not “ordered anyone to do anything” when it announced its “intention to withdraw from the deer disposal business on county and local roads”).

Nor can there be any doubt, and again the Attorney General does not dispute, that the legislative mandate expressly incorporates a new funding obligation on the affected municipalities: the 2009 fiscal year budget projects that the affected rural communities will pay the State a total of \$12.5 million under the cost-sharing agreements, and each municipality has been told exactly how much it must contribute for its State Police protection.

III

In defending the legislative provisions at issue, the State first invokes the constitutional exemption that laws “which implement the provisions of this Constitution” shall not be deemed “unfunded mandates.” N.J. Const. art. VIII, § 2, ¶ 5(c)(5). The State urges that “[t]he annual

appropriations act, passed pursuant to the specific command of N.J. Const. art. VIII, § 2, ¶ 2, is such a law and cannot, therefore, be considered an unfunded mandate.”

Article VIII, § 2, ¶ 2 directs in substance that appropriations for State government shall be provided for in an annual general law and that appropriations shall not exceed the total amount of revenue available to meet them. The Appropriations Act undoubtedly conformed with that provision. But not every provision in the Act “implements” the New Jersey Constitution. Indeed, if every provision of every annual appropriation act were read as “implementing” the Constitution, the “State mandate/State pay” principle could be sidestepped simply by including an unfunded mandate in an annual appropriations act. One constitutional provision should not be read as thus negating another; rather, the competing constitutional directives should be harmonized so as to give effect to both. See, e.g., State v. Muhammad, 145 N.J. 23, 44 (1996). Employing the language the Council used in rejecting an argument advanced by the Commissioner of Education that all educational spending mandates implement the “thorough and efficient” clause of the New Jersey Constitution and thus are exempted from the Council’s jurisdiction, the State’s reliance on the Appropriations Act as an exemption here is “clearly at odds” with the constitutional and statutory provisions under which the Council acts: “otherwise the exemption would swallow the rule.” In re Highland Park Board of Education and Borough of Highland Park, decided August 5, 1999, at 21-22. See also In re Special Services School Districts of Burlington, Atlantic, Cape May and Bergen Counties (“Special Services School Districts”), decided July 26, 2007, at 11 (the exemption of laws “required to comply with federal laws or rules or to meet eligibility standards for federal entitlements” (Art. VIII, § 2, ¶ 5(c)(1)) is not invoked “simply by showing that a discretionary choice has some logical connection to

meeting the federal requirements”; the State must “demonstrate[] with specificity how the challenged mandate is necessary to being in compliance with federal law or to maintaining eligibility for federal programs”).

The issue here is not whether the Appropriations Act was enacted in obedience to a constitutional command, as the State frames it, but whether the Act’s provisions for funding State Police rural patrol services “implement” the provisions of the New Jersey Constitution. The Attorney General has not suggested, nor does the Council discern, any basis for holding that the legislative mandate imposing State Police costs on rural municipalities “implements” any provision of the New Jersey Constitution. That mandate accordingly is not exempted by Art. VIII, § 2, ¶ 5(c)(5) from being considered an unfunded mandate.

IV

The State next argues that the mandate imposed on the rural municipalities is not unfunded, because they are “eligible for various grants under the Department of Community Affairs’ SHARE program that provides implementation, feasibility, and COUNT grants to incentivize new shared services” and the Appropriations Act explicitly authorizes the State Treasurer to “use monies from any grant-in-aid or State Aid . . . to meet the local share of providing [State Police] services.”

The Council rejected such an argument in Special Services School Districts, supra. The Commissioner of Education there urged that generalized appropriation of State aid to school districts provided a new source of non-property tax revenue to offset the additional direct expenditures mandated by the regulation there at issue. Holding that the constitutional and

statutory provisions concerning unfunded mandates “implicitly assume[] that a specific source of funding will be identified to pay for the new mandate” and that the increased State aid for education was not so “earmarked,” Id. at 15-16, the Council reasoned as follows:

[I]f some or all of [the increased State aid] is used for [implementing the challenged regulatory mandate], doing so diminishes the school district’s ability to use the “new” money for other equally appropriate purposes that in its discretion it might prefer. Giving resources to local governments on the one hand and immediately taking them away on the other in the form of a new unfunded mandate frustrates the purposes of N.J. Const. art VIII, § 2, ¶ 5(a) and [N.J.S.A. 52:13H-1 to 22]. In addition, without a clearly earmarked link between the purported new source of revenue and the new mandate to which it is applied, there will be potential problems of proof as the same bundle of State aid . . . [is] cited to justify more than one unfunded mandate. The Commissioner’s “bookkeeping” analysis is unworkable and would risk opening a loophole that could severely undermine the “State mandate/State pay” principle.

[Id. at 16]

That reasoning is equally applicable and dispositive here. The State grants cited by the Attorney General are not earmarked for funding State Police services; indeed, the SHARE program and COUNT grants are only for planning, not for operation, of shared services. The State Aid appropriations are not supplemented or otherwise tied to the cost-sharing obligations. The State Treasurer’s use of State Aid monies to satisfy a municipality’s cost-sharing obligation would be a garnishment of municipal funds, not a grant of new funds. To treat those sources as offsetting the additional municipal expenditures would indeed render the “State mandate/State pay” principle meaningless.

V

The Fiscal Year 2009 Appropriations Act does, however, include an appropriation, not to exceed \$5 million, specifically earmarked “to satisfy in part the payments due from those municipalities [that receive rural patrol services] under the cost sharing agreements.” L. 2008, c. 35, at 49. The State argues that because the Act thus “authorize[s] resources, other than the property tax, to offset the additional direct expenditures” (N.J. Const. art. VIII, § 2, ¶ 5(a)) and the Council is without “authority to determine whether the funding . . . is adequate” (N.J.S.A. 52:13H-12(a)), the challenged provisions of the Act cannot be held to be an unfunded mandate. That argument fails to take account of the relevant facts and misapplies the statute.

The Appropriations Act does not purport to fund the new mandate in full, nor does the \$5 million earmark purport to be an estimate of the additional direct expenditures imposed on the affected communities. To the contrary, the Act expressly states that the \$5 million will only “satisfy in part” the new mandate. The State Treasurer has informed the municipalities that they will bear \$12.5 million of the State’s cost of providing rural police services. Thus, while the \$5 million in funding may reduce that burden to \$7.5 million, the State’s own figures show that the mandate imposed on rural municipalities is unfunded by \$7.5 million.

In so finding, the Council does not violate N.J.S.A. 52:13H-12(a). “The obvious purpose of this legislative provision . . . is to prevent the Council from becoming involved in fiscal policymaking.” In re Ocean Township (Monmouth County) and Frankford Township (“Ocean/Frankford”), decided August 2, 2002, at 12. The Council here is not second-guessing legislative judgments about the adequacy of the legislative funding, but simply recognizing the explicit terms and the acknowledged consequences of the legislation.

VI

The final question, then, is whether the cost-sharing mandate is to be characterized as “unfunded” when its \$12.5 million cost would be partially offset by the \$5 million appropriation for grants to affected municipalities. The answer is yes. 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 for a mandate and leaving an acknowledged balance of the cost to be shouldered by the local units. As stated in Ocean/Frankford, the Council cannot allow the constitutional principle “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.” Ibid.

VII

For the foregoing reasons, the Claimants’ motion for summary judgment is granted and the State’s cross-motion for summary judgment is denied. The portion of the Fiscal Year 2009 Appropriations Act set forth in Addendum A hereto is declared to be “an unfunded mandate . . . because it does not authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law” and accordingly “shall cease to be mandatory in its effect and expire.” N.J.Const. art. VIII, § 2, ¶ 5(a).

So ordered.

* * * * *

The above opinion was adopted by the Council and issued on December 12, 2008. Council Members Sylvia B. Pressler (Chair), Leanna Brown, Timothy Q. Karcher, Victor R. McDonald, III, Rita E. Papaleo, Ryan J. Peene, Jack Tarditi, and Janet L. Whitman join in the written opinion.

ADDENDUM A

Extract from Appropriations Act, L. 2008, c. 35, A2800, page 158, line 8, through page 159, line 17.

“Notwithstanding the provisions of any law or regulation to the contrary, none of the monies appropriated to the Division of State Police or the Department of Law and Public Safety shall be used for providing police protection to the inhabitants of rural sections pursuant to R.S.53:2-1 in any municipality that received such police protection in FY2007-08 provided, however, that such monies may be expended for providing such police protection in any municipality described above that received rural policing services pursuant to R.S.53:2-1 in FY2007-08 if the municipality enters into a cost sharing agreement by December 15, 2008 with the State Treasurer, in which the municipality agrees to provide a local share for full time police protection and such lesser amount for part time police protection, as determined by the State Treasurer; provided further that the amount of any such local share shall not result in more than a \$100 increase over 2007 average residential property taxes as calculated by the Division of Local Government Services. If such a municipality has not entered an agreement for shared police services with another municipality or government agency, notified the State Treasurer in writing of such agreement, and provided an executed copy of such agreement to the Treasurer by December 15, 2008, such municipality shall be deemed to have entered into a cost sharing agreement effective July 1, 2008 with the State Treasurer as provided in this paragraph.

“Notwithstanding the provisions of any law or regulation to the contrary, none of the monies appropriated to the Division of State Police or the Department of Law and Public Safety shall be used for providing police protection to the inhabitants of rural sections pursuant to R.S.53:2-1 in a municipality in which such services were not provided in FY2007-08 unless that municipality enters into a cost sharing agreement with the State Treasurer to provide the full cost of the Division of State Police for providing such services. Any amount received in accordance with the conditions hereto shall be collected by the State Treasurer and shall be deposited into a dedicated fund within the Division of State Police and are appropriated for State Police operations.

“Notwithstanding the provisions of any law or regulation to the contrary, a municipality that enters into a cost sharing agreement with the State Treasurer may use monies from any grant-in-aid or State Aid appropriated pursuant to this act to meet the local share of providing such services;

provided, that this paragraph shall not be construed to authorize use of constitutionally dedicated monies, bond monies, or federal funds in a manner or for a purpose inconsistent with the Constitution or federal law.

“Notwithstanding the provisions of any law or regulation to the contrary, municipal appropriations made pursuant to a cost sharing agreement with the State Treasurer shall be included in the municipality’s final appropriations upon which its permissible expenditures are calculated pursuant to section 2 of P.L.1976, c.68 (C.40A:4-45.2). Notwithstanding the provisions of section 10 of P.L.2007, c.62 (C.40A:4-45.45) to the contrary, amounts required by a municipality to be raised to pay for the cost of police services pursuant to a cost sharing agreement, as described hereinabove, shall be treated as an exclusion that shall be added to the calculation of the municipal adjusted tax levy.

“Notwithstanding the foregoing provisions regarding cost sharing agreements or any law to the contrary, if the Superintendent of the Division of State Police, in consultation with the Attorney General, determines that public safety requires that police protection be provided to the inhabitants of rural sections pursuant to R.S.53:2-1 despite the fact that a municipality as described above has not entered into a cost sharing agreement with the State Treasurer, monies appropriated to the Division of State Police and the Department of Law and Public Safety may be used for providing such police protection and the Director of the Division of Budget and Accounting is authorized to withhold State Aid payments to such municipalities and transfer such amounts to the Division of State Police.

“Notwithstanding the provisions of any law or regulation to the contrary, municipalities shall not be allowed to apply for Extraordinary Aid for any expenses related to a cost-sharing agreement for rural policing.”