IN THE MATTER OF COMPLAINTS FILED BY THE COUNTIES OF MORRIS, WARREN, MONMOUTH, AND MIDDLESEX

Council on Local Mandates

Argued September 26, 2006

Decided September 26, 2006

Written Opinion issued October 31, 2006

Syllabus

(This syllabus was prepared for the convenience 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.)

The Counties of Morris, Warren, Monmouth, and Middlesex ("Claimants") filed Complaints with the Council contending that a change in State policy governing the pick-up and disposal of deer carcasses violates the constitutional prohibition against new unfunded mandates, N.J. Const. art. VIII, § 2, ¶ 5 ("Amendment"), as codified in the Local Mandates Act ("LMA"). In a press release issued on June 7, 2006 ("June 7 notice"), the New Jersey Department of Transportation ("NJDOT") informed counties and municipalities that its practice of removing dead deer from all State, county and local roadways, in place for at least the past twenty years, would end on September 30, 2006, after which "counties and municipalities should be prepared to begin performing this function in their jurisdictions." At the Council's request, the Commissioner of the NJDOT answered the Complaints. The Commissioner of the New Jersey Department of Environmental Protection ("NJDEP") answered the Complaints as well, it appearing that NJDEP regulations might be in issue. Respondent NJDOT filed a Motion to Dismiss the Complaints, contending that there was neither a constitutional nor statutory requirement that it perform deer removal services and denying that its "[p]ast funding practice . . . rise[s] to the level of a statutory mandate."

HELD: The Council unanimously denies the State's Motion to Dismiss the Complaints and grants Summary Judgment on behalf of Claimants.

Despite Respondent NJDOT's contention that it has no obligation to remove dead deer from county and local roads, the Council concludes that the State's conceded practice of doing so for many years clarifies the ambiguous wording of N.J.A.C. 7:25-17.4, pursuant to the doctrine of contemporaneous construction, and places the legal responsibility for that removal on Respondents. Nor does the Council accept Respondent NJDOT's assertion that the June 7 Notice is not a "rule or regulation" within the Council's jurisdiction or that NJDOT has not ordered "anyone to do anything." The Council has the power and authority to deem a policy statement to be an unfunded mandate encompassed by the "rule or regulation" provision of the Amendment and the LMA where, as here, the practical consequence is that localities must act. To hold otherwise would put form over substance and permit the State to avoid or circumvent the constitutional requirement of "State mandate, State pay."

Because it does not authorize resources to offset the related costs of what is a new function or responsibility for local governments, the June 7 notice violates the LMA. While the Council has no jurisdiction to order the State to continue collecting deer carcasses, its ruling that the June 7 Notice "ceases to be mandatory in its effect" and "expires" is final under the LMA.

Steven F. Ritardi, Special Counsel to County of Morris, argued the cause for Claimant County of Morris (*Carmagnola & Ritardi*, attorneys; *Ronald Kevitz*, Morris County Counsel, on the briefs).

Joseph J. Bell, County Counsel for Warren County, argued the cause for Claimant County of Warren (*Bell & Gage*, attorneys; *Mr. Bell* on the brief).

Robert D. Faccone, First Assistant Monmouth County Counsel, argued the cause for Claimant County of Monmouth (*Malcolm V. Carton*, Monmouth County Counsel on the brief).

Kenneth J. Lebrato, Deputy Middlesex County Counsel, argued the cause for Claimant County of Middlesex (*Mr. Lebrato* on the brief).

Richard J. Harcar, Senior Deputy Attorney General, and *Sudha V. Raja*, Deputy Attorney General, argued the cause for Respondent Commissioner of the Department of Transportation (*Stuart Rabner*, Attorney General of New Jersey, attorney; *Ms. Raja* on the briefs).

Caroline K. Stahl, Deputy Attorney General, argued the cause for Respondent Commissioner of the Department of Environmental Protection (*Stuart Rabner*, Attorney General of New Jersey, attorney; *Sudha V. Raja* on the briefs).

James G. O'Donohue, Esq., argued the cause for amicus curiae New Jersey Association of Counties (*Hill Wallack*, attorneys; *Mr. O'Donohue* on the briefs).

OPINION

I

The Complaints

This proceeding was initiated by a Complaint filed by the County of Morris on July 10, 2006. The County asserts that on June 7, 2006, the New Jersey Department of Transportation ("NJDOT") announced a change in policy that constitutes an unfunded mandate in violation of the New Jersey Constitution, Article VIII, § 2, ¶ 5, and the Local Mandates Act, N.J.S.A. 52:13H-1 et seq. This announcement, in the form of a "Dear Mayor" letter issued as a press release ("June 7 Notice"), states that "the NJDOT policy governing the pick-up and disposal of deer carcasses is being changed for FY2007." The June 7 Notice continues that "[b]y September 30, 2006, counties and municipalities should be prepared to begin performing this function in their jurisdictions." Substantially similar claims were filed by Warren County on August 2, 2006, Monmouth County on August 17, 2006, and Middlesex County on August 22, 2006. The Council consolidated the four Complaints on August 29, 2006. On that date, the Council also granted leave to the New Jersey Association of Counties ("NJAC") to participate as amicus curiae.

On August 2, 2006, the Attorney General filed a formal Answer and Motion to Dismiss the Complaint on behalf of the Commissioner of the NJDOT. Subsequently, at the Council's request, the Attorney General also answered on behalf of the Commissioner of the New Jersey Department of Environmental Protection ("NJDEP"), it appearing that regulations promulgated by the Division of Fish and Wildlife in NJDEP might be relevant to the disposition of the Complaints. In its Answer and in support of its Motion to Dismiss, NJDOT contended, *inter alia*, that there was neither a constitutional nor statutory requirement that it perform deer removal services, and it denied that its "[p]ast funding practice . . . rises[s] to the level of a statutory mandate." This answer was later extended to cover the other Claimants as well.

On August 3, 2006, Morris County moved for Summary Judgment. In its August 22, 2006, Complaint, Claimant Middlesex County moved to enjoin implementation of the June 7 Notice pending the Council's consideration of the Complaints. On July 18, 2006 and August 29, 2006, the Council requested supplemental briefing by the parties on questions of law that had not initially been addressed by them. Oral argument was thereafter heard on September 26, 2006 on the State's Motion to Dismiss, Morris County's Motion for Summary Judgment, and Middlesex County's request for an injunction. Recognizing that the deer removal policy announced in the June 7 Notice was intended to go into effect on October 1 and that Claimants would need to make contractual arrangements promptly should the responsibility for the deer fall to them on that date, the Council recessed for deliberation after the September 26 hearing, and immediately thereafter announced its decision on the procedural motions. The Council:

-- Denied Respondent's Motion to Dismiss;

-- Granted Summary Judgment "declaring the policy change announced in the letter of June 7, 2006 to be an unfunded mandate and as such it shall cease to be mandatory in its effect on municipalities and counties, and shall expire";

-- Dismissed the request for injunctive relief as moot;

-- Stated that its decision "requires neither the State nor the counties or municipalities to remove dead deer carcasses"; and

-- Stated that a written opinion would follow.

II

The Legal Context for Deciding Unfunded Mandate Claims

Article VIII, § 2, ¶ 5 of the New Jersey Constitution ("Amendment") applies to any provision of a law enacted on or after January 17, 1996, and to any rule or regulation originally adopted after July 1, 1996, without regard to when the authorizing statute was enacted. The Amendment provides that any such law, rule or regulation, or portion thereof, that 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 et seq. ("LMA"), to implement the provisions of the Amendment, effective May 8, 1996.

The standard for summary disposition of Complaints, whether by Motion to Dismiss or Summary Judgment, was first addressed by the Council in In re Board of Education and Borough of Highland Park ("Highland Park I"), decided August 5, 1999, and reaffirmed in In re Ocean Township (Monmouth County) and Frankford Township ("Ocean/Frankford"), decided August 2, 2002. Requests for summary disposition are to be reviewed "with great caution," Highland Park I at 13, because decisions of the Council are final. Such a request can be granted "only if the Council concludes that no further factual information would be relevant to its decision." Ocean/Frankford at 5.

III

Relationship to Other Decisions by the Council

This Complaint comes before the Council in an unusual posture, one that has not previously required consideration. The typical unfunded mandate complaint in the decade since implementation of the LMA has involved a newly imposed obligation on local government to do something that had not previously been done at all. For instance, in In re Monmouth-Ocean Educational Services Commission et al., decided August 20, 2004, school districts were required, for the first time, to periodically test educational structures for the presence of radon gas. The Council concluded that there was an unfunded mandate in that proceeding, and its order that the statute "shall cease to be mandatory in its effect" had the consequence of giving practical relief to the Claimants by returning them to the prior status quo in which neither the State nor local school districts were obligated to test for radon.

This case is very different. It is uncontested that for at least twenty years, the State of New Jersey has performed the function of deer carcass removal from all roadways, State, county and local.[1] The avowed purpose of the June 7 Notice was to shift financial responsibility for the function of deer removal (except for State and interstate highways) from the State to local governments. Should the Council determine that this shift is an unfunded mandate, it can invalidate it. But the Council has not been given the power either by the Constitution or the LMA to affirmatively order the State to resume the function that it has attempted to shift to counties and municipalities. Here, it is beyond the Council's jurisdiction to require that the status quo be maintained, in other words.

The dispositive issue for purposes of these motions is whether the June 7 Notice is a "rule or regulation" within the Council's remedial jurisdiction to review. Following judicial practice, the Council normally would resolve a question of its jurisdiction before turning to the specifics of the Claim. In this case, however, the jurisdictional issue is tightly bound to the substance of the Claim itself, making it necessary first to briefly describe and discuss New Jersey's overall policies and practices with respect to managing its deer population. There being no disputed factual issues, disposition of the cross motions for dismissal and summary judgment suffices to fully decide the Claims.[2]

IV

The Regulatory Framework Concerning Deer

New Jersey has enacted a comprehensive regulatory scheme dealing with all forms of wildlife found within its borders. See generally N.J.S.A. Title 23; Mercer County Deer Alliance v. New Jersey

[1] It is unnecessary to determine exactly when this practice began. Although the record is imprecise, all of the parties have agreed that the State has borne this responsibility since before the adoption of the LMA in 1996.

[2] Because the Council decided on September 26, 2006, that the June 7 Notice constitutes an unfunded mandate and "expires," see N.J.S.A. 52:13H-2, Middlesex County's request for an injunction became moot and accordingly was dismissed as of that date.

Dep't of Env't Prot., 349 N.J. Super. 440 (App. Div. 2002). As a component of this regulatory framework, there are extensive and detailed regulations specifically applicable to the deer herd, see generally N.J.S.A. 23:4-12, -13, -23, -27, and -42 through -48, a herd whose size and increasingly frequent presence in our highly developed landscape results in the roadkill that is the subject of these Complaints.[3] A particular concern is to strictly control deer hunting, through a system of permits that is enforced in part by close regulation of the possession of deer, live or dead, by individual citizens. See, e.g., N.J.S.A. 23:4-27 and -47. The statutory scheme is implemented principally through regulations promulgated by the Division of Fish and Wildlife in the NJDEP. See generally N.J.A.C. 7:25 (Fish and Wildlife Code).

Because of the strict rules about the possession of dead deer, both the Legislature and NJDEP have found it appropriate to clarify who may temporarily "possess" an accidentally killed deer, primarily as a result of roadway collisions, without otherwise complying with the permit requirements. See N.J.S.A. 23:4-43 and its implementing regulation, N.J.A.C. 7:25-17.4. (There being no substantial divergence between the two provisions, reference is to the regulation unless otherwise noted.) N.J.A.C. 7:25-17.4 provides:

> Deer found dead on or along any New Jersey public highway shall be disposed of by New Jersey State or municipal police officers or persons authorized by them at a sanitary landfill or other site approved by the Division of Waste Management of the Department of Environmental Protection or the police agency may authorize possession, as conditioned in N.J.A.C. 7:25-17.6.

Although there is an obvious ambiguity in this regulation, in that the drafters have made no attempt to allocate responsibility for deer disposal *between* State and municipal officers, the parties agree that prior to the new policy announced in the June 7 Notice, all deer carcass removal has been carried out by the

[3] Claimants do not question the State's broad regulatory powers. Indeed, Claimant Middlesex County and *amicus* NJAC go farther and argue that under venerable common law principles, the State as sovereign "owns" the deer and is responsible for them in all respects. They cite, e.g., Martin v. Waddell's Lessee, 41 U.S. 367 (1842); Singer v. Township of Princeton, 373 N.J. Super. 10 (App. Div. 2004). In view of its disposition of this matter on other grounds, the Council need not address this argument.

State, at its own expense, without regard to whether the deer was found on a State, county or local road. It is unclear from the pleadings and supporting documents when this practice was initiated. No party contends, however, that the policy has been followed for anything less than the last twenty years, a time span more than sufficient to establish that the policy was solidly in place when the LMA came into effect in 1996.

It is with this background that the Council turns to the motions at hand.

V

The State's Responsibility for Deer Removal

N.J.A.C. 7:25-17.4 was adopted in its present form in 1986. If the reference to "State police officers" had not been included in this regulation, it would mandate that local officials remove dead deer, and because this hypothetical version of the regulation would have been adopted prior to 1996, it would constitute an exception to the Local Mandates Act. See N.J.S.A. 52:13H-2. The actual regulation, however, applies ambiguously to "State *or* municipal" police officers, and this ambiguity precludes a straightforward application of § 13H-2.

The Council has considered and rejected the conclusion that municipalities have been under a mandate to remove deer at their own expense ever since the adoption of N.J.A.C. 7:25-17.4 in its present form in 1986. Reaching this conclusion would be inconsistent with the State's actual practice of assuming full responsibility for deer removal for at least the past twenty years. Under the doctrine of contemporaneous and practical construction, adhered to by the New Jersey courts for more than a century, "the long and unchallenged usage and practical interpretation by those charged with implementation, enforcement, and administration of [a] provision will prevail over the strict construction of the provision when there is good reason to question the viability and continued validity of that provision." McNeil v. Legislative Apportionment Commission, 177 N.J. 364, 391 (2003). In McNeil,

the "practical" problem was that a literal interpretation of our State Constitution could have resulted in a violation of federal policy protecting the rights of minority voters. In the matter now before the Council, the "practical and contemporaneous" construction of N.J.A.C. 7:25-17.4 as assigning responsibility for deer disposal to the State best harmonizes the ambiguous text of the regulation with the clear (and more recently adopted) principle of the "State mandate/State pay" constitutional amendment. Reading N.J.A.C. 7:25-17.4 without this construction would open a loophole that is inconsistent with the practical reality that the State is attempting to shift a financial burden to municipalities that it had heretofore shouldered itself.

The Council's construction of N.J.A.C. 7:25-17.4, stated above, is necessary to its decision, but it is not dispositive. As construed, the regulation establishes the *State's* obligation but does not, in and of itself, purport to shift that obligation to counties and municipalities.[4] The Council's jurisdiction in this matter is limited to declaring that "any part of a rule or regulation . . . which is determined in accordance with the provisions of this act to be an unfunded mandate . . . shall cease to be mandatory in its effect and shall expire." N.J.S.A. 52:13H-2. Thus, for purposing of deciding these cross motions, the critical question is whether any such "rule or regulation" adopted after 1996 has shifted the responsibility allocated to the State by N.J.A.C. 7:25-17.4 to county or local governments.

The Claimants point to NJDOT's June 7 Notice as accomplishing this purpose, despite the fact that it is a press release, and neither a statute nor a formal "rule or regulation." The Attorney General, by contrast, has repeatedly asserted that the June 7 Notice is simply informational as to the State's intention to withdraw from the deer disposal business on county and local roads; in the State's simplistic and literal approach, it has not in any way "ordered anyone to do anything." Letter Brief, Sept. 8, 2006, at 7.

[4] The Counties also claim that an unfunded mandate arises from NJDOT's "nonfunding of a portion of N.J.S.A. 27:1A-5(b) and (e)." See, e.g., Morris County Complaint, ¶II(1). At the most, these provisions demonstrate that the Department of Transportation has the power to address the disposal of deer carcasses along the State's highways. On its face, this statute neither requires the State to do so, nor mandates that any county or municipal agencies do so.

Considered more closely, the State's argument is, in essence, a double-pronged one: *first*, that informal policy mandates are not within the purview of the LMA; and *second*, that the June 7 Notice conveys no mandate, even if it is within the scope of the LMA. The Council rejects both arguments. To circumscribe the LMA as the Attorney General proposes would be to tolerate blatant circumvention of the constitutional purpose underlying the LMA by exalting form over substance.

VI

Informal Policy Mandates are Reviewable Under the LMA

The LMA does not define the phrase "rule or regulation," but there is no indication that the drafters' intent was to give it the restrictive application implied by the State's argument. In construing the scope of the LMA, the Council has previously emphasized its "broad remedial purpose," and it has adopted the same interpretive approach as the New Jersey courts, which is to "liberally construe remedial statutes to give effect to the legislative intent." Highland Park I, supra, at 25. Moreover, on several occasions since the adoption of the LMA, the Legislature has appended to it statements of policy that clearly contemplate a broad definition of the phrase "rule or regulation." For instance, L. 2000, c. 126, § 1, codified as N.J.S.A. 52:13H-21, provides

> Over the past four decades, prior to adoption of the constitutional amendment prohibiting unfunded State mandates on local government, the State routinely and systematically imposed greater and greater numbers of *mandates, orders, directives and burdens* on local government. (emphasis added)

Chapter 126 then granted legislative relief as to a specific group of local mandates that were not otherwise subject to the LMA because they had been imposed prior to 1996, when the Amendment was approved. See N.J.S.A. 52:13H-2. The Legislature's demonstrable concern, consistent with the remedial

purpose of the LMA, was with the fact of the mandated burden, not with its outward form, as the State would have it.[5]

Decisions of the New Jersey Supreme Court reinforce this conclusion. Beginning with Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313 (1984), the Court has laid down specific guidelines for agency decision-making. In this connection, the Court has explicitly recognized that "[a]s an alternative to acting formally through rulemaking or adjudication, administrative agencies may act informally." In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508, 518 (1987). Citing academic experts, the Court continued, "[I]nformal action constitutes the bulk of the activity of most administrative agencies. [It] is indispensable, widespread, and perhaps abused." Ibid. (citations omitted).

In light of the serious purpose of the LMA to prevent or eliminate unfunded mandates, the Council cannot ascribe to the framers of the Amendment and the LMA an intent to open up the glaring, formalistic loophole contended for by the Attorney General. The Council therefore concludes that it is not jurisdictionally barred from considering whether the June 7 Notice constitutes an unfunded mandate because of the informal method of its promulgation.[6]

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[5] A similarly pragmatic approach is taken by the Administrative Procedure Act, N.J.S.A. 52:14B-2(e), which defines the word "rule" as an "agency statement of general applicability and continuing effect that implements or interprets law or policy . . . ."

[6] The Council notes, but does not need to address, the possibility that formal rulemaking is required under Metromedia to change the deer disposal policy previously promulgated by N.J.A.C. 7:25-17.4. The Council's jurisdiction does not extend to invalidating regulations because they violate the Metromedia rule, however, and even if the Council were (hypothetically) to do so, the Claimants would be left with N.J.A.C. 7:25-17.4, a regulation that the Council likewise lacks jurisdiction to enforce. For the purpose of the Council's exercise of its own jurisdiction, it suffices that the June 7 Notice has not been declared *invalid* by any competent authority, and the Council assumes its validity as of the date of its decision in this matter.

VII

The Practical effect of the June 7 Notice is to Create an Unfunded Mandate

Nor can the Council accept the State's unrealistic assertion that it has not "ordered anyone to do anything." On the contrary, as amicus NJAC points out, the June 7 Notice states that the deer removal policy "is being changed for FY2007." NJAC also notes a follow-up (undated) letter from NJDOT Deputy Commissioner Stephen Dilts to all counties and municipalities stating that they "should be prepared to begin performing this function in their jurisdiction [by September 30]." Letter Brief, Sept. 14, at 2. The quoted language, which mirrors the language of the June 7 notice, can only have been understood by counties and municipalities as an instruction to them to "prepare" to "perform" the "function" of deer carcass removal on October 1, 2006. At the September 26 hearing in this matter, representatives of each County Claimant confirmed, not surprisingly, that each County did indeed understand the June 7 Notice that way.

The State undercuts its own "do nothing" position by attempting to have it both ways. On the one hand, the implication of the Attorney General's assertion that NJDOT has not "ordered anyone to do anything" is that it is satisfactory for deer carcasses to be left to rot on or beside local roadways. On the other hand, its June 7 Notice and other communications with local officials *assume* that counties and municipalities will in fact shoulder the burden after September 30. It could hardly be otherwise, given that the State has performed the task on a statewide basis through good budget years and lean ones for so long and, in fact, recites in the disposal contract (in force until September 30) that the "public health, safety and welfare" depends on its doing so.[7] Allowing deer carcasses to pile up would have obvious and

[7] Under Section 4.6, Remedies for Non-performance, the contract provides: "The Department of Transportation and the contractor recognize that delay in the completion of service results in damage to the State in terms of the public health, safety and welfare and additional costs to the State of administration of the contract." See T-1298, Statewide Roadside Deer Carcass Removal Contract, at http://www.nj.gov/treasury/purchase/noa/contracts/t1298.shtml. See also, e.g., N.J.S.A. 26:3B-7 (L. 1945, c. 192): "No person, corporation or municipality knowingly shall maintain or permit to be

serious consequences both for the safety of travelers on the highways and for the health of New Jerseyans, consequences that need neither legal research nor scholarly study to realize. Inevitably, the State's withdrawal will have the practical effect, if not the formal trappings, of an unfunded mandate.

The State argues, however, that its new "policy," communicated in the June 7 Notice, amounts to nothing more than a proportional allocation of responsibility among levels of government that follows responsibility for the roads themselves. Local governments plow snow from local roads, the Attorney General points out, and they perform routine maintenance such as filling potholes. Removing deer carcasses is simply another form of "maintenance," in its view, and thus the State will continue to remove deer from State and interstate highways, "its" highways, while assigning local maintenance (deer removal from county and local roads) to counties and municipalities, respectively.

The obvious flaw in this reasoning is that it ignores the "State mandate/State pay" principle of the New Jersey Constitution and Local Mandates Act. NJDOT's "policy" reallocating responsibilities for deer removal, with attendant financial responsibility as well, could undoubtedly have been imposed on local governments prior to 1996. As the Council has already explained, however, the State's assumption of this responsibility pursuant to N.J.A.C. 7:25-17.4 creates a baseline, and any change of policy away from that "State Pay" baseline after 1996 is a new decision that is subject to the new constitutional rules. The State has never assumed responsibility for local snowplowing or pothole filling, and so those burdens are (as they always have been) the burdens of local governments. The Attorney General essentially asks the Council to rewrite Article VIII, § 2, ¶ 5 of the New Jersey Constitution and the LMA to permit costs to be shifted to local governments if the State thinks those burdens are more properly borne by local taxpayers. This directly contravenes the requirements of the Amendment and the LMA.

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maintained any accumulation of filth or source of foulness which is hazardous to the health or comfort of any of the inhabitants of this State."

VIII

Conclusion

For the foregoing reasons, the Council concludes that the June 7 Notice constitutes an "unfunded mandate . . . because it does not authorize resources to offset the additional direct expenditures required for the implementation of the law or the rule or regulation." Accordingly, it "shall cease to be mandatory in its effect and shall expire." N.J.S.A. 52:13H-2. The State's Motion to Dismiss is denied. Summary Judgment is granted on behalf of Claimants. In light of these dispositions, Claimant Middlesex County's request for injunctive relief is dismissed as moot.

In concluding that the function of deer removal may not be passed to local governments without "resources to offset . . . additional direct expenditures," the Council recognizes that it has not resolved the Claimants' broader claim that the State must continue to shoulder this burden. The Council's jurisdiction, however, is limited to the negative power of invalidation; it cannot directly enforce against NJDOT and NJDEP an affirmative obligation to attend to the deer disposal problem, because it has not been given those enforcement powers by the people of New Jersey in the instruments of its creation. Such legal or policy questions as may still remain are properly to be resolved elsewhere within the structure of government established by our Constitution.

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The above opinion was adopted by the Council and issued on October 31, 2006. Council Members Victor R. McDonald, III (Chair), Timothy Q. Karcher, Richard Levesque, Jr., Rita E. Papaleo, Sylvia B. Pressler, Sy L. Wane, and Janet L. Whitman join in the written opinion.