

## Civil Administration

**SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT  
OF PLAINTIFF-INTERVENOR CITY OF PHILADELPHIA'S  
OPPOSITION TO PRELIMINARY OBJECTIONS**

**I. MATTER BEFORE THE COURT AND INTRODUCTION**

Before the Court is Plaintiff-Intervenor the City of Philadelphia's Supplemental Memorandum of Law in Opposition to Defendants' Preliminary Objections (Control Nos. 25032978 and 25033472).

In accordance with the Court's Order dated June 10, 2025, the City submits this Supplemental Memorandum of Law in further support of its Response in Opposition to Preliminary Objections and to address issues raised by the Court at oral argument on June 10, 2025.

Specifically, the City addresses three issues raised by the Court during oral argument. First, whether Section 1119 (Judicial Review) and Section 1122 (Private Right of Action) of the Philadelphia Fair Practices Ordinance (FPO) conflict with each other. Second, whether the FPO violates or is preempted by the Pennsylvania Local Agency Law (LAL). Third, whether the FPO mandates that all landlords in Philadelphia participate in the federal Housing Choice Voucher (HCV) program.

Sections 1119 and 1122 do not conflict because Section 1119 refers to judicial review of agency adjudications while Section 1122 creates a private right of action in the *absence* of an agency adjudication. This structure is completely consistent with the LAL because it preserves the right of aggrieved persons to appeal agency adjudications while allowing a private right of action where complainants have filed a complaint with the agency but their complaint has not been adjudicated. Finally, the FPO prohibits discrimination on the basis of source of income. It makes it unlawful for landlords to reject an applicant just because they wish to use a HCV (exactly what

Plaintiffs have pled in this case), which is not the same thing as mandating that all landlords participate in the HCV program.

## **II. ARGUMENT**

### **A. Legal Standard**

This case is at the preliminary objection stage and the City reiterates the legal standard set forth in its earlier opposition filings to the preliminary objections, incorporated herein by reference.

### **B. Sections 1119 and 1122 of the FPO Do Not Conflict**

The Philadelphia Fair Practices Ordinance (“FPO”) is the City’s anti-discrimination law. Phila Code § 9-1101 et seq. It was enacted “to assure that all persons . . . enjoy the full benefits of citizenship and are afforded equal opportunities for employment, housing and use of public accommodation facilities . . .” Phila Code § 9-1102. The FPO was first enacted in 1963 and has been amended numerous times over the years.

The FPO creates two paths to court for persons claiming to be aggrieved by prohibited discrimination: (1) an agency investigation, mediation, conciliation, hearing and adjudication process followed by appeal to court; and (2) agency administrative exhaustion, followed by a private right of action in court if there is no agency adjudication or conciliation agreement.

The FPO’s agency process is set forth in Sections 9-1111 through 9-1121 of the Philadelphia Code. Section 9-1111 provides that the Philadelphia Commission on Human Relations (the “Commission”) is “vested with the authority to administer and enforce this Chapter and in connection therewith may promulgate and issue regulations.” Phila. Code § 9-1111; see also Phila. Home Rule Charter §§ 4-700 & 4-701 (generally granting the Commission authority to administer and enforce Philadelphia’s anti-discrimination laws and to conduct investigations and public hearings).

Code Sections 9-1112 through 9-1117 govern the processes by which the Commission receives and investigates complaints. After a complaint is filed with the Commission (§ 9-1112), the respondent must submit an answer in writing (§9-1114). The Commission may at any time after the filing of a complaint attempt to resolve the complaint through mediation or another method of dispute resolution. Phila. Code § 9-1114. In addition, the Commission shall investigate the complaint and may issue subpoenas. Phila. Code § 9-1115(1).

After investigation, the Commission determines whether probable cause exists for the allegations in the complaint. Id. § 9-1115(3). If the Commission determines that there is no probable cause, it closes the case and issues a “letter of determination” to all parties involved.<sup>1</sup> At this point, the agency process ends and the complainant has a right to sue in court under Section 9-1122.

If, on the other hand, the Commission determines that probable cause exists, then the agency process may continue. The Commission and the parties may pursue conciliation (governed by § 9-1116), which may result in a conciliation agreement. If a conciliation agreement has not been entered within a year after the filing of the complaint, then the complainant may choose to end the agency process and file a complaint in court. Id. § 9-1122.

The Commission may adjudicate a complaint by appointing a panel of Commissioners to conduct a public adjudicatory hearing in accordance with Section 9-1117. Id. § 9-1117 (requiring notice, opportunity for parties to be heard and submit evidence, and transcription for such hearings). After such a hearing, the Commission issues a final order finding for or against the complainant, which includes the Commissioner’s findings of fact. Id. § 9-1118(1). The

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<sup>1</sup> See Commission Reg. 2.12(a)(1), available at <https://www.phila.gov/media/20200508153825/PCHR-regulations.pdf> (last accessed June 26, 2025).

Commission, therefore, will issue an “order” only after it has concluded that there is probable cause for the allegations in the complaint and after a panel has presided over a hearing under Section 9-1117.

Consistent with the Pennsylvania Local Agency Law (LAL), 2 Pa.C.S. § 751 et. seq., the FPO provides for judicial review of adjudications of the Commission. In cases that proceed to an adjudicatory hearing under Section 9-1117, an order is issued. Section 9-1119 provides that any party aggrieved by an “order” of the Commission may appeal to a court of competent jurisdiction.

The FPO also provides for a separate path to court via a private right of action. Section 9-1122, titled “Private Right of Action” specifies that a complainant may bring an action in court under two circumstances: if “within one (1) year after the filing of a complaint with the Commission, the Commission dismisses the complaint or has not entered into a conciliation agreement to which the complainant is a party.”<sup>2</sup> Phila. Code § 9-1122(1). Put another way, the private right of action path is only available to parties if there has not been a conciliation agreement or an adjudicatory hearing and order of the Commissioner.

Importantly, Section 9-1122 does not say that a complainant has a private right of action if they are aggrieved by an “order” issued pursuant to Section 9-1118. Rather, once the Commission has held an adjudicatory hearing and issued a final order, the parties may appeal under Section 9-1119 and the Pennsylvania LAL. Sections 9-1119 and 9-1122 are thus in harmony with one another because both ensure that a litigant’s right to be heard in court is not foreclosed. These two provisions also operate to prevent parties from relitigating claims from scratch in court when they are dissatisfied with a final adjudicatory order of the Commission.

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<sup>2</sup> FPO Section 9-1117(3) allows either party in a housing discrimination matter to take the matter to the Court of Common Pleas in lieu of a hearing before the Commission.

The FPO is not the only City ordinance that provides for both an agency adjudication process and a private right of action in court. Chapter 9-3500 of the Philadelphia Code prohibits employment discrimination based on an applicant's criminal record and provides for administration and enforcement by the Commission. Phila. Code § 9-3506. It also provides complainants a private right of action "[i]f within one (1) year after the filing of a complaint with the Commission, the Commission concludes that it has not found sufficient evidence of a violation to proceed further with an investigation, or has not entered into a conciliation agreement to which the complainant is a party." *Id.* § 9-3508. Chapter 9-4100 of the Philadelphia Code protects use of sick time for certain jobs and provides for an agency investigation and adjudication process and provides that "any person aggrieved by a violation of this Chapter . . . may bring a civil action in a court of competent jurisdiction against an employer violating this Chapter, except that a person aggrieved by a violation of this Chapter shall first file a complaint with the Agency . . ." *Id.* § 9-4110; see also, inter alia, Phila. Code § 17-1300 (regarding minimum wage and benefits), Phila. Code § 9-2406 (regarding predatory lending), and Phila. Code § 9-614 (regarding gratuities).

There are also similar structures in federal and state statutes. For example, persons in Pennsylvania who believe they have been discriminated against in employment and wish to bring claims based on state and federal law must first file a complaint with the Equal Employment Opportunity Commission ("EEOC") or the Pennsylvania Human Relations Commission ("PHRC"). Under the EEOC, a complainant must first provide a signed statement alleging the employment discrimination they suffered.<sup>3</sup> Unless a claim is related to the Equal Pay Act, a complainant cannot file a lawsuit for unlawful discrimination without first filing a charge with the EEOC. *Id.* If 180 days have passed without the EEOC issuing a decision, a complainant may

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<sup>3</sup> *See*, How to File a Charge, available at <https://www.eeoc.gov/how-file-charge-employment-discrimination> (last accessed June 26, 2025).

file a lawsuit in federal court.<sup>4</sup> Once a complainant files a lawsuit the EEOC will stop processing the complaint. Id. After investigation, the EEOC will make a determination on the merits.<sup>5</sup> If the EEOC determines that the facts do not establish a violation of law, the EEOC will provide a complainant with a letter called a "Dismissal and Notice of Rights." Id.

The judicial review and private right of action provisions of the FPO are in harmony with one another and are similar to procedures set forth in other ordinances and laws.

**C. The City's FPO Private Right of Action Is Not Preempted by the Pennsylvania Local Agency Law**

The FPO does not violate the LAL, nor is it preempted by the LAL. The FPO has not been expressly preempted by LAL and the LAL does not manifest field preemption. Most importantly, the FPO's private right of action is consistent with the LAL because the FPO creates an exclusive agency appeal path for adjudications.

**1. The Preemption Framework**

The City is a home rule municipality. As such, the City has the presumptive power to enact any given local law, those laws are presumed valid, and any ambiguities with respect to a home rule municipality's authority should be resolved in favor of the municipality. See Hoffman Min. Co., Inc. v. Zoning Hearing Bd., 32 A.3d 587, 593 (Pa. 2011) ("the General Assembly must clearly evidence its intent to preempt"); Nutter v. Dougherty, 938 A.2d 401, 411 (Pa. 2007) ("grants of municipal power shall be liberally construed in favor of the municipality"); Delaware Cty. v. Middletown Twp., 511 A.2d 811, 813 (Pa. 1986) ("In analyzing a home rule municipality's

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<sup>4</sup> See, Filing a Lawsuit in Federal Court, available at <https://www.eeoc.gov/federal-sector/filing-lawsuit-federal-court> (last accessed June 26, 2025).

<sup>5</sup> See, What You Should Know: The EEOC, Conciliation, and Litigation, available at <https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-conciliation-and-litigation> (last accessed June 26, 2025).

exercise of power, then, we begin with the view that it is valid absent a limitation found in the Constitution, the acts of the General Assembly, or the charter itself, and we resolve ambiguities in favor of the municipality”).

As the Pennsylvania Supreme Court has made clear with respect to Philadelphia: “We cannot stress enough that a home rule municipality’s exercise of its local authority is not lightly intruded upon, with ambiguities regarding such authority resolved in favor of the municipality.” Nutter, 938 A.2d at 414. The City’s Ordinances – including the Fair Practices Ordinance – are thus entitled to a strong presumption of validity. See, e.g., Rufo v. Board of License and Inspection Review, 192 A.3d 1113, 1120 (Pa. 2018).

The City has the power to legislate “as fully as could the General Assembly,” unless the General Assembly has, either explicitly or implicitly, preempted the city from doing so. See Hoffman, 32 A.3d at 594 (discussing three types of preemption under Pennsylvania law: express preemption; conflict preemption; and field preemption). Express preemption is not at issue here, because the LAL at 2 Pa. C.S. § 751 et seq. does not contain a preemption clause or any preemption language. There are two types of implied preemption: field preemption and conflict preemption. Neither apply here.

## **2. Field Preemption**

Field preemption requires a clear intent to occupy an entire regulatory field and has been limited by Pennsylvania courts to specific topics. “[T]he mere fact that the General Assembly has enacted legislation in a field does not lead to the presumption that the state has precluded all local enactments in that field; rather, the General Assembly must clearly evidence its intent to preempt.” Hoffman, 32 A.3d at 593. Courts should act with caution when finding preemption because finding a field preempted can have significant ramifications. “Such clarity is mandated because of the



severity of the consequences of a determination of preemption[.]” Id. Here, there has been no showing of a clear legislative intent by the General Assembly to preempt the field of judicial review. The LAL requires that aggrieved persons have the right to appeal to a court of competent jurisdiction. It does not say that this may be the only path to court when a complainant has filed a complaint with a local agency, nor does it restrict in any way the ability of localities to create legal remedies or causes of action.

Pennsylvania caselaw demonstrates that the fields that are preempted are specific and narrow. “This Court has determined that the General Assembly has evidenced a clear intent to totally preempt local regulation in only three areas: alcoholic beverages, strip mining, and banking.” Id. In 2024, the Commonwealth Court found (the City believes incorrectly) that the General Assembly also preempted the entire field of firearms regulation. Gun Owners of America, Inc. v. City of Philadelphia, 311 A.3d 72, 83 (Pa. Commw. Ct. 2024).

The field of judicial review does not meet the requirements for field preemption in Pennsylvania, because there is no clear intent to do so in the LAL, and it has never been included in the narrow list of subjects that are deemed field preempted.

### **Conflict Preemption**

Conflict preemption also does not apply here. “Conflict preemption is a formalization of the self-evident principle that a municipal ordinance cannot be sustained to the extent it is contradictory to, or inconsistent with, a state statute.” Delaware Riverkeeper Network v. Sunoco Pipeline L.P., 179 A.3d 670, 692 (Pa. Commw. Ct. 2018). Conflict preemption exists under two circumstances. First, conflict preemption exists when the conflict between a local ordinance and a state statute is irreconcilable. Id. A local ordinance and state statute are irreconcilable when “simultaneous compliance with both the local ordinance and the state statute is impossible,” id.,

or “when it is physically impossible to comply” with both laws. Werner v. Plater-Zyberk, 799 A.2d 776, 787 (Pa.Super. Ct. 2002). Second, conflict preemption also exists when a local ordinance “stands as an obstacle to the execution of the full purposes and objectives of a statutory enactment of the General Assembly.” Id.

First, it is possible to comply with both the FPO and LAL. The LAL provides that “[a]ny person aggrieved by an *adjudication* of a local agency...shall have the right to appeal to the court vested with jurisdiction.” 2 Pa. C.S. 752 (emphasis added). The FPO limits the private right of action so as to ensure that if there is an *adjudication* by the Commission, then the only path available to an aggrieved party is an LAL appeal to the Philadelphia Court of Common Pleas.

Section 9-1122 of the FPO creates a private right of action only if the complaint does not proceed to a conciliation agreement or an adjudication. Simply put, Section 9-1122 does not conflict with the LAL because it only applies to matters that are not, and cannot be, adjudicated by the Commission because they have been closed by the Commission or withdrawn by the complainant. Nothing in the LAL requires a complainant to choose an agency adjudication if another pathway to court exists.

Crucially, the Commission’s decision to not move forward with a complaint does not constitute an “adjudication” and thus cannot be challenged through the LAL. See Baker v. Com., 507 Pa. 325, 332 (Pa. 1985) (“[A] Commission order finding a complaint lacks probable cause for further agency action is not an “adjudication” under 2 Pa.C.S. § 101 and the remedy of appeal under 2 Pa.C.S. § 702 is not available.); see also Appeal of Alston, 305 A.3d 620 (Table), 2023 WL 5838535 at 5 (Commw. Ct. 2023) (unreported decision) (rejecting appellant’s argument that the PCHR’s dismissal was an adjudication under the LAL that could be appealed to the trial court). This means that once the Commission decides not to move forward, a complainant only has a right

to relief though Section 9-1122 of the FPO, not the LAL. Similarly, once a complainant exercises their right to sue, that complainant's path to relief through agency adjudication and the LAL has been foreclosed.

When the Commission holds an adjudicatory hearing and the complainant is unhappy with the result of this adjudication, then they, or the respondent, can challenge it through the standard LAL process. In this circumstance, a complainant will be bound to the record before the Commission. This is the pathway described in Section 9-1119 of the FPO. "Any party aggrieved by any order of the Commission may appeal to any court of competent jurisdiction..." Phila. Code § 9-1119 (1). Therefore, there is no impossibility or irreconcilable conflict between the FPO and the LAL. Rather, the FPO embodies the right of aggrieved parties to appeal an agency adjudication to court and creates an entirely separate private right of action for matters that are not adjudicated.

Second, the FPO does not undercut LAL or create an obstacle to its execution. To determine if an ordinance stands in obstacle to the execution of another law one must look to the purpose of the law. "[T]he remaining aspect of conflict preemption, when a state law stands as an obstacle to the accomplishments and execution of the full purposes and objectives of [the legislature]." Dooner v. DiDonato, 971 A.2d 1187, 1200 (Pa. 2009). Courts have analyzed "the effect of the challenged ordinance on the proper functioning and application of the state enactment." Fross v. Cnty. of Allegheny, 20 A.3d 1193, 1203 (Pa. 2011). "If the local ordinance impedes the operation of the state statute, the ordinance is preempted." Id.

Section 751 of the LAL describes the law's scope and purpose:

Except as provided in subsection (b), this subchapter shall apply to all local agencies regardless of the fact that a statute expressly provides that there shall be no appeal from an adjudication of an agency, or that the adjudication of an agency shall be final or conclusive, or shall not be subject to review."<sup>6</sup>

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<sup>6</sup> 2 Pa. C.S. § 751.

This section demonstrates that the purpose of the LAL is to ensure that parties are not foreclosed from being heard in court even if an agency adjudication is against them and even if a statute purports to make that agency adjudication unappealable. This purpose is not at all in conflict with the FPO, which preserves the right to appeal Commission adjudications to court.

The fact that the FPO allows a complainant to initiate a civil action in court when the Commission has not made an adjudication does not stand as an obstacle to the purpose of the LAL. LAL provides a right to appeal to individuals aggrieved by an adjudication. But the decision by the Commission regarding whether probable cause exists is not an adjudication. Short of an adjudicatory hearing by the Commission, the parties cannot challenge actions of the Commission through an appeal pursuant to the LAL and Section 9-1119. On the other hand, when the Commission does make an adjudication, Section 9-1119 mirrors the LAL, allowing complainants to appeal the Commission's order. This does not defeat the purpose of LAL, it supports it.

In Hoffman, the court looked to see if a municipal zoning ordinance presented an obstacle to the "primary purpose of the [state] statute[.]" Hoffman, 32 A.3d at 604. The state statute, known as the Surface Mining Act, prevented all surface mining operations within 300 feet of an occupied dwelling. Id. at 591. A local zoning ordinance established that mining activities must be setback 1,000 feet from residential areas. Id. at 592. The court found that the state statute did not preempt the zoning ordinance because the primary purpose of the Surface Mining Act was "providing for the conservation and improvement of areas of land affected in surface mining." Id. at 603. (internal citations omitted). The additional setback imposed by the zoning ordinance did not stand as an obstacle to this purpose. Id.

Here, similarly to Hoffman, the FPO does not frustrate the purposes of the LAL. The purpose of the LAL is to provide a right to appeal agency adjudications where an explicit right to

appeal may not have existed under local law. The FPO expressly preserves that right and also provides a path to court for complainants whose complaints are not adjudicated by the Commission. Both sets of laws seek to preserve the right to redress in court for individuals who are aggrieved by the actions or inactions of an agency.

For all of these reasons, the FPO does not violate and is not preempted by the LAL.

**D. The FPO Prohibits Landlords From Rejecting a Housing Applicant Because They Wish to Use a Housing Choice Voucher.**

The FPO prohibits discrimination, which is not the same as requiring participation in the federal HCV program for all Philadelphia landlords.

The FPO prohibits discrimination in housing on the basis of “source of income,” which it defines to include “all forms of public assistance . . . and housing assistance programs.” It is not in dispute in this case that rejecting or turning away a housing applicant or inquirer outright for the sole reason that they wish to use HCVs to pay all or part of their rent violates the FPO. For some but not all landlords in Philadelphia, persons will inquire or apply who indicate that they wish to use a HCV. According to the allegations in the Complaint, this is exactly what Plaintiffs did. Some landlords will simply reject or turn away these applicants for the sole reason that they wish to pay with an HCV. Again, according to the allegations in the Complaint, this is exactly what Defendants did. On the other hand, other landlords will never encounter an applicant who asks to use HCVs. Other landlords who encounter such applicants will proceed to reviewing the housing applications to determine whether the applicants are qualified. Landlords do not have to accept rent that is less than what they want to charge. They do not have to accept applicants that they wish to reject for other nondiscriminatory reasons.

This distinction has been recognized by other courts. For instance, the federal court in Bourbeau upheld Washington D.C.’s antidiscrimination ordinance. The court held that it “is wrong to assume that reading the [D.C. Human Rights Act] to prohibit discrimination against voucher holders on the basis of their status as voucher holders is tantamount to mandating participation in the program. Landlords remain free not to rent to voucher holders provided they do so on other legitimate, non-discriminatory grounds... [.]” Bourbeau v. Jonathan Woodner Co., 549 F. Supp. 2d 78, 87 (D.D.C. 2008) (internal citations omitted).

### III. RELIEF REQUESTED

For the reasons set forth herein, Plaintiff-Intervenor the City of Philadelphia respectfully requests that the Court overrule Defendants’ Preliminary Objections and allow this case to proceed beyond the pleadings.

Dated: July 1, 2025

Respectfully submitted,

CITY OF PHILADELPHIA  
LAW DEPARTMENT

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**CERTIFICATE OF SERVICE**

I, William B. Shuey, hereby certify that I filed a copy of the foregoing document to the First Judicial District of Pennsylvania's electronic filing system. Pursuant to Pennsylvania Rule of Civil Procedure 205.4(g)(2), service will be complete upon all counsel of record when the filing is accepted by the Prothonotary.

DATE: July 1, 2025

BY: /s/ William B. Shuey  
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