IN THE MATTER OF COMPLAINTS FILED BY THE MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION, THE RUMSON-FAIR HAVEN REGIONAL HIGH SCHOOL DISTRICT, AND THE STAFFORD TOWNSHIP BOARD OF EDUCATION

Council on Local Mandates

Argued June 10, 2004

Decided August 20, 2004

Syllabus

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

Monmouth-Ocean Educational Services Commission ("Monmouth-Ocean") filed a Complaint with the Council contending that N.J.S.A. 18A:20-40, adopted September 14, 2000, violates the constitutional prohibition against new unfunded mandates codified in the Local Mandates Act ("LMA"). N.J.S.A. 18A:20-40 requires public schools to conduct tests for the presence of radon gas. Similarly worded Complaints filed by the Rumson-Fair Haven Regional High School District and the Stafford Township Board of Education were consolidated with that of Monmouth-Ocean ("Claimants") and eighteen other Complaints filed by school districts were held in abeyance pending the outcome of this case. The Respondents, the Commissioners of Education and of Environmental Protection, concede that the Legislature provided no new source of funding (other than local property taxes) to pay for the radon testing, but filed a Motion to Dismiss the Complaints, contending that even though the mandate is unfunded, it is authorized by two exemptions set forth in §3 of the LMA. Specifically, Respondents argue that (i) the mandate is also imposed on non-governmental entities in "the same or substantially similar circumstances," and therefore, the unfunded mandate is permissible pursuant to the "government/non-government" exemption set forth in §3(b) of the LMA, and (ii) that the mandate implements a provision of the New Jersey Constitution, in this case the Thorough and Efficient Education Clause, Art. VIII, §4, ¶1, as permitted by §3(e) of the LMA.

HELD: The Council unanimously denies the State's Motion to Dismiss and, finding that no additional facts are needed to reach the merits of the Complaints, the Council concludes that N.J.S.A. 18A:20-40 constitutes an unfunded mandate and ceases to be mandatory in effect and expires.

(a) The Council's authority is limited to considering whether or not a mandate is unfunded pursuant to the provisions of the Amendment and the LMA. The Council accordingly makes no decision respecting the merits of the Legislative decision to require radon testing in public schools. If the State does not fund a mandate imposed on a local governmental body, and if that mandate does not fall within an "exempt" category under the New Jersey Constitution, it must fail.

(b) With respect to the government/non-government exemption found in §3(b) of the LMA, the Legislature has not imposed the radon testing requirement on public and non-public entities in "the same or substantially similar circumstances." N.J.S.A. 18A:20-40, as interpreted by the Commissioner of Education and the parties, requires individual testing of numerous spaces in "every" public school building. No similar mandate has been enacted for non-public school buildings, except for the narrow provisions of N.J.S.A. 30:5B-5.2(a), applicable only to private child care centers. Moreover, the latter statute requires radon testing only of the specific space occupied by the child care center. Respondents' reliance on N.J.S.A. 52:27D-123a, which requires radon-minimization techniques in newly constructed schools and residential structures, is misplaced because that statute requires a very different set of activities and no ongoing testing.

(c) With respect to the constitutional implementation exemption found in §3(e) of the LMA, the Council adheres to the interpretation of this clause enunciated in Highland Park I, decided by the Council on August 5, 1999. When the Thorough and Efficient Education Clause, N.J. Const. art. VIII, §4, ¶1, is invoked to excuse an unfunded mandate, the Legislature either must state explicitly that it is implementing that clause, or the State bears the burden of making a specific, precise, fact-based showing that the unfunded mandate implements the Thorough and Efficient Education Clause within terms previously defined by the Legislature or the courts. Respondents have offered no argument or proofs sufficient to meet that burden under Highland Park I.

Bruce Rodman argued the cause for Claimant Monmouth-Ocean Educational Services Commission (*Mr. Rodman* on the brief).

Lewis A. Scheindlin, Assistant Attorney General, argued the cause for Respondents Commissioners of Education and of the Department of Environmental Protection (*Peter C. Harvey*, Attorney General of New Jersey, attorney; *Mr. Scheindlin* on the briefs).

Michael F. Kaelber, Esq. argued the cause for amicus curiae New Jersey School Boards Association (*Mr. Kaelber* on the briefs).

Steven M. Fleischer, Esq. argued the cause for amicus curiae Ridgewood Board of Education (*Sills Cummis Epstein & Gross*, attorneys; *Philip E. Stern* on the brief).

Nathanya G. Simon, Esq. argued the cause for amici curiae Fair Lawn Board of Education, Freehold Regional High School District Board of Education, Jackson Township Board of Education, Jamesburg Board of Education, Keyport Board of Education, Lincoln Park Board of Education, Mount Olive Township Board of Education, and Ramapo-Indian Hills Board of Education (*Schwartz Simon Edelstein Celso & Kessler*, attorneys; *Ms. Simon* on the brief).

Lynne Strickland argued the cause for amicus curiae Garden State Coalition of Schools (*Ms. Strickland* on the brief).

DECISION

Claimant Monmouth-Ocean Educational Services Commission filed a Complaint with the Council on Local Mandates on January 21, 2004. Claimant Rumson-Fair Haven Regional High School District filed a similarly worded Complaint on January 23, 2004, as did Claimant Stafford Township Board of Education on January 26, 2004. The three Complaints are identical in all material respects. Each demands judgment that N.J.S.A. 18A:20-40, requiring public schools to conduct tests for the presence of radon gas, constitutes an unfunded mandate in violation of the New Jersey Constitution, art. VIII, §2, ¶5, as implemented by the Local Mandates Act, N.J.S.A. 52:13H-1 through -22. The Complaints were consolidated by the Council on January 26, 2004.

By letter dated January 29, 2004, the Council required the Commissioners of Education and of the Department of Environmental Protection to answer the Complaints as Respondents, and to file any motion directed to the Complaints, on or before February 19, 2004.[1] On February 19, Respondents filed a Motion to Dismiss the Complaints.

By letter of March 26, 2004, the Council granted leave to the New Jersey School Boards Association (NJSBA), the Garden State Coalition of Schools (GSCS), and fourteen individual school districts to appear as amici curiae.[2] After extensive briefing and opportunity for the parties to submit proofs by affidavit, oral argument was held on June 10, 2004.

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[1] After the Council's January 29, 2004, letter, Complaints were filed by eighteen Boards of Education, all of which requested the same relief as the three Claimants in this matter. By letters dated February 24, March 8, and March 26, 2004, the Council notified the parties and the eighteen Boards of Education that the additional Complaints would be held in abeyance until after the conclusion of this proceeding.

[2] In addition to the nine Boards of Education that participated as amici curiae in the briefing and oral argument (see appearances list), amicus status was granted to the Hazlet

I
Constitutional and Statutory Background

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 issued pursuant to a law originally adopted after July 1, 1996. The Amendment provides that any such law, rule or regulation, or portion thereof, which is determined by the Council to be an unfunded mandate shall cease to be mandatory in its effect and shall expire. See N.J. Const. art. VIII, §2, ¶5(a). The Legislature adopted the Local Mandates Act, N.J.S.A. 52:13H-1 et seq. ("LMA") to implement the provisions of the Amendment, effective May 8, 1996.

The law challenged by Claimants as an unfunded mandate, N.J.S.A. 18A:20-40, was enacted by the Legislature as part of P.L. 2000, ch.122, adopted September 14, 2000. Because the statute was enacted after the dates specified in the Amendment, ¶5(a), it is subject to the LMA and within the jurisdiction of the Council. Respondents do not question the Council's jurisdiction or Claimants' standing to challenge N.J.S.A. 18A:20-40 under the LMA.

N.J.S.A. 18A:20-40 provides as follows:

> a. Except as may be provided pursuant to subsection b. of this section, every public school building used as a public school in the State shall be tested for the presence of radon gas or radon progeny at least once every five years. If the public school has been tested less than five years prior to the effective date of this act, then the test shall be performed within five years of that test and once every five years thereafter.
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> b. The Commissioner of Education, in consultation with the Department of Environmental Protection, shall determine the extent of testing required and the locations for the testing, provided

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Township Board of Education, the Monmouth Regional High School Board of Education, the Manchester Township Board of Education, the Oceanport Board of Education, and the Marlboro Township Board of Education.

> that at least every public school building used as a public school in which a child care center is operated by a nonprofit organization is tested by the school in which the child care center is operated for the presence of radon gas or radon progeny at least once every five years. The superintendent of each school district in the State, in consultation with the Department of Environmental Protection and the principal of each school to be tested, shall determine the buildings to be tested, the locations within each building to be tested, the method of testing, and the procedures concerning notification and circulation of the testing results.
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> [P.L. 2000, c. 122, § 3.]

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To make out a claim of unconstitutionality under the Amendment and the LMA the Claimants must satisfy the following three requirements:

> *First*, that the statute, rule or regulation imposes a "mandate" on a unit of local government;
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> *Second*, that "additional direct expenditures [are] required for the implementation of the law or rule or regulation . . . ;" and
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> *Third*, that the statute, rule or regulation fails to "authorize resources, other than the property tax, to offset the additional direct expenditures."

Amendment, ¶5(a); see also In re Ocean Township (Monmouth County) and Frankford Township ("Ocean/Frankford") (August 2, 2002) at 5.

II
The Section 3 Exceptions

At oral argument, Respondents conceded that N.J.S.A. 18A:20-40 imposes a mandate[3] and that "additional direct expenditures" are required for its implementation.[4] Claimants maintain, without opposition, that the statute does not authorize resources (other than the property tax) to offset the expenditures required to perform the mandated testing. Respondents' argument in support of N.J.S.A. 18A:20-40, and the dispositive issue for purpose of resolving the consolidated Complaints, is that the radon testing mandate is valid under either of two exemptions found in §3 of the LMA. Respondents first argue that the radon testing mandate applies to both government and non-government entities, and therefore is permitted by N.J.S.A. 52:13H-3(b). Respondents also argue that the radon testing mandate implements a provision of the New Jersey Constitution, as permitted by N.J.S.A. 52:13H-3(e), specifically citing the Thorough and Efficient Education Clause, N.J. Const. art. VIII, §4, ¶1.

[3] See also the Department of Education (DOE) memorandum dated September 5, 2003, in which Assistant Commissioner of Education Richard Rosenberg instructs school administrators that "all public school buildings used as a public school must be tested by September 2005" (emphasis in the original). The memorandum is available at the DOE website, www.state.nj.us/njded/facilities/memos/.

[4] In a DOE memorandum dated January 29, 2003, also available at the DOE website, Assistant Commissioner Rosenberg estimated the cost of testing to be in the range of $20-50 per room, or $10-25 per room, depending on the testing method used. In its May 27, 2004, submission, Claimant Stafford Township Board of Education advised the Council that its cost to complete the required testing, in the 2003-2004 school year, was $4,724.02.

III
The Motion to Dismiss

Respondents raise the §3 defenses by way of a Motion to Dismiss. 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 of the Borough of Highland Park ("Highland Park I"), decided August 5, 1999, and reaffirmed in Ocean/Frankford. 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.

The Council concludes that both the consolidated Complaints and the Motion to Dismiss raise issues of statutory interpretation and that "no further factual information" is needed to resolve those issues. For the reasons set forth herein, the Council finds and concludes that N.J.S.A. 18A:20-40 is an unfunded mandate in violation of the Constitution of New Jersey, art. VIII, §2, ¶5, as implemented by the Local Mandates Act, N.J.S.A. 52:13H-1 through -22. Accordingly, Respondents' Motion to Dismiss is denied and Claimants' demand for judgment is granted.

The Council's authority is limited to considering whether a mandate is funded or unfunded, and if it is unfunded, whether certain enumerated exemptions apply. In making its determination, the Council does not consider the merits of any particular mandate. The purpose of the LMA is to protect units of local government from State-imposed unfunded mandates. See N.J.S.A. 52:13H-1(c). The Council's decision that N.J.S.A. 18A:20-40 is invalid under the LMA does not speak to the merits of the Legislature's radon testing policy. The Council's decision

also does not preclude the Legislature from establishing a radon testing mandate that is either funded in accordance with the terms of the Amendment or satisfies one or more of the exemptions set forth in §3 of the LMA.

IV
The Government/Non-Government Exemption

To establish the radon testing statute as a §3(b) exception to the "state mandate, state pay" principle of the Amendment and the LMA, Respondents must demonstrate that the unfunded mandate is "imposed on both government and non-government entities in the same or substantially similar circumstances." Amendment, ¶ 5(c)(2) and N.J.S.A. 52:13H-3(b). On its face, N.J.S.A. 18A:20-40 fails to meet this test because it applies only to radon testing in public schools. Respondents argue, however, that N.J.S.A. 18A:20-40 is part of a larger set of statutes and regulations that, read together, apply to both governmental and non-governmental entities, thereby triggering the §3(b) exception.[5] Respondents place primary reliance on N.J.S.A. 30:5B-5.2(a), which mandates that "the owner of any building in which a *[licensed] child care center . . . is located* shall test . . . the space in the building in which the child care center

[5] Claimants argue that they have challenged *only* the provisions of N.J.S.A. 18A:20-40, and that it is therefore inappropriate to consider any other statutes, as Respondents propose to do. "Any amendment to N.J.S.A. 30:5B-1 et seq. regarding radon testing in child care centers is distinctly separate from and unrelated to N.J.S.A. 18A:20-40 and cannot reasonably be construed as an expansion to N.J.S.A. 18A:20-40." Letter Response to Motion to Dismiss, March 2, 2004, at 1. Experience teaches, however, that the Legislature often addresses different parts of a problem at different times, and the drafters of §3(b) could not have thought that the "same or similar circumstances" analysis would always (or even frequently) be carried out within a single statutory section. To narrowly read §3(b) as Claimants ask would be to unduly restrict the Council. See also Ocean/Frankford at 10, where the Council read separate legislative texts together in a different context.

is located for the presence of radon . . . ."[6] N.J.S.A. 30:5B-5.2(a) (emphasis added).

Respondents argue that the §3(b) exemption is satisfied so long as the mandate is imposed on *any* non-government entity. Since it is undisputed that N.J.S.A. 30:5B-5.2(a) applies to privately-owned buildings containing child care facilities, Respondents ask the Council to conclude that the challenged mandate applies to both government and non-government entities and is therefore valid, even though it is unfunded. The Council rejects Respondents' construction of N.J.S.A. 52:13H-3(b) which, if adopted, could open a loophole potentially large enough to render the entire "state mandate, state pay" principle moot.

Respondents' approach essentially ignores the most important part of the statutory exemption, namely, the requirement that the mandate be "imposed on both government and non-government entities in the same or substantially similar circumstances." As amici point out, N.J.S.A. 30:5B-5.2(a) requires testing only of "the *space in the building* in which the child care center is located." N.J.S.A.18A:20-40(a), by contrast, requires testing of "*every* public school *building,*" and the Department of Education has explained to school districts that this means "all frequently occupied rooms in contact with the ground, or first floor rooms above basement spaces that are not frequently occupied."[7] Amici also emphasize what is missing altogether from

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[6] Respondents also point, unpersuasively, to N.J.S.A. 52:27D-123a, which requires the Department of Community Affairs to ensure that certain newly constructed schools and residential structures "minimize" the entry of radon gas and its progeny. Given the fact that this statute requires a different act (building design rather than testing), that it requires compliance only during construction (unlike the requirement to test all schools every five years), and that it applies only in those parts of the state where radon is most likely to be present (unlike the statewide requirement to test schools), N.J.S.A. 52:27D-123a is not "the same or substantially similar" to N.J.S.A. 18A:20-40 as that phrase is interpreted by the Council.

[7] Assistant Commissioner Rosenberg's September 2003 memorandum, referenced in

the legislative scheme; neither N.J.S.A. 30:5B-5.2(a) nor any other statute called to the Council's attention requires *any* radon testing of a private, non-government elementary or secondary school that does not contain a child care center.

The only "circumstance" that matters for a public school district is whether, to paraphrase the words of N.J.S.A. 18A:20-40(a), it operates a "school building used as a school." For a non-government entity to be in "the same or substantially similar" circumstances for purposes of the mandate, it too would have to be required to conduct radon tests of every "school building used as a school." As noted, however, there is no such legislative mandate for private schools. Instead, non-government schools are required to conduct radon tests only if they house a child care center, and then only with respect to the individual space in which the child care center is operated. Presumably, the purpose of radon testing is to protect the health of children being educated in school buildings. Children are children, and health is health, whether the school is public or private, yet identical school operations are treated very differently depending on whether or not the word "public" is added to the name of the entity being regulated.

This conclusion accords with the legislative history of §3(b). The interpretive statement to the proposed Amendment that was placed on voters' ballots in November 1995 described the §3(b) exemption in very limited terms ("The amendment would not apply to . . . mandates equally imposed on the public and private sector . . . ."). See Senate Committee Substitute for Senate Concurrent Resolution No. 87, Interpretive Statement (May 15, 1995). During a public hearing before the Senate Community Affairs Committee examples of unfunded mandates,

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footnote 3 above, directs school administrators to a Department of Environmental Protection radon website, www.njradon.org. The quoted language is taken from the "Questions and Answers" section of the "School Radon Testing Program" page that is accessible through that website. See also January 2003 DOE memorandum, referenced in footnote 4 above, at 1.

which were exempt from funding requirements pursuant to section §3(b) of the LMA, included workplace regulations such as Right to Know and Workers' Compensation laws. See Public Hearing before the Senate Community Affairs Committee (May 25, 1995) at 32X-33X.

Implicit in these examples is the concept that the exempt statutes or regulations would apply uniformly to government and non-government entities, provided only that each type of entity carried out operations that created the same kind of risk for workers. As to such a risk, the government and non-government entities would be in "the same or substantially similar" circumstances and an unfunded mandate could be imposed on the government entities because the same mandate was applied to the non-government entities. Substitute "students" for "workers" and "classroom risk" for "workplace risk" and it is obvious that public and private schools are in "the same" or "substantially similar" circumstances with respect to the need for radon testing, but the government entities are subject to a mandate much broader than the one imposed on the non-government entities.

As noted above, the Council's decision does not address the merits of the challenged mandate. Proper deference to the Legislature also requires that the Council consider only the specific mandate that the Legislature has imposed. For purposes of the §3(b) issue presented by the parties, numerous "pairs" of government and non-government mandates can be imagined, but the Legislature has not enacted them, and the Council has no authority to consider them hypothetically.

The plain language of N.J.S.A. 18A:20-40(a) and N.J.S.A. 30:5B-5.2(a) demonstrates that the government and non-government entities therein are not subject to mandates that are "the same" or "substantially similar" in scope or content. It follows that the government and non-

government entities subject to these respective mandates are not in circumstances that are "the same" or "substantially similar." Because they are not, N.J.S.A. 52:13H-3(b) does not excuse the imposition of an unfunded mandate on the Claimants.

Respondents' Motion to Dismiss, insofar as it is based on N.J.S.A. 52:13H-3(b), is denied.

V
The "Thorough and Efficient" Exemption

Respondents also base the Motion to Dismiss on the operation of N.J.S.A. 52:13H-3(e), which exempts from the operation of the LMA unfunded mandates that "implement the provisions of the New Jersey Constitution." Respondents allege that N.J.S.A. 18A:20-40 is exempt from the LMA because it implements the Thorough and Efficient Clause of the Constitution, art. VIII, §4, ¶1.

The Council has previously considered the §3(e) exemption in Highland Park I, and its discussion there governs the disposition of Respondents' Motion to Dismiss in this case. Acknowledging that §3(e) was intended to avoid a "constitutional quagmire," wherein the LMA might bar the Legislature from mandating compliance with the Thorough and Efficient Education Clause, the Council nonetheless concluded that it was not deprived of all jurisdiction to review education mandates simply because they concerned education. Highland Park I at 21-22. Describing the arguments in that case, it cautioned against "almost matter of fact [assertions] that because the subject spending is for education, it necessarily implements the Thorough and Efficient [Education] Clause." Id. at 21. To resolve what would otherwise be the tension between the Thorough and Efficient Clause and the LMA, the Council in Highland Park I

required either that the Legislature state explicitly that a mandate was imposed in furtherance of the Thorough and Efficient Education Clause of the New Jersey Constitution or, in the absence of such a legislative declaration, that the State carry the burden of making a specific, precise, fact-based showing that the mandate in question furthered an element of a thorough and efficient education, as that constitutional term had previously been defined by the Legislature or the courts. Id. at 22-23.

Respondents have not heeded Highland Park I in framing the Motion to Dismiss as to §3(e). Respondents assert "almost matter of fact" that radon testing promotes safe schools, and safe schools are necessary to a "thorough and efficient" education. Unable to draw the Council's attention to an explicit legislative declaration that the radon testing mandate implements the Thorough and Efficient Clause, Respondents have not offered specific proofs establishing the relationship, as required by Highland Park I. Amicus NJSBA, by contrast, argued that the per-pupil cost of a thorough and efficient education, required to be calculated biannually under the Comprehensive Educational Improvement and Financing Act of 1996 ("CEIFA"), N.J.S.A. 18A:7F-1 et seq., does not include and could not have included a component for radon testing. In a rebuttal of NJSBA's argument, Respondents acknowledged that the State did not have a "T&E" calculation breaking facilities costs down to a level showing whether radon testing was or was not included. Respondents' argument is insufficient to create a debatable question on this issue, let alone carry the burden established by Highland Park I to prevail on a Motion to Dismiss.

Respondents advanced no proofs to support their position and presented no argument at the hearing that the legislature had declared radon testing to be necessary for a thorough and

efficient education. The Motion to Dismiss, insofar as it is based on N.J.S.A. 52:13H-3(e), is denied.

VI
Conclusion

For the reasons set forth above, Respondents' Motion to Dismiss is denied both as to N.J.S.A. 52:13H-3(b) and as to N.J.S.A. 52:13H-3(e). On the basis of the pleadings, the briefing, and the oral presentation of the parties and amici, and pursuant to the standard established for summary dispositions in Highland Park I, as set forth above, the Council also finds that no further findings of fact are needed in these circumstances. The parties agree that N.J.S.A. 18A:20-40 constitutes an invalid unfunded mandate *unless* it is excused by any of the provisions of N.J.S.A. 52:13H-3. As to N.J.S.A. 52:13H-3(b), the plain language of N.J.S.A. 18A:20-40 requires the Council to conclude that the radon testing mandate is not imposed on government and non-government entities in "the same or substantially similar circumstances." As to N.J.S.A. 52:13H-3(e), the Council concludes that Respondents have failed to make a threshold showing, as required by Highland Park I, that the radon testing mandate is a component of a constitutionally-mandated thorough and efficient education.

Accordingly, the relief sought by Claimants is granted. N.J.S.A. 18A:20-40 is an unfunded mandate prohibited by N.J. Const. art. VIII, §2, ¶5(a) and the Local Mandates Act, N.J.S.A. 52:13H-1 et seq. It therefore ceases to be mandatory in its effect and hereby expires.[8]

So ordered.

[8] As a result of the within decision, the claims raised in the eighteen Complaints held by the Council in abeyance (see footnote 1 above) are rendered moot and are hereby dismissed, with no need for further proceedings pursuant to Rule 9 of the Council's Rules of Procedure.

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The above decision was adopted by the Council and issued on August 20, 2004. Council Members Timothy Q. Karcher (Chair), Sam Crane, Marie L. Garibaldi, Sean M. Kennedy, Sy Wane and Janet L. Whitman join in the written decision. Council Members Geoffrey S. Berman and Victor R. McDonald, III, did not participate in the decision.