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OF COUNSEL:
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November 6, 2019

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

Council on Local Mandates
135 West Hanover Street
Trenton, New Jersey 08625

**Re: Complaint on behalf of the
Township of West Milford**




Dear Hon. John A. Sweeney and Council members:

Pursuant to Rule 3.b., enclosed please find an original and two (2) copies of the Complaint and Addendum on behalf of the Township of West Milford. Same was also electronically filed to filings-clmand@treas.state.nj.us on November 6, 2019.

Please feel free to contact our office if you have any questions or are in need of any additional information.

Very truly yours,
DORSEY & SEMRAU



Fred Semrau

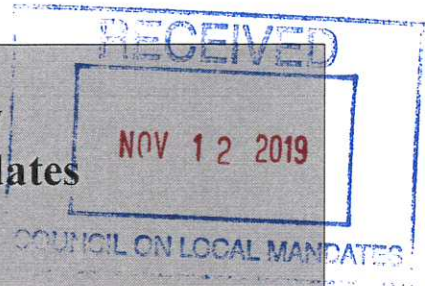
Enclosures

FCS/dms

cc: Mayor Michele Dale w/enclosures



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):

Claimant contact information:

Mailing Address:

City: State: Zip Code:

Phone: Fax:

E-mail address:

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

Name:

Title/Relationship:

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

Mailing Address:

City: State: Zip Code:

Phone: Fax:

E-mail Address:

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:

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

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:

The Township of West Milford submits that P.L. 2004, Chapter 120 (N.J.S.A. 13:20-1 through -35) (the Highlands Water Protection and Planning Act) and its implementing rules set forth at N.J.A.C. 7:38-1 through -14.2 (collectively "Highlands Act"), as applied to the Township of West Milford, constitute an unfunded mandate in violation of Article VIII, Section II, Paragraph 5 of the New Jersey Constitution.

The Highlands Act, as applied to the Township, which essentially is one of the geographically largest communities in the State of New Jersey at over eighty (80) square miles, in effect imposes a moratorium on all development within the Township. As concluded in the Highlands Council's 2009 West Milford Buildout Report, the Township, under the Highlands Act, has zero buildout available to the municipality.

The Highlands Act creates an unfunded liability for the Township because the State Legislature failed to appropriate resources to offset the permanent loss of ratables to the Township, notwithstanding the continued obligation of the Township to maintain infrastructure and provide for the stewardship of these preserved lands.

Initially, the Highlands Act provided for property tax reimbursement for those ratable losses that were sustained pursuant to the Highlands Act. This was set forth in N.J.S.A. 54:1-85 and known as The Highlands Property Tax Stabilization Board and Fund ("Board"). The statute established a special non-lapsing fund for the purpose of providing State aid to qualified municipalities. The Board was to establish procedures for determining the valuation base for a qualified municipality to determine whether fiscal stress "has been caused by the implementation of the Highlands Water Protection and Planning Act." The Board was instructed to determine the amount due to a qualified municipality to compensate for the decline in the aggregate true value of vacant land directly attributed to the implementation of the Highlands Act. This legislation called for final payments to be made in 2014 and presently, there is no provision available for such reimbursement notwithstanding that the hardships and the loss of ratables continue for qualified municipalities such as the Township.

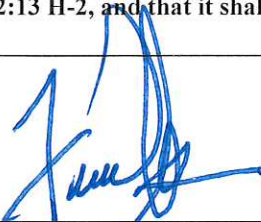


Note: The text provided in paragraph II (3) is to be used for the Pleading Summary published on the Council's web site. If more space is needed, please attach additional sheet(s).

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.

See Addendum to Complaint attached hereto

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

5. Does Claimant seek injunctive relief? No <input type="checkbox"/> Yes <input checked="" type="checkbox"/>	
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:	
<input checked="" type="checkbox"/> Resolution (of county/municipal governing body or of board of education), which is incorporated herein by reference, <i>or</i>	
<input type="checkbox"/> 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].	<input type="text" value="Fred Semrau"/> Name (typed or printed) of person signing
Date: <input type="text" value="November 6, 2019"/>	<input type="text" value="Municipal Attorney"/> Title (typed or printed) of person signing
Total number of attached pages:	<input type="text" value="7"/>

Print Form

**IN THE MATTER OF A COMPLAINT
FILED BY THE TOWNSHIP OF WEST
MILFORD, COUNTY OF PASSAIC,
STATE OF NEW JERSEY**

**NEW JERSEY COUNCIL ON LOCAL
MANDATES**

**ADDENDUM TO
COMPLAINT**

1. The Claimant, Township of West Milford, alleges that the following statute, rule, or regulation is an unfunded mandate in violation of N.J. Const. Art. VIII, sec. 2, para. 5 and N.J.S.A. 52:13H-2, because it does not authorize resources, other than property taxes, to offset the additional direct expenditures required for its implementation:

- a. N.J.S.A. §§13:20-1 through -35 (Highlands Water Protection and Planning Act);
- b. N.J.S.A. §54:1-85 (The Highlands Property Tax Stabilization Board and Fund)
- c. The regulations and rules implementing same set forth at N.J.A.C. §§7:38-1 through -14.2

2. The above-cited statutes, rules or regulations became effective on August 10, 2004 and December 4, 2006, respectively.

Response to Section II, the Complaint, #3 Basis for the Claim:

1. The Township of West Milford (hereinafter "Township") submits that P.L. 2004, Chapter 120 (N.J.S.A. §§13:20-1 through -35) (the Highlands Water Protection and Planning Act) and its implementing rules set forth at N.J.A.C. §§7:38-1 through -14.2 (hereinafter collectively "Highlands Act"), as applied to the Township, impose an unfunded mandate in violation of Article VIII, Section II, Paragraph 5(a) of the New Jersey Constitution and N.J.S.A. §52:13h-2.

2. In addition, N.J.S.A. §54:1-85, known as the Highlands Property Stabilization Board and Fund, was intended to be an integral funding source for this mandate. This fund has been completely depleted and abandoned and is no longer a funding source for the Highlands Act and negatively impacted municipalities such as the Township.

3. The Township specifically challenges N.J.S.A. §13:20-30 of the Highlands Act, which in pertinent part provides:

- a. Commencing on the date of enactment of this Act and until the effective date of the rules and regulations adopted by the Department of Environmental Protection pursuant to sections 33 and 34 of this act, all major Highlands development in the preservation area shall require a Highlands Preservation Area

approval from the department. The Highlands Preservation Area approval shall consist of the related aspects of other regulatory programs which may include, but need not be limited to, the “Freshwater Wetlands Protection Act,” P.L.1987, c. 156 (C.13:9B-1 *et seq.*), “The Endangered and Nongame Species Conservation Act,” P.L.1973, c. 309 (C.23:2A-1 *et seq.*), the “Water Supply Management Act,” P.L.1981, c. 262 (C.58:1A-1 *et seq.*), the “Water Pollution Control Act,” P.L.1977, c. 74 (C.58:10A-1 *et seq.*), “The Realty Improvement Sewerage and Facilities Act (1954),” P.L.1954, c. 199 (C.58:11-23 *et seq.*), the “Water Quality Planning Act,” P.L.1977, c. 75 (C.58:11A-1 *et seq.*), the “Safe Drinking Water Act,” P.L.1977, c. 224 (C.58:12A-1 *et seq.*), the “Flood Hazard Area Control Act,” P.L.1962, c. 19 (C.58:16A-50 *et seq.*), and any rules and regulations adopted pursuant thereto. For the purposes of this section, the provisions of P.L.1975, c. 232 (C.13:1D-29 *et seq.*) shall not apply to an application for a permit pursuant to the “Flood Hazard Area Control Act,” P.L.1962, c. 19 (C.58:16A-50 *et seq.*).

b. The Highlands Preservation Area approval shall also require:

(1) a prohibition on major Highlands development within 300 feet of any Highlands open waters, and a 300-foot buffer adjacent to all Highlands open waters; provided, however, that this buffer shall not extend into the planning area. For the purposes of this paragraph, major Highlands development does not include linear development for infrastructure, utilities, and the rights-of-way therefor, provided that there is no other feasible alternative, as determined by the department, for the linear development outside of the buffer. Structures or land uses in the buffer existing on the date of enactment of this act may remain, provided that the area of disturbance shall not be increased. This paragraph shall not be construed to limit the authority of the department to establish buffers of any size or any other protections for category one waters designated by the department pursuant to the “Water Pollution Control Act,” P.L.1977, c. 74 (C.58:10A-1 *et seq.*), or any other law, or any rule or regulation adopted pursuant thereto, for major Highlands development or for other development that does not qualify as major Highlands development;

(2) the quality of all Highlands open waters and waters of the Highlands within the preservation area to be maintained, restored, or enhanced, as required pursuant to the “Water Pollution Control Act,” P.L.1977, c. 74 (C.58:10A-1 *et seq.*) or the “Water Quality Planning Act,” P.L.1977, c. 75 (C.58:11A-1 *et seq.*), or

any rule or regulation adopted pursuant thereto, and any new or expanded point source discharge, except discharges from water supply facilities, shall not degrade existing water quality. In the case of water supply facilities, all reasonable measures shall be taken to eliminate or minimize water quality impacts;

(3) notwithstanding the provisions of subsection a. of section 5 of P.L.1981, c. 262 (C.58:1A-5), or any rule or regulation adopted pursuant thereto, to the contrary, any diversion of more than 50,000 gallons per day, and multiple diversions by the same or related entities for the same or related projects or developments of more than 50,000 gallons per day, of waters of the Highlands shall require a permit pursuant to the "Water Supply Management Act," P.L.1981, c. 262 (C.58:1A-1 *et seq.*), and any permit issued pursuant thereto shall be based on consideration of individual and cumulative impacts of multiple diversions, maintenance of stream base flows, minimization of depletive use, maintenance of existing water quality, and protection of ecological uses. Any new or increased diversion for nonpotable purposes that is more than 50% consumptive shall require an equivalent reduction in water demand within the same subdrainage area through such means as groundwater recharge of stormwater or reuse. Existing unused allocation or allocations used for nonpotable purposes may be revoked by the department where measures to the maximum extent practicable are not implemented to reduce demand. All new or increased diversions shall be required to implement water conservation measures to the maximum extent practicable;

(4) a zero net fill requirement for flood hazard areas pursuant to the "Flood Hazard Area Control Act," P.L.1962, c. 19 (C.58:16A-50 *et seq.*);

(5) the antidegradation provisions of the surface water quality standards and the stormwater regulations applicable to category one waters to be applied to Highlands open waters;

(6) a prohibition on impervious surfaces of greater than three percent of the land area of a lot existing on the date of enactment of this act, except that Highlands open waters shall not be included in the calculation of that land area;

(7) a prohibition on development, except linear development for infrastructure, utilities, and the rights-of-way therefor, provided that no other feasible alternative, as determined

by the department, exists for the linear development, on steep slopes with a grade of 20% or greater; and

(8) a prohibition on development that disturbs upland forested areas, in order to prevent soil erosion and sedimentation, protect water quality, prevent stormwater runoff, and protect threatened and endangered animal and plant species sites and designated habitats. Notwithstanding the provisions of this paragraph to the contrary, if a major Highlands development complies with all other applicable requirements for a Highlands Preservation Area approval pursuant to this subsection and disturbance to an upland forested area is unavoidable, the department shall allow the disturbance to an upland forested area of no more than 20 feet directly adjacent to a structure and of no more than 10 feet on each side of a driveway as necessary to access a non-forested area of a site.

- c. Application for a Highlands Preservation Area approval shall be made on forms made available by the department and shall be accompanied by a fee established in accordance with a fee schedule issued by the department within 10 days after the date of enactment of this act and published in the New Jersey Register. The fee schedule shall be exempt from the rulemaking requirements of the “Administrative Procedure Act,” P.L.1968, c. 410 (C.52:14B-1 *et seq.*) and shall expire upon the adoption of the rules and regulations required pursuant to subsection a. of section 33 of this act.
- d. The requirements and provisions of this section shall not apply in the planning area.

4. The Highlands Act, as applied to the Township, which essentially is geographically one of the largest communities in the State of New Jersey at over eighty (80) square miles, in effect imposes a moratorium on all development within the Township. As concluded in the Highlands Council’s 2009 West Milford Buildout Report, the Township, under the Highlands Act, has zero buildout available to the municipality. See Highland’s Council’s 2009 West Milford Buildout Report, page 12.¹

5. This moratorium on building and development in the Township also includes zero square feet of non-residential development that is available for the Township of West Milford.

¹ All reports and decisions referenced in this Addendum to Complaint shall be provided when permitted by the Council on Local Mandates.

6. The Highlands Act creates an unfunded mandate and liability for the Township because the State Legislature failed to appropriate adequate resources to offset the permanent loss of ratables to the Township, notwithstanding the continued obligation of the Township to maintain infrastructure and provide for the stewardship of these preserved lands.

7. Initially, the Highlands Act provided for property tax reimbursement for those ratable losses that were sustained pursuant to the Highlands Act. This was set forth in N.J.S.A. §54:1-85, known as The Highlands Property Tax Stabilization Board and Fund (“Board”). The statute established a special non-lapsing fund for the purpose of providing State aid to qualified municipalities. The Board was to establish procedures for determining the valuation base for a qualified municipality to determine whether fiscal stress “has been caused by the implementation of the Highlands Water Protection and Planning Act.” The Board was instructed to determine the amount due to a qualified municipality to compensate for the decline in the aggregate true value of vacant land directly attributed to the implementation of the Highlands Act.

8. This legislation called for final payments to be made in 2014 and presently there is no provision available for such reimbursement notwithstanding that the hardships and the loss of ratables continue for qualified municipalities such as the Township. Accordingly, the Highlands Property Tax Stabilization Board and Fund was a mechanism to fund the mandate of the Highlands Act. However, it no longer exists and no longer pays out any funding to qualified communities, such as the Township of West Milford.

9. The Council cannot allow the Constitution 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. *See Complaint of Shiloh Borough* (decided December 12, 2008); *see also Complaint of Ocean/Frankford Townships* (decided August 2, 2002).

10. Legislation containing a local mandate should be accompanied by a statement or, where appropriate, a fiscal note setting forth the manner in which sufficient funding is, or will be provided to cover the anticipated costs of municipal compliance without resort to other sources such as increased property taxes, grants, loans and the like. *See Complaint of Deptford Township* (decided February 17, 2016).

11. The Highlands Act and its rules, as applied to the Township of West Milford, do not fall within the categories of laws, rules and regulations deemed not to be unfunded mandates under N.J.S.A. §52:13H-3(a)-(f).

12. This challenge is limited to the Highlands Act as it is applied to West Milford since the entire Township is designated as a Highlands Act Preservation Area. There is no opportunity for growth and development because the restrictions of the Preservation Area apply to the entire Township.

Response to Section II, the Complaint, #4, Estimate of Additional Direct Expenditures:

As a result of the Highlands Act, the Township has computed that it has experienced lost revenue on an average of 1 million dollars per year. This is based on an analysis of the dramatic downturn in new or added assessments in the Township versus other similarly situated municipalities. Report of West Milford Township entitled *Analysis of Impact of Highlands Act*.

As a result of the termination of the Property Tax Reimbursement Program, the Township has lost in excess of \$500,000 per year from reimbursement based on the existing 3,600 acres of land in the Township that no longer have any development potential or possibility for ratable generation as a result of the Highlands Act. The Township has additional estimated costs, expenses and lost revenue based on the following:

- A. Transfer Development Credits: Under the Highlands Act, such funds are paid to the developer and the property is left with a severe deed restriction. The Valley Ridge development community was vacant land which was acquired under the Transfer Development Credits program, under which the developer was paid funds, but the Township was not compensated for the loss of revenue resulting in a loss of ratables to the Township of \$600,000 per year.
- B. The Township has incurred incremental expenses as a result of the Highlands Act and the severe restrictions imposed, which include the development of public purpose facilities. The Township has experienced these incremental expenses in the following manner:
 - a) Construction of the Recycling Center and the prohibition from constructing an access road;
 - b) Construction of the West Milford Library and the application costs, along with accommodations that had to be made to construct this public facility;
 - c) The Township would incur significant costs in that it is precluded from the development of recreational facilities and ancillary facilities to accommodate such sites.

The lost revenues for the Township of West Milford, which exceed 1 million dollars per year, on a conservative basis, result in additional expenditures by the Township of West Milford in its budgetary process and, accordingly, by the taxpayers of the municipality.

In addition, the Highlands Act creates a number of additional costs for the Township from a monitoring standpoint, Construction Code violations and enforcement, procedures and construction interpretations as to Highlands exemptions reviews; Township engineering costs with respect to septic, redevelopment projects, wastewater management, storm water management and municipal projects.

The restrictions of the Highlands Act cause these direct expenditures which constitute an unfunded mandate.

Response to Section II, the Complaint, #5 Does the Claimant Seek Injunctive Relief:

Yes. The Township will rely on several reports summarizing the various aspects of lost revenue and additional costs incurred by the adoption and implementation of the Highlands Act. In addition, the Township will rely upon the Highlands Council's 2009 West Milford Buildout Report. All reports upon which the Township shall rely shall be produced when the Council on Local Mandates permits.



Township of West Milford

Passaic County, New Jersey

~ Resolution 2019 – 298 ~

A RESOLUTION OF THE TOWNSHIP OF WEST MILFORD, COUNTY OF PASSAIC AND STATE OF NEW JERSEY AUTHORIZING THE FILING OF A COMPLAINT WITH THE NEW JERSEY COUNCIL ON LOCAL MANDATES THAT THE HIGHLANDS WATER PROTECTION AND PLANNING ACT, N.J.S.A. 13:20-1 THROUGH -35, AND N.J.A.C. 7:38-1 THROUGH -14.2, AS APPLIED TO WEST MILFORD TOWNSHIP, CONSTITUTES AN UNFUNDED MANDATE IN VIOLATION OF ARTICLE VIII, SECTION II, PARAGRAPH V OF THE NEW JERSEY CONSTITUTION

WHEREAS, as applied to the Township of West Milford, the Highlands Water Protection and Planning Act and its implementing rules (hereinafter collectively "Highlands Act") and it imposes upon the municipal government an undue financial hardship in violation of the New Jersey Constitution; and

WHEREAS, pursuant to the Highlands Act, areas impacted by the Act are divided into the Preservation Area and the Planning Area; and

WHEREAS, there is a strict approval process for any major development to be permitted within the Preservation Area; and

WHEREAS, the Township of West Milford is geographically one of the largest communities in the State of New Jersey at over 80 square miles; and

WHEREAS, the Township of West Milford is located 100% within the Highlands Preservation Area, thus restricting all development opportunities and causing a permanent loss in ratables; and

WHEREAS, the New Jersey Council on Local Mandates is responsible for resolving disputes on whether a law, rule or regulation adopted after 1996 constitutes an unfunded mandate; and

WHEREAS, an unfunded mandate upon municipalities is a law, rule or regulation that does not authorize resources, other than the property tax, to offset additional direct expenditures required to implement said law, rule or regulation; and

WHEREAS, no funding has been provided for in connection with the Highlands Act other than N.J.S.A. 54:1-85, known as the "Highlands Property Stabilization Board and Fund"; and

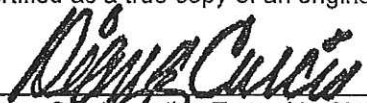
WHEREAS, the Highlands Property Stabilization Board and Fund was intended to be an integral funding source for the Highlands Act; however, it has since been depleted and abandoned and is no longer a funding source for the Highlands Act and municipalities such as the Township of West Milford in violation of the New Jersey Constitution.

NOW THEREFORE, BE IT RESOLVED by the Township Council of the Township of West Milford, in the County of Passaic, State of New Jersey, as follows:

1. That the Governing Body does hereby authorize the filing of a complaint on behalf of the Township with the New Jersey Council on Local Mandates that the Highlands Act constitutes an unfunded State mandate in violation of Article VIII, Section II, Paragraph V of the New Jersey Constitution.
2. That a certified copy of this resolution be provided to the Township Attorney for inclusion in the filing with the Council on Local Mandates.
3. This Resolution shall take effect immediately.

Adopted: October 16, 2019

Adopted this 16th day of October 2019 and certified as a true copy of an original.


Diane Curcio, Acting Township Clerk