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STATE OF WASHINGTON

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No. 82255-5
CLERK

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF PORT ANGELES, Respondent,

v.

OUR WATER-OUR CHOICE and PROTECT OUR WATERS,
Petitioners,

and

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,
Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS
OUR WATER-OUR CHOICE AND PROTECT OUR WATERS

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I. INTRODUCTION

Petitioners Protect Our Waters (“POW”) and Our Water-Our Choice (OWOC)¹ seek this Court to issue a decree pursuant to RCW 35.17.290 to place two initiatives before the voters of the City of Port Angeles.² For the City Municipal Water System and for all other public water systems serving the City now or in the future, the initiatives either regulate or prohibit adding substances to the water supply of such systems when the intent is to medicate people. The initiatives do not seek to regulate the utility functions of these water systems.³

This Court should reverse the Court of Appeals, Div. II, Published Opinion⁴ and in this pre-election review find the initiatives to be legislative in nature not exceeding the local initiative power.

II. ASSIGNMENTS OF ERROR

A. Assignments Of Error

No. 1. Div. II of the Court of Appeals (“Div. II”) erred when it did not correct the errors of the trial court⁵ including when it found “the

¹ Together referred to as the Committees.

² The full text of the initiatives is provided at A-16 to A-19 of the Petition for Review to the Court of Appeals, Div. II (“Petition”).

³ Utility functions such as adding substances to treat water to make water safe or potable are not regulated by the initiatives. Petition at A-16 to A-17 and A-19. The initiatives only regulate or prohibit the non-utility function of adding substances (herein referred to as “medicine”) to public water systems “for the purpose of treating physical or mental disease or affecting the structure or functions of the body of any person, or with any other intent of acting in the manner of a preventive or treating medication or drug for humans or animals.” See Petition at A-19; see also *id.* at A-17 for regulation of similar “substances.”

⁴ A copy of the Published Opinion is provided at A-1 to A-14 in the Petition.

⁵ These errors are identified in Appellants’ Opening Brief at 1-2

Committees' initiatives are administrative"⁶ and that they interfere with the legislative body's "power to operate water utilities."⁷

No. 2. Div. II erred when it found, in pre-election review, Courts "do review initiatives for whether they would be lawful if approved."⁸

No. 3. Div. II erred when it found, unlike in statewide initiatives, "trial courts review the substance and nature of local initiatives" in pre-election review.⁹

No. 4. Div. II erred when it agreed with the trial court and held the initiatives invalid in pre-election review.¹⁰

No. 5. Div. II errs when it states a court may review more than the "fundamental and overriding purpose" of an initiative when determining whether the initiative is legislative or administrative in nature.¹¹

No. 6. Div. II errs when it states that the proper body to determine the initiatives purpose is the trial court.¹²

No. 7. Div. II errs when it states that the legislature created just a single exception for setting more stringent water supply purity standards than those set by the state board of health.¹³

⁶ See Petition at A-1 to A-2, A-7 to A-8, and A-10.

⁷ Id. at A-1 to A-2, and A-10 to A-13

⁸ Id. at A-1.

⁹ Id.

¹⁰ Id. at A-2.

¹¹ Id. at A-6.

¹² Id. at A-6, Note 4.

¹³ Id. at A-7

No. 8. Div. II errs when it finds the City itself lacks authority to add legal restrictions regarding the purity of its water supply.¹⁴

No. 9. Div II errs when if finds Citywide plans to regulate the addition of medicines to local water supplies are actions that implement a statewide plan that regulates water supply additives on a statewide basis.¹⁵

No. 10. Div II errs in suggesting substantive pre-election analysis of conflicts with state or federal law are “warranted” for local initiatives although “inappropriate” for statewide initiatives when, in both cases, there is the power to enact.¹⁶

No. 11. Div II errs when it finds the City properly cited to cases where the Supreme Court has undertaken substantive pre-election review of local initiatives or referendums.¹⁷

No. 12. Div II errs when it found that the grant of power to a city council to operate a water utility prevents a corporate city from regulating the addition of all medicines by any person to any water supplies serving the city.¹⁸

No. 13. Div II errs when it finds that the initiatives interfere with legitimate power of the city council to operate a water utility.¹⁹

¹⁴ Id. at A-8.

¹⁵ Id. at A-8.

¹⁶ Id. at A-9. After making this statement, Div. II later chose not to decide this issue. Id. at A-10. But also id. at A-8 where it states “Initiatives Not Within the City’s Power to Enact.”

¹⁷ Id. at A-9 to A-10.

¹⁸ Id. at A-10 to A-11.

¹⁹ Id. at A-12 to A-13.

No. 14. Div. II erred when it failed to issue a decree pursuant to RCW 35.17.290 to place the initiatives on the ballot.²⁰

B. Issues Pertaining To Assignments Of Error

No. 1. Does a corporate code city have authority either by Article XI, Section 11 of the Washington State Constitution (police power) or by RCW 35A.70.070(6) and Chapter 35.88 RCW to adopt strict local water purity standards for all public water systems serving the inhabitants of the City despite the fact that City's legislative body operates one of the public water systems serving the City?

No. 2. When a city has not previously adopted any local water purity standards for all public water systems serving the inhabitants of the City, are the first initiatives that establish such standards considered to be legislative, particularly when they regulate the use of public drinking water systems to medicate citizens?

a. As an ancillary issue, should this Court make a finding of fact based on admissions in the record that multiple public water systems serve the inhabitants of the City?

No. 3. Should a court review only the "fundamental and overriding purpose" of an initiative when determining whether an initiative's purpose is legislative in nature?

No. 4. Beyond determining that procedural requirements are met, that an initiative is legislative, and that the "fundamental and overriding purpose" is within the state's or corporate city's power to enact, may a court

²⁰ Id. at A-13.

performing pre-election review determine whether local initiatives would be consistent with federal or state laws, if approved?

No.5. For each of the initiatives reviewed by the Court of Appeals decision, is it legislative and is its “fundamental and overriding purpose” within the corporate city’s power to enact such that this Court should issue a decree pursuant to RCW 35.17.290 to place one or both initiatives on the ballot?

III. STATEMENT OF THE CASE

The Committees incorporate into this brief by reference Section “D” “Statement of the Case” from the Petition for Review, including Subsections 1, 2, and 3 thereto.

IV. ARGUMENT

A. A Corporate Code City Has Authority By Police Power And By RCW 35A.70.070(6) And Chapter 35.88 RCW To Adopt More Restrictive Local Water Purity Standards For All Public Water Systems Serving The City

Div. II erred²¹ when it found that the legislative grant to the City Council to operate a water utility in RCW 35A.11.020 prevented the corporate City from adopting, pursuant to RCW 35A.70.070 and chapter 35.88 RCW,²² local citywide water purity ordinances more restrictive than

²¹ Id. at A-10 to A-13.

²² RCW 35A.70.070 (Petition at A-41) states, “Every code city . . . shall . . . exercise control over water pollution as provided in chapter 35.88 RCW.” RCW 35.88.010 (Id. at A-43) states, “For the purpose of protecting the water furnished to the inhabitants of cities . . . cities . . . are given jurisdiction over all property occupied by” public water supply systems. RCW 35.88.020 (Id. at A-43 to A-44) states “Every city. . . may by ordinance prescribe what acts shall constitute offenses against the purity of its water supply” and further the mayor may appoint special police who may arrest any person violating a local ordinance protecting “the purity of the water supply” or violating any regulation of the state board of health protecting “the purity of such water supply.” This implies an overall legislative scheme where state board of health regulations and citywide regulations work together to protect water supply purity for a city.

state or federal standards to protect water furnished to City inhabitants. Div. II also erred when it found that the corporate City could not use police power²³ to adopt ordinances to set water supply purity standards more restrictive than those set by federal or state law.

1. The hierarchy in water law allows state water purity standards to be more restrictive than federal standards and allows local standards to be more restrictive than state standards

The Safe Drinking Water Act sets minimum standards for public water systems but does not prevent state or local jurisdictions from adopting more restrictive standards:

Nothing in this subchapter shall diminish any authority of a State or political subdivision to adopt or enforce any law or regulation respecting drinking water regulations or public water systems, but no such law shall relieve any person of any requirement otherwise applicable under this subchapter.

42 USC Sec. 300g-3(e) (Appendix B-6 to B-7 hereto). The Safe Drinking Water Act addresses matters related to setting and enforcing maximum contaminant levels in public water supplies and monitoring and treating contaminants. 42 USC Subchapter XII. It does not generally regulate “additives” to public water supplies but specifies treatments for identified contaminants which may involve additives to make water safe.²⁴

The Safe Drinking Water Act recognizes its purpose is not to regulate the addition of medicines to public water supplies:

²³ Police power is granted to the corporate City to adopt water purity ordinances that do not conflict with general laws, “Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” WASH. Constitution, Article XI § 11.

²⁴ 42 USC Sec. 300j(a) discusses chemicals and substances used “for the purpose of treating water.” 42 USC Sec. 300g-1(b)(4)(E) states that when the Administrator establishes a maximum contaminant level, they shall list “treatment techniques” which may include additives.

No national primary drinking water regulation may require the addition of any substance for preventive health care purposes unrelated to contamination of drinking water.

42 USC Sec. 300g-1(b)(11) (Appendix B-4 hereto).

Washington state addresses drinking water safety and purity in several laws. RCW 43.20.050(2)(a) authorizes the state board of health to adopt rules “to assure safe and reliable public drinking water.” RCW 70.142.010(1) implements in part the state enforcement responsibilities of the Safe Drinking Water Act and directs that the “state board of health shall adopt by rule a maximum contaminant level for water provided to consumers' taps.”

RCW 70.142.010(2) implements the provision of 42 USC Sec. 300g-3(e) and provides, “State and local standards for chemical contaminants may be more strict than the federal standards.” Because local standards may not violate state and federal standards, any authority for local standards must authorize more restrictive local standards that further protect water purity.²⁵ RCW 70.142.040 allows local health departments in larger counties to set water quality standards “more stringent” than those set by the state board of health. Of primary importance to the instant case, RCW 35A.70.070(6) and Chapter 35.88 RCW authorize a corporate city to set local standards for water purity that apply to all water supplies serving the city.²⁶ Supra, this brief note 22 at page 5. This authority and the corporate City’s police power provide authority to enact the proposed initiatives.

²⁵ Local ordinances do not constitutionally conflict with state law just because the local ordinance is more restrictive than the state law. Seattle v. Eze, 111 Wn.2d 22, 33, 759 P.2d 366 (1988).

²⁶ RCW 35.88.010 - .020 are cited in Kaul v. Chehalis, 45 Wn.2d 616, 619, 277 P.2d 352 (1954) as statutes “designed to insure the purity of water supplies.”

2. Div. II erred when it concluded that the initiatives were invalid because of the City Council's power to operate a water utility

Div. II erred when it found the local initiatives invalid on the claim they would interfere with the power granted to the city council to operate a water utility.²⁷

a. The power to operate a water utility was not granted exclusively to the City Council

Div. II cites to RCW 35A.11.020 for the proposition that the City Council was granted power to operate a water utility. *Id.* But generally, a City Council has all powers granted to the legislative body plus all powers granted to the corporate City. The real test must be whether the power to operate a water utility was granted exclusively to the legislative body. In the instant case, this power was not granted exclusively to the legislative body.

i. RCW 35A.80.010 grants the power to provide utility service to the corporate city

While the general statute RCW 35A.11.020 grants “all powers possible” to the legislative body of a code city, the more specific statute governing public utilities for a code city grants the power to provide and operate a utility to the corporate city.

A code city may provide utility service within and without its limits and exercise all powers to the extent authorized by general law for any class of city or town. . . . A code city may protect and operate utility services as authorized by chapters 35.88, 35.91, 35.92, and 35.94 RCW.

RCW 35A.80.010. Chapter 35.88 RCW referenced in the above quote is the statute relied upon by the Committees to give the corporate city power to

²⁷ See Petition at A-10 to A-13.

enact the initiatives. Chapter 35.92 RCW also referenced in the above quote also gives the corporate city the power to operate water utilities:

A city or town may construct, condemn and purchase, purchase, acquire, add to, alter, maintain and operate waterworks.

RCW 35.92.010.²⁸ Because the power to operate water utilities has not been given exclusively to the City Council the argument advanced by Div. II fails. It is not interference by the corporate city if the power is also given to the corporate city.

b. The legislature did not intend its grant of “all possible powers” to the legislative body to prevent initiatives and referendums on all such powers for code cities

Div. II quotes RCW 35A.11.020 for the proposition that “The legislative body of each code city shall have all powers [necessary for] operating and supplying of utilities.”²⁹ This statute actually states:

The legislative body of each code city shall have **all powers possible** for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law. By way of illustration and not in limitation, such powers may be exercised in rendering local . . . governmental services, including operating and supplying of utilities.

RCW 35A.11.020 (emphasis supplied).

If the legislature intended the governing body to exclusively have “all powers possible” and if they agreed with the common law proposition that powers granted to the legislative body are not subject to initiative or referendum, then they would have performed a useless act when they granted

²⁸ This statute gives the governing body the right to set rates for its municipal water service.

²⁹ See Petition at A-10 to A-11.

initiative and referendum powers to code cities in RCW 35A.11.080.³⁰ So the legislature either intended its grant of “all powers possible” to not be “exclusive” to the governing body or it intended to overturn or further refine the common law proposition that powers granted to the legislative body are not subject to initiative or referendum. The most likely interpretation is that the legislative grant in RCW 35A.11.020 was not intended to be “exclusive.” This is supported regarding the operation of utilities by the simultaneous grant in RCW 35A.80.010 (a more specific statute) of this power to the corporate city.³¹ If the power to operate utilities was not given exclusively to the legislative body, then the Committees’ initiatives do not interfere with an exclusive legislative power.

Alternatively, this Court could overturn or refine its common law proposition which is now that powers granted to the legislative body are not subject to initiative or referendum. In a line of previous cases, this Court found powers granted to the legislative body were not appropriate for initiative or referendum because the legislature required duties to be carried out to take the action that could not be performed by the exercise of a “yes/no” vote.³² Div. II did not analyze whether the duties exercised by the initiatives and authorized by chapter 35.88 RCW could be performed by the

³⁰ Oak Harbor School Dist. v. Ed. Ass'n, 86 Wn.2d 497, 500, 545 P.2d 1197 (1976).

³¹ The Court should harmonize RCW 35A.80.010 and 35A.11.020 by finding that the grant of authority to the legislative body in RCW 35A.11.020 was not exclusive because if it was exclusive a conflict would exist with RCW 35A.80.010 and this latter more specific statute should prevail. In re Estate of Kerr, 134 Wn.2d 328, 335, 949 P.2d 810 (1998).

³² Snohomish Cy. v. Anderson, 123 Wn.2d 151,156, 868 P.2d 116 (1994); Accord Whatcom Cy. v. Brisbane, 125 Wn.2d 345, 350-51, 884 P.2d 1326 (1994); 1000 Friends of Washington v. McFarland, 159 Wn.2d 165, 149 P.3d 616, 623 (2006); and see City of Seattle v. Yes for Seattle, 122 Wn. App. 382, 388, 93 P.3d 176(2004).

exercise of a “yes/no” vote.³³ Upon review, this Court should find that a “yes/no” vote is all that is required to determine if medicines in the public water supplies should be prohibited or regulated.

c. An ordinance prohibiting or regulating the putting of medicines in public water supplies does not interfere with the operation of a water utility

Div. II found the initiatives would interfere with the statutory delegation to the City Council to operate a water utility.³⁴ Even if there were an exclusive delegation to the City Council to operate a water utility and even if initiatives are not allowed to interfere with that operation, this should not be cause to find invalid, in pre-election review, initiatives that regulate or prohibit putting medicines in all public water supplies serving the City now and in the future.

A City decision to regulate or prohibit all medicines in all public water supplies in the City is a general law. It applies to all persons whether or not they are associated with public water suppliers. But the reasonable function of operating a water utility does not include adding medicines to public water supplies.³⁵ Because this is not a reasonable function of operating a water utility, regulations controlling such actions do not interfere with such utility operations.

³³ See Petition at A-10 to A-13.

³⁴ Id.

³⁵ It is the duty of the city to furnish [inhabitants] with wholesome water, free from contamination. Kaul v. Chehalis, 45 Wn.2d 616, 621, 277 P.2d 352 (1954).

While this is an issue of first impression in this state, a similar issue was addressed by the Ohio Supreme Court in Canton v. Whitman, 44 Ohio St.2d 62, 337 N.E.2d 766 (1975). The Canton Court determined that despite a constitutional grant of power to cities to own and operate public utilities, a police power regulation involving fluoridation³⁶ would not unreasonably limit or otherwise interfere with the operation of a municipal utility. Canton at 67-68. Appendix A-3 to A-4 hereto.

Similarly, this issue was addressed by the Iowa Supreme Court in Wilson v. City of Council Bluffs, 253 Iowa 162, 100 N.W.2d 569 (1961) where the Court ruled that despite a statute authorizing a city to operate a waterworks, such a statute could not be construed “in any way authorizing fluoridation.” Wilson at 570-71. Appendix A-9 to A-11 hereto.

3. Div. II erred because the corporate city has authority to enact the initiatives

In summary, the corporate city is authorized by RCW 35A.70.070(6) and Chapter 35.88 RCW and by police power to adopt more restrictive local water purity standards for all public water systems serving the inhabitants of the City despite the fact that the City operates one of the public water systems serving the City. Neither state nor federal law or regulations prevent the corporate city from adopting more restrictive citywide regulations for protecting the purity of all water systems serving the City. The governing statutes should not be read to give the City Council exclusive rights to

³⁶ This Court can take judicial notice that fluoride is added to public water supplies for the sole purpose to prevent tooth decay. Kaul v. Chehalis, 45 Wn.2d 616, 618, 277 P.2d 352 (1954). Therefore it is a substance regulated by Section 3(A) of the POW Initiative (Petition at A-17) and by Section 2 of the OWOC Initiative (Petition at A-19).

operate the municipal water system. But even if the City Council had that exclusive right, adding medicines to water supplies is not a reasonable function of operating a water utility and so this Court should find there is no interference with the operating of a utility.

B. When A City Has Not Previously Adopted Any Local More Restrictive Water Purity Standards, The First Initiatives That Establish Such Standards Citywide Are Legislative

Div. II errs when it finds that because the state board of health is authorized by RCW 43.20.050(2)(a) to adopt statewide rules “to assure safe and reliable public drinking water,” that the adoption of citywide rules to require higher water purity standards for all public water systems serving the City are administrative.³⁷ The fundamental error by Div. II is its conclusion that the “City itself lacks the authority to add additional legal restrictions.”³⁸

As discussed previously in this brief, the corporate City has authority, separate from and unrelated to the authority granted to the state board of health in RCW 43.20.050(2)(a) or to the authority granted to local boards of health of large counties in RCW 70.142.040, to require higher water purity standards citywide.³⁹ So the corporate City does have authority to add additional legal restrictions citywide.⁴⁰ This authority of the corporate city to adopt more restrictive citywide water purity regulations does not

³⁷ See Petition at A-7 to A-8.

³⁸ Id.

³⁹ Supra, this brief at 5-13. Both RCW 35A.70.070(6) and 35A.80.010 authorize the corporate City to set higher water purity standards citywide pursuant to chapter 35.88 RCW.

⁴⁰ This was recognized by the Kaul Court. Supra, this brief at 7, note 26.

implement or pursue/affect the statewide plan put in place by the state board of health. Div. II is wrong to contend otherwise.⁴¹

As discussed in Appellants' Opening Brief at 23-29, the initiatives are legislative because they "establish new law for the City for the purpose of locally regulating the purity of the water supply for all public water systems serving the City."⁴² The new ordinances are also permanent and general in character.⁴³

It is an issue of first impression in this state as to whether a local decision to, or not to, put medicines in city water supplies is legislative or administrative. However, other states have ruled that such a decision is intrinsically legislative and can be made under the police power.⁴⁴

This Court should reverse Div. II and find that local decisions to, or not to, put medicines or other substances intended to treat people (and not water), in public water supplies are intrinsically legislative and suitable for

⁴¹ See Petition at A-7 to A-8.

⁴² Appellants' Opening Brief at 24. While Div. II is correct that "Each initiative would regulate additives to Port Angeles' public water system" (Petition at A-7), this is not the full scope of the initiatives. The initiatives prohibit or regulate addition of any medicine to any public water supply serving the City now or in the future but do not regulate additives to make water safe or potable.

⁴³ Appellants' Opening Brief at 25. The only "medicine" regulated on a statewide basis by the state department of health is fluoride. WAC 246-290-72012 (where fluoride is identified as a "Water additive which promotes strong teeth"). Petition at A-52 to A-53; see *id.* at A-49 to A-62. The initiatives are new law because they regulate or prohibit all medicines not just fluoride (see Appellants' Opening Brief at 25 citing to *Citizens* at 348), they set higher standards just for the City and not for the state, they apply to all public water supplies serving the City now or in the future, and they apply to all persons.

⁴⁴ *Hughes v. City of Lincoln*, 232 Cal.App.2d 741, 746-47, 43 Cal.Rptr. 306 (Cal.App.Dist.3 1965) ("Intrinsically therefore, as well as in its police power origin, the decision to fluoridate is legislative rather than administrative.") Appendix A-15 hereto. Justice Hamley's dissent in *Kaul* at 640-41 points out that in the November, 1954, elections there were eleven referendums on fluoridation. Similar referendums and initiatives on fluoridation have been commonplace in Washington state and around this nation. This supports the *Hughes* Court conclusion that such decisions are intrinsically legislative.

local initiative and referendum unless specifically prohibited by state law. This Court should continue the 55-year tradition of allowing initiatives and referendums on such matters.

1. This Court should make a finding of fact based on admissions in the record that multiple public water systems serve the inhabitants of the City

In Appellants' Opening Brief, it was requested that the Court make a finding that there are multiple public water systems serving the City.⁴⁵ Div. II declined to address this issue because of its erroneous conclusion that the initiatives were administrative.⁴⁶ The Committees request that this Court make the requested finding.

C. A Court Should Only Review The "Fundamental And Overriding Purpose" Of An Initiative When Determining In Pre-election Review Whether An Initiative's Purpose Is Legislative In Nature

The Committees advocate that pre-election review should include a review of procedural issues, if requested, and otherwise be limited to whether the "fundamental and overriding purpose" of an initiative or referendum is legislative in nature and enacts a law that the jurisdiction has authority to enact. It is important that courts limit pre-election review on other than procedural issues to the fundamental and overriding purpose of the ordinance or law. Otherwise, as occurred in the instant case, trial courts can get overly involved in whether minor provisions of an initiative would be in conflict with state or federal law if the initiative were approved. This increases the

⁴⁵ Appellants' Opening Brief at 10-14 and 32.

⁴⁶ See Petition at A-13.

time and expense necessary to get an initiative to the voters and may preclude the voters from being able to exercise free speech rights at the polls.

In its argument, the Committees cited to Coppernoll v. Reed, 155 Wn.2d 290, 302-03, 119 P.3d 318 (2005) for the proposition that in pre-election review a court “looked at the fundamental and overriding purpose of the initiative, rather than mere incidentals to the overriding purpose.”⁴⁷

Div. II did not consider policy argument for limiting non-procedural review of an initiative to the fundamental and overriding purpose of an ordinance or law and instead noted that because “In Coppernoll, there was no question that the initiative was legislative in nature” that the Coppernoll Court only connected the “fundamental and overriding purpose” language to the “power to enact” test.⁴⁸ Div. II went further when it stated emphatically that:⁴⁹

After examining Coppernoll and Futurewise, it is clear that a court may review more than the “fundamental and overriding purpose” of the initiative when determining whether it is legislative or administrative in nature.

This Court should reject Div. II’s conclusion. To adequately limit pre-election review, a court should only consider the “fundamental and overriding purpose” of an initiative for both the “legislative” test and the “power to enact” test. The presence of a small portion of an initiative that is administrative in nature should not prevent the people from voting on the initiative when the “fundamental and overriding purpose” of the initiative is

⁴⁷ Appellants’ Opening Brief at 16-20; Petition at A-5 to A-6.

⁴⁸ See Petition at A-5 to A-6 and note 3 on A-6.

⁴⁹ Id. at A-6. Futurewise is Futurewise v. Reed, 161 Wn.2d 407, 166 P.3d 708 (2007)

legislative. This Court should clarify that both the “legislative” and “power to enact” tests are only applied to the “fundamental and overriding purpose” of both local and statewide initiatives, in pre-election review.⁵⁰

D. In Pre-election Review Of A Local Initiative, A Court May Not Review Whether The Initiative Would Be Lawful, If Approved

Div II errs when it states that local initiatives, in pre-election review, are to be reviewed for whether they would be lawful, if approved.⁵¹ Div II errs when it states:

Courts . . . review initiatives for whether they would be lawful if approved. . . . trial courts review the substance and nature of local initiatives before they are submitted to the voters because local initiatives must be consistent with federal and state laws.

Petition at A-1 (emphasis supplied). This Court should make clear that it does not allow “substantive” review regarding whether a local initiative would be valid, if approved, in pre-election review. Div. II also states:

Where substantive review of a state-wide initiative is inappropriate, a similar review for a local initiative is warranted given the greater restrictions placed upon them.

Petition at A-9.

In light of recent case law, Div. II’s legal conclusions quoted above should be reversed. Ultimately, Div. II did not decide whether the trial court did or did not have authority in pre-election review to enter conclusions that

⁵⁰ Div. II also notes that the trial court did not make a finding as to the “fundamental and overriding purpose” of the initiatives. This is an issue of law that this Court decides de novo (without deference to the trial court). Even if it were an issue of fact, this Court is in the same position to make findings as the trial court because the case was based on undisputed facts. State v. Karpenski, 94 Wn. App. 80, 105, note 103, 971 P.2d 553 (1999). The purposes of the initiatives can be inferred from the language of the ordinances. Local 587 v. State, 142 Wn.2d 183, 205-06, 11 P.3d 762 (2000).

⁵¹ See Petition at A-1 and A-9.

the initiatives would be unlawful, if approved. Div II decided not to reach this issue because it had already wrongly concluded that the initiatives were administrative in nature and interfered with the City Council's exclusive power to operate a water utility.⁵² If this Court finds that the initiatives are legislative and that there is "power to enact" given to the corporate City, this Court will reach the issue of whether a trial court, in pre-election review, can properly review whether local initiatives would be lawful, if approved.⁵³

The Coppernoll Court cites to a local initiative case,⁵⁴ when it states:

It has been a longstanding rule of our jurisprudence that we refrain from inquiring into the validity of a proposed law, including initiative or referendum, before it has been enacted.

Coppernoll at 297. Reasons given for not allowing such pre-election review include "involves issuing an advisory opinion, violates ripeness requirements, undermines the policy of avoiding unnecessary constitutional questions, and constitutes unwarranted judicial interference with a legislative process."⁵⁵ Also such pre-election review may "unduly infringe on free speech values."⁵⁶

⁵² See Petition at A-10.

⁵³ The trial Court characterizes claims that the initiatives, if approved, would be unlawful as the "third test" described in the trial court's Findings of Fact, Conclusions of Law, and Judgment in conclusion 4.1.3. Petition at A-27. It characterizes this test as the "subject matter of the initiative exceeds the legislative authority of the City." Id. In conclusions 4.4 to 4.7, the trial court finds the initiatives invalid according to this test because: the initiatives conflict legislative authority given to the state board of health (4.4); one initiative conflicts with federal authority given to the FDA (4.5); the other initiative "is intended to create regulations that are, to some extent, inconsistent with state and federal law" (4.6); and this initiative would violate Wash. Constitution, Article VIII, Sec. 7 (4.7). Petition at A-27 to A-29.

⁵⁴ Seattle Bldg. & Constr. Trades Coun. v. City of Seattle, 94 Wn.2d 740, 745, 620 P.2d 82 (1980). Div. II wrongly finds this case supports "substantive invalidity" analysis for pre-election review. See Petition at A-9 to A-10.

⁵⁵ Coppernoll at 298.

⁵⁶ Id. at 298.

The Coppernoll Court identifies two narrow pre-election review exceptions to be allowed in this state: a) for violations of procedural requirements for putting a measure on the ballot; and b) for subject matter not being proper for direct legislation (using the “legislative” and “power to enact” tests).⁵⁷

“Substantive invalidity” pre-election challenges are not allowed in this state.⁵⁸ For a statewide initiative, “substantive invalidity” involves a pre-election claim that “the measure, if passed, would be substantively invalid because it conflicts with a federal or state constitutional . . . provision.”⁵⁹ For local initiatives, “substantive invalidity” should be defined by this Court to be a pre-election claim that a measure, if passed, would conflict with a federal or state constitutional provision or general law.⁶⁰

A statewide initiative cannot survive in post-election review if it conflicts with the federal or state constitution. A local initiative cannot survive in post-election review if it conflicts with the federal or state constitution or with the general law. Just as the Coppernoll Court has decided that a claim that a statewide initiative conflicts with a constitutional provision can not be heard in pre-election review, this Court should rule that a claim that a local ordinance conflicts with a constitution or general law provision cannot be heard in pre-election review.

⁵⁷ Id. at 297-99.

⁵⁸ Id. at 297.

⁵⁹ Id.

⁶⁰ WASH. Constitution, Article XI § 10 and 11 require compliance with general laws.

Under such a ruling, this Court would not permit pre-election review for local initiatives for whether they would be lawful if approved. With such a ruling, this Court should find that the trial court's Conclusions 4.1.3, and 4.4 to 4.7 are not valid issues for pre-election review of a local initiative.

E. This Court Should Issue A Decree Pursuant to RCW 35.17.290 To Place The Initiatives On The Ballot

Because the initiatives are legislative and are within the corporate City's power to enact, this Court should issue a decree pursuant to RCW 35.17.290 to place the initiatives on the ballot.

V. CONCLUSION

A. This Court Should Grant The Relief Requested

This Court should grant the relief requested and issue a decree to place the initiatives on the ballot.

B. This Court Should Grant Petitioners Statutory Costs

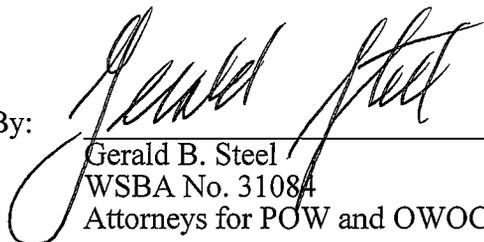
Petitioners request statutory costs.

Dated this 1st day of June, 2009.

Respectfully submitted,

GERALD STEEL PE

By:



Gerald B. Steel
WSBA No. 31084
Attorneys for POW and OWOC

CERTIFICATE OF SERVICE

I certify that on the 1st day of June, 2009, I caused a true and correct copy of this certificate and the Supplemental Brief of Petitioners Our Water-Our Choice and Protect Our Waters to be served on the following by first class mail:

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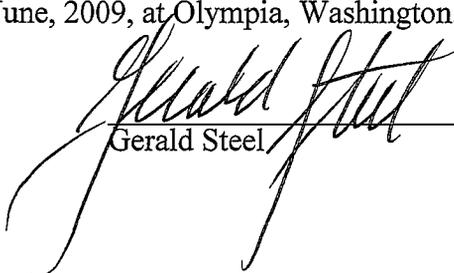
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Dated this 1st day of June, 2009, at Olympia, Washington.



Gerald Steel

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APPENDIX INDEX

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44 Ohio St.2d 62; Canton v. Whitman; 337 N.E.2d 766

CITY OF CANTON, APPELLEE, V. WHITMAN, DIR. OF ENVIRONMENTAL PROTECTION,
APPELLANT.

[Cite as Canton v. Whitman (1975), 44 Ohio St.2d 62]

Environmental protection - Director's order to fluoridate municipally-owned water supply - R.C. 6111.13 - Constitutionality - Valid exercise of state's police power - Does not interfere with ownership or operation of utility - Local option provision, valid.

1. Prevention and control of dental caries, a common disease of mankind, is a proper subject, in relation to public health, for legislation enacted pursuant to the police power vested in the state, as well as in municipalities, by the general laws and the Constitution of the state of Ohio. (Kraus v. Cleveland, 163 Ohio St. 559 , proved and expanded.)
2. Police and similar regulations adopted under the powers of local self-government established by the Constitution of Ohio must yield to general laws of statewide scope and application, and statutory enactments representing the general exercise of police power by the state prevail over police and similar regulations of a municipality adopted in the exercise of its powers of local self-government. (State ex rel. Klapp v. Dayton P. & L. Co., 10 Ohio St.2d 14 , paragraph one of the syllabus approved and followed.)
3. Legislation enacted by the state pursuant to the police power, in relation to the public health, is valid as applied to the municipal operation of a public utility under Section 4 of Article XVIII of the Ohio Constitution, where such legislation does not interfere with the ownership or operation of the utility.
4. The General Assembly has discretion to enact legislation subject to local option elections by those directly affected, and a local option provision does not violate the requirement of Section 26, Article II of the Ohio Constitution, that all laws of a general nature shall have a uniform operation throughout the state.

(No. 75-282 - Decided November 19, 1975.)

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APPEAL from the Court of Appeals for Stark County.

The city of Canton owns and operates a public waterworks and water supply system. The city does not add fluorides to the water supply and the level of natural fluorides in the water is less than eight-tenths milligrams of fluoride per liter, the level of fluoridation required by R.C. 6111.13. On July 1, 1974, the then Ohio Director of Environmental Protection issued an order directing the city to begin fluoridating its water within 30 days.

The city appealed to the Environmental Board of Review, which upheld the order. An appeal was taken to the Court of Appeals, which reversed the orders of the Board and the Director, holding that R.C. 6111.13 was not reasonably related to the police power of the state.

The cause is now before this court pursuant to an allowance of a motion to certify the record.

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Mr. Harry E. Klide, city solicitor, and Mr. William J. Hamann, for appellee.

Mr. William J. Brown, attorney general, and Mr. Christopher R. Schraff, for appellant.

STERN, J.

The issue raised in this case is, generally, whether the state may require a municipality to fluoridate a municipally-owned-and-operated water supply, and, specifically, whether R.C. 6111.13, which requires fluoridation, is a valid exercise of the state police power.(fn1)

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The purpose of fluoridation is well-known. Fluorides help prevent and control the incidence of dental caries. Fluoridation has become a familiar public health measure

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in the past two decades, and it is beyond questioning a proper subject for legislation pursuant to the police power. *Kraus v. Cleveland* (1955), 163 Ohio St. 559, 127 N.E. 2d 609; *Alkire v. Cashman*, 350 F. Supp. 360 (S.D. Ohio E.D. 1972); *Dowell v. Tulsa*, 273 P. 2d 958 (Okla. 1954); *Paduano v. New York*, 17 N.Y. 2d 875, 218 N.E. 2d 339 (1966); Annotation, 43 A.L.R. 2d 453.

In *Kraus*, supra, we held that a municipality could fluoridate its municipally owned water supply, as a proper exercise of the police power. Here, the city of Canton does not wish to fluoridate its water, and the issue is whether the state may order the city to do so.

The city contends that fluoridation is a matter of local self-government and of the operation of a municipal public utility, matters which are reserved for municipal control under the home-rule provision of the Ohio Constitution.

Section 3 of Article XVIII of the Ohio Constitution provides:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

This section, adopted in 1912, preserved the supremacy of the state in matters of "police, sanitary and other similar regulations," while granting municipalities sovereignty in matters of local self-government, limited only by other constitutional provisions. Municipalities may enact police and similar regulations under their powers of local self-government, but such regulations "must yield to general laws of statewide scope and application, and statutory enactments representing the general exercise of police power by the state prevail over police and similar regulations in the exercise by a municipality of the powers of local self-government." *State ex rel. Klapp v. Dayton P. & L. Co.* (1967), 10 Ohio St.2d 14, 225 N.E. 2d 230 (paragraph one of the syllabus); *West Jefferson v. Robinson* (1965), 1 Ohio St.2d 113, 205 N.E. 2d 382; *Cincinnati v. Hoffman* (1972), 31 Ohio St.2d 163, 285 N.E. 2d 714 (Brown, J., dissent-

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ing); *Leavers v. Canton* (1964), 1 Ohio St.2d 33, 37, 203 N.E. 2d 354.

Matters involving local self-government and those involving the police power often overlap. Even if a matter is of local concern, the local regulation may have significant extraterritorial effects, in which

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case it properly becomes a matter of statewide concern for the General Assembly. *Cleveland Electric Illuminating Co. v. Painesville* (1968), 15 Ohio St.2d 125 , 239 N.E. 2d 75; *Beachwood v. Board of Elections* (1958), 167 Ohio St. 369 , 371, 148 N.E. 2d 921. Similarly, a matter which relates to exercise of the police power by a municipality, e.g., the appointment of officers to the police force, may essentially be an exercise of local self-government not subject to state authority. *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191 , 151 N.E. 2d 722.

The power of local self-government and that of the general police power are constitutional grants of authority equivalent in dignity. A city may not regulate activities outside its borders, and the state may not restrict the exercise of the powers of self-government within a city. The city may exercise the police power within its borders, but the general laws of the state are supreme in the exercise of the police power, regardless of whether the matter is one which might also properly be a subject of municipal legislation. Where there is a direct conflict, the state regulation prevails.

The city contends further that the power to fluoridate is a "power of local self-government." That argument is necessarily rejected by the decision of this court in *Kraus v. Cleveland supra*. See, also, *Beachwood v. Board of Elections, supra*. The decision to fluoridate is intrinsically one involving public health. Whether it is decided by an exercise of local self-government is irrelevant, for its validity must depend upon whether it bears a substantial relationship to the public health. In *Kraus*, the court held that fluoridation is a proper subject for exercise of the police power when enacted by a municipality, and was not "in contravention of the general laws in relation to adultera-

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tion or the practice of medicine." Fluoridation is equally a proper subject for the exercise of the state police power, and a municipal ordinance in contravention of a general state law requiring fluoridation is invalid. The public health is a matter of state as well as local concern (*State ex rel. Mowrer v. Underwood* [1940], 137 Ohio St. 1 , 27 N.E. 2d 773; *State ex rel. Cuyahoga Heights v. Zangerle*, 103 Ohio St. 566 , 134 N.E. 686 [1921]), and that concern extends to those ills which affect us individually, as well as those which we transmit to one another.

As this court stated in *Kraus, supra*, at page 562:

"* * * An examination shows that laws relating to child labor, minimum wages for women and minors and maximum hours for women and minors have all been upheld on the basis of the police power in relation to public health. Regulations relating to control of venereal disease, blood tests for marriage licenses, sterilization, pasteurization of milk, chlorination of water and vaccination have all been held valid as based on police power exercised in regard to public health.

"Clearly neither an overriding public necessity or emergency nor infectious or contagious diseases are the criteria which authorize the exercise of the police power in relation to public health."

The city of Canton also contends that the fluoridation legislation interferes with the power to own or operate public utilities granted by Section 4 of Article XVIII. That section reads:

"Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. * * *"

Those rights and privileges are derived directly from the people through the Constitution, and the General Assembly may not impose restrictions upon the power to operate a public utility granted to a

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municipality under Article XVIII of the Ohio Constitution. State ex rel. McCann v.

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Defiance (1958), 167 Ohio St. 313, 148 N.E. 2d 221; Swank v. Shiloh (1957), 166 Ohio St. 415, 143 N.E. 2d 586; Euclid v. Camp Wise Assn. (1921), 102 Ohio St. 207, 131 N.E. 349. It may, however, enact legislation under its general police power to protect the public health and safety. State ex rel. McCann v. Defiance, supra; Akron v. Public Util. Comm. (1948), 149 Ohio St. 347, 78 N.E. 2d 890; Bucyrus v. Department of Health (1929), 120 Ohio St. 426, 166 N.E. 370.

The ownership and operation of a municipal waterworks is not limited by a state requirement that fluorides be added to the water in the interest of the public health, to any greater degree than by other health and safety requirements affecting the purity of the water or the safety of plant operations. The state, in fact, supplies the equipment necessary to add the fluorides. An exercise of the police power necessarily occasions some interference with other rights, but that exercise is valid if it bears a real and substantial relationship to the public health, safety, morals or general welfare, and if it is not unreasonable or arbitrary. Piqua v. Zimmerlin (1880), 35 Ohio St. 507, 511. Fluoridation is plainly a matter involving the public health; there is no indication that it unreasonably restricts, limits, or otherwise interferes with the operation of a municipal utility.

The effect of fluoridating a water supply is a local one, limited to the area served by the system. (fn2)

The local interest in the decision regarding fluoridation is clear, while the interest of the state is not as direct as in the areas of infectious diseases or of pollution. Cf. Bucyrus v. Department of Health, supra. However, the mandate of Section 3 of Article XVIII of the Ohio Constitution is that municipal exercise of the police power is valid only insofar as it does not conflict with general state laws, regardless of whether the matter might also be decided locally.

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In fact, the General Assembly did permit the users of local water supplies to decide whether to fluoridate their water. R.C. 6111.13 contained provisions which authorized a special election to be called within 120 days of the effective date of the legislation, November 17, 1969, by the users of any water supply system which did not then add fluorides. The question of fluoridation would be decided by a majority vote. Thirty-eight such elections were held, and in thirty-six the vote was against fluoridation. No special election was held in the area supplied by the city of Canton waterworks, although fluoridation had previously been rejected in two general elections.

The city contends that the local option provision of R.C. 6111.13 prevented that section from being valid as a general law, because its effect was to require some water suppliers to fluoridate, while allowing others, whose users held a referendum, to avoid that requirement.

The referendum provisions of R.C. 6111.13 are somewhat unusual, in that they require that the referendum be held, if at all, within 120 days, and require that the voters be only those using the water supply, regardless of the political subdivision in which they might reside. Essentially, however, the provisions are for a local option, and no claim is raised that those provisions are unreasonable.

The principle of local options is well-established. It is a legislative deferral to differing local needs and attitudes, a principle which is also embodied in the home-rule provisions. Local option laws are upheld by the great weight of authority (Locke's Appeal [1873], 72 Pa. 491, 13 Am. Rep. 716; 16 Am. Jur. 2d 508; 16 C.J.S. 680; 79 L. Ed. 562), and their enactment lies within the discretion of the General Assembly. As stated in Stone v. Charlestown (1873), 114 Mass. 214, 221:

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"* * * In doing so, the Legislature does not, in any sense, delegate its constitutional authority, but, in the exercise of that authority, determines that if the inhabitants of that part of the state to be immediately affected by the proposed change assent to it public policy requires it to be

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made, and that, without such assent, the other considerations offered in support of it are not sufficient to justify its adoption by the Legislature. The question whether the act shall take effect at once, or only upon such acceptance by the inhabitants, is within the discretion of the Legislature to determine."

A local-option law is also not objectionable as not having a uniform operation throughout the state, as required by Section 26 of Article II of the Ohio Constitution. As the court stated in *Gordon v. State* (1889), 46 Ohio St. 607, 628, upholding a local option liquor law:

"* * * The provisions of the act are bounded only by the limits of the state, and uniformity in its operation is not destroyed, because the electors in one or more townships may not see fit to avail themselves of its provisions. The act makes no discrimination between localities to the exclusion of any township. Every township in the state comes within the purview of the law, and may have the advantage of its provisions by complying with its terms. The operation of the statute is the same in all parts of the state, under the same circumstances and conditions." See, also, *Cincinnati W. & Z. R. Co. v. Commissioners of Clinton County* (1852), 1 Ohio St. 77.

The fluoridation local option was similarly applied uniformly throughout the state, and made no discrimination between one locality and another. The users of all affected water supply systems were equally permitted to petition for a local option election.

For the reasons stated above, we disagree with the holding of the Court of Appeals that the inclusion by the General Assembly of local option provisions rendered the entire statute void because they were not reasonably related to the police power. It is, of course, true that the beneficial effects of fluoridation upon the public health are unrelated to the votes of a majority in any community. Medical research has proven fluoridation effective in reducing dental caries, and communities with fluoridated water will generally have better dental hygiene than those without fluoridation,

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irrespective of a majority vote. Yet many persons strongly oppose fluoridation for religious and other reasons. Plainly, the General Assembly made a political compromise - it ordered fluoridation, but permitted users of particular water supplies to choose, by local option, to avoid that order under specified conditions. As in *Stone v. Charlestown*, supra, the Ohio General Assembly determined that "if the inhabitants of that part of the state to be immediately affected by the proposed change assent to it, public policy requires it to be made, and that, without such assent, the other considerations offered in support of it are not sufficient to justify its adoption by the * * * [General Assembly]."

The decision as to whether the benefits to the public health of fluoridation are sufficient to require it for all, notwithstanding the concerted opposition of many individuals, is within the discretion of the General Assembly. So, too, is the decision that those immediately affected by a local fluoridation program should have an option to decide that same question for themselves.

For the foregoing reasons, the judgment of the Court of Appeals is reversed, and the orders of the Environmental Board of Review and the Director of Environmental Protection are affirmed.

Judgment reversed.

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O'NEILL, C.J., HERBERT, W. BROWN, and P. BROWN, JJ., concur.

CORRIGAN and CELEBREZZE, JJ., dissent.

Footnotes:

R.C. 6111.13, as amended by the General Assembly in 1972 (134 Ohio Laws 766), provides in pertinent part:

"If the natural fluoride content of supplied water of a public water supply and waterworks system is less than eight-tenths milligrams per liter of water, fluoride shall be added to such water to maintain a fluoride content of not less than eight-tenths milligrams per liter of water nor more than one and three-tenths milligrams per liter of water beginning:

"(A) On or before January 1, 1971, for a public water supply and water-works system supplying water to twenty thousand or more persons:

"(B) On or before January 1, 1972, for a public water supply and water works system supplying water to five thousand or more persons, but less than twenty thousand persons. A municipal corporation may request the environmental protection agency for reimbursement of the actual cost of acquiring and installing equipment, excluding chemicals added to the water supply, necessary for compliance with division (A) or (B) of this section. The director of environmental protection, upon determination of the necessity of this cost for this purpose, shall order the reimbursement for such costs, from funds available to the agency.

Between 1969 and 1973, R.C. 6111.13 also provided:

"Within one hundred twenty days after November 17, 1969, a petition may be filed with the board of elections of a county containing a political subdivision served by a public water supply to which fluoride must be added under this section and where fluoride was not regularly added to such water supply prior to the filing of such petition, requesting that the issue of adding fluoride to the water supply be placed on the ballot at a special election in the political subdivisions of the county or adjoining counties served by the water supply to be held on a date specified in the petition, not less than ninety nor more than one hundred twenty days after the date of filing the petition.

"The petition shall meet the requirements of R.C. 3501.38 and, in addition, shall designate the political subdivisions in the county and adjoining counties served by the water supply and shall be signed by not less than ten per cent of the number of electors served by the water supply of each political subdivision who voted for Governor at the last preceding gubernatorial election. The board of elections shall place the issue on the ballot at the special election to be held in the political subdivisions served by the water supply.

"If a water supply extends into more than one county, the board of elections of the county where the petitions are filed shall, within ten days after such filing, send notice of such filing to all other boards of elections of counties served by the water supply and shall furnish all ballots for the special election.

"In political subdivisions where only a part of the electors are served by the water supply, only those electors shall be allowed to vote on the issue who sign forms provided by the board of elections stating that they are served by the water supply. The question of adding fluoride to the water supply shall be

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determined, at this election, by a majority vote of those voting on the issue."

The latter provisions were repealed in 1973 (135 Ohio Laws 1109), by which time the 120-day period for filing of petitions had expired.

2. In the case of a municipal water supply, the area served is not limited by municipal boundaries, for the municipality may sell any amount of its surplus water to other communities. Section 6, Article XVIII of the Ohio Constitution.

OH

Ohio St.2d

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110 N.W.2d 569; WILSON v. CITY OF COUNCIL BLUFFS, 253 Iowa 162, (Iowa 09/19/1961);

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WILSON v. CITY OF COUNCIL BLUFFS, 253 Iowa 162, 110 N.W.2d 569 (Iowa 09/19/1961)

[1] Supreme Court of Iowa.

[2] No. 50306

[3] 253 Iowa 162, 110 N.W.2d 569, 1961.IA.0042025

[4] September 19, 1961

[5] C.L. WILSON ET AL., FOR THEMSELVES AND REPRESENTING OTHER RESIDENT TAXPAYERS AND USERS OF THE PUBLIC WATER SUPPLY OF CITY OF COUNCIL BLUFFS, APPELLEES, V. CITY OF COUNCIL BLUFFS, APPELLANT.

[6] SYLLABUS BY THE COURT

[7] MUNICIPAL CORPORATIONS: Powers. Municipalities have only those 1 powers expressly given them by the legislature, those which arise from fair implication and those necessary to carry out powers expressly or impliedly granted. MUNICIPAL CORPORATIONS: Powers — grants strictly construed. 2 Grants of power to municipalities are strictly construed against the authority claimed, and in case of reasonable doubt must be denied. STATUTES: General and special — conflict — special statute 3 considered an exception. Where a general statute, if standing alone, would include the same matter as a special statute and thus conflict with it, the special statute will be considered an exception to the general statute whether it was adopted before or after the general statute. MUNICIPAL CORPORATIONS: Waterworks — statutes authorizing — 4 scope — powers granted. Code sections 397.1 and 397.26, C., '58, are special statutes dealing entirely with the power of the city to own and operate such a utility as the waterworks and with the physical aspects thereof, but have nothing to do with the manner in which it is operated or the type, character or ingredients of the product produced and sold, other than that it be water. MUNICIPAL CORPORATIONS: Fluoridation of water — health measure 5 — police power. A city ordinance providing for fluoridation of water furnished to residents through the municipal waterworks is a health measure and a police power enactment. MUNICIPAL CORPORATIONS: Public health — police power. Public 6 health is a proper subject of police power delegated to municipalities coextensive with their corporate limits. MUNICIPAL CORPORATIONS: Fluoridation of water — power implied. 7 A city has authority, implied by sections 366.1 and 368.2, C., '58, to enact an ordinance providing for fluoridation of the water furnished by its municipal waterworks.

[8] [253 Iowa Page 163]

[9] APPEAL AND ERROR: Constitutional questions must be raised in 8 trial court. A constitutional issue not raised in the trial court by the pleading and which was not before that court will not be considered on appeal. APPEAL AND ERROR: Appellee may claim error without a 9 cross-appeal. Appellee may contend in support of trial court's decree that there was error in a holding without a cross-appeal. MUNICIPAL CORPORATIONS: Fluoridation of city water supply — no 10 violation of statutes dealing with sale of poisons. The addition of sodium fluoride to the municipal water supply in quantities approved by the State Department of Health cannot be held to be a violation of the chapter

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dealing with the sale and distribution of poisons. Section 205.5, Code of 1958.

[10] Appeal from Pottawattamie District Court — R. KENT MARTIN, Judge. Proceeding to enjoin enforcing an ordinance calling for fluoridation of the public water supply. From a decree as prayed defendant appeals. — Reversed.

[11] David E. Stuart, City Attorney, and John M. Peters, Assistant City Attorney, both of Council Bluffs, for appellant.

[12] Richard C. Turner, of Council Bluffs, for appellees.

[13] The opinion of the court was delivered by: Hays, J.

[14]

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This is a class action wherein plaintiffs, as residents and taxpayers of the City of Council Bluffs, Iowa, seek to enjoin the enforcement by said City of an ordinance, known in the record as Ordinance No. 3575, providing for fluoridation of water furnished to residents of said City through its municipal waterworks. Such relief was granted by the trial court.

[15] Ordinance No. 3575, after setting forth at some length a list of national, state and local medical, dental and health associations and boards which have endorsed the use of fluorides in water as a health measure, provides: Section I. "That fluoride [253 Iowa Page 164]

[16] shall be introduced into the public water supplies of the City of Council Bluffs, Iowa, in such concentration as is recommended by the Iowa State Department of Health; provided, however, that fluoridation equipment and the installation and operation thereof shall at all times be subject to the inspection, rules, regulations and direction of said Department of Health. * * *"

[17] A pretrial stipulation provided: (1) No issue is raised as to plaintiff's authority to maintain the action. (2) It is conceded that the fluoride to be added to the water will not purify the water or make it more potable and that it is not being added for that purpose. (3) No issue is raised as to whether or not the City council was duly advised upon the question of whether or not the adding of fluoride to the water will be beneficial or detrimental to the users. (4) No issue is raised as to whether or not the fluoride will prevent dental caries, or whether or not the City acted arbitrarily or abused its discretion in making its determination in that respect. (5) No claim is made that the fluoride will make the water less potable or less pure. (6) This stipulation permits urging that the addition of fluoride by the City violates chapter 205, Code of 1958. (7) No issue is raised concerning the amount of fluoride the City intends to add to the water or that it exceeds the amount recommended for the purpose of accomplishing the reduction of dental caries.

[18] Under the pleadings and in the light of above mentioned stipulation, but two legal questions were before the trial court for determination: (1) Statutory authority of the City to enact said ordinance; and (2) Violation of chapter 205, Code of 1958. The trial court held the City had no statutory authority, express or implied, to enact the ordinance, but that, assuming such authority, the ordinance did not violate chapter 205. Appellant assigns error in the holding of no authority. Appellees urge in support of the decree, error as to the holding relative to chapter 205, Code of 1958.

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[19] [1-3] I. The law is clear and well established in this state that municipalities have only those powers expressly given them by the legislature, those which arise from fair implication and those necessary to carry out powers expressly or impliedly granted. Also, such grants of power are strictly construed [253 Iowa Page 165]

[20] against the authority claimed, and in case of reasonable doubt must be denied. *Dotson v. City of Ames*, 251 Iowa 467, 101 N.W.2d 711, and authorities therein cited. The law is equally well established that where a general statute, if standing alone, would include the same matter as a special statute and thus conflict with it, the special statute will be considered an exception to the general statute

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whether it was adopted before or after the general statute. *Gade v. City of Waverly*, 251 Iowa 473, 101 N.W.2d 525, and cited authorities.

[21] II. Four sections of the Code appear to be pertinent to the issue of authority to enact the ordinance in question.

[22] Section 366.1, "Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

[23] Section 368.2 provides in part: "Cities and towns are bodies politic and corporate * * * and shall have the general powers and privileges granted, and such others as are incidental to municipal corporations * * *, not inconsistent with the statutes of the state, for the protection of their property and inhabitants, and the preservation of peace and good order therein, * * *"

[24] Section 397.1, "Cities and towns may purchase. Cities and towns shall have the power to purchase, establish, erect, maintain, and operate within or without their corporate limits * * * waterworks, * * *, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus, and other requisites of said works or plants, and lease or sell the same."

[25] Section 397.26, "Jurisdiction of city. For the purpose of maintaining and protecting such works or plants from injury, and protecting the water of such waterworks from pollution, [253 Iowa Page 166]

[26] the jurisdiction of such city or town shall extend over the territory occupied by such works, and all reservoirs, mains, filters, streams * * * and other requisites of said works or plants used in or necessary for the construction, maintenance, and operation of the same, and over the stream or source from which the water is taken for five miles above the point from which it is taken."

[27] [4] III. The trial court held there was nothing in section 397.1 or section 397.26 in any way authorizing fluoridation. We agree. We might also add that nowhere in the briefs and arguments do we find any contention of express authority. The trial court also held, in effect, these two statutes were special ones in relation to water supplies as against the general powers of municipal corporations. We do not agree with this premise. True they are special statutes dealing with one phase of water supplies, but that phase deals entirely with the power of the City to own and operate such a business or utility. It deals

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only with the physical aspects of such a utility and has nothing to do with the manner in which it is operated or the type, character or ingredients of the product produced and sold other than, perhaps, that it be water. Neither 397.1 nor 397.26 conflicts with 366.1 or 368.2. Such cases as *Mason City v. Zerble*, 250 Iowa 102, 93 N.W.2d 94; *Gade v. City of Waverly*, 251 Iowa 473, 101 N.W.2d 525, *supra*; *Shelby County Myrtue Memorial Hospital v. Harrison County*, 249 Iowa 146, 86 N.W.2d 104; *Leighton Supply Co. v. City Council of Fort Dodge*, 228 Iowa 995, 292 N.W. 848, are not in point.

[28] [5] IV. There can be no question under this record and the stipulation but that the City acted in good faith, and, after due deliberation, under its, at least supposed, power in sections 366.1 and 368.2, above set forth. More specifically, the ordinance itself shows it as deemed to be a health measure enacted under that part of section 366.1 which is as follows: "* * * and such as shall seem necessary and proper to provide for the safety, preserve the health * * * of * * * the inhabitants thereof

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* * * " (Italics ours.) It is a "police power" enactment.

[29] [6] "Police power" is a general term containing many ramifications and has never been pinpointed as to its exact meaning. [253 Iowa Page 167]

[30] *City of Des Moines v. Manhattan Oil Co.*, 193 Iowa 1096, 184 N.W. 823, 188 N.W. 921, 23 A.L.R. 1322. No one contends that the matter of the public health is not a proper subject of the police power or that such power has not been specifically delegated to cities and towns coextensive with their corporate limits. *Cecil v. Toenjes*, 210 Iowa 407, 228 N.W. 874. The trial court recognizes such facts but holds the addition of fluorides to the public water supply is not an authorized attribute thereof. It bases this holding primarily upon the stipulation that the only purpose of adding fluorides is on the theory that it will prevent dental caries in children; and that dental caries is neither a contagious nor an infectious disease.

[31] [7, 8] The trial court concedes the right of a city to enact health regulations such as are intended to overcome contagious or infectious diseases on the theory that it is for the benefit of the community as a whole rather than those who are actually affected therewith. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. There is nothing in the cited case prohibitive of "aiding a segment of the whole" rather than "aiding the whole", if the aiding is in fact a health measure, nor have we been cited any such a holding. See *City of Des Moines v. Manhattan Oil Co.*, 193 Iowa 1096, 184 N.W. 823, 188 N.W. 921, 23 A.L.R. 1322. It is clear that the City considered it to be a health measure. Under the stipulation no claim is made that the City acted hastily or arbitrarily in enacting the ordinance, nor is there any issue as to whether it is or is not beneficial or detrimental as a health adjunct. The merits of fluoridation are not in issue, only the authority or the lack of authority in the City to enact such an ordinance. We hold it has such authority, not in specific words but necessarily implied under sections 366.1 and 368.2, Code of 1958. See annotation, 43 A.L.R.2d 453, 459, and authorities therein cited. While appellees argue an invasion of personal liberties guaranteed by the State and Federal Constitutions, no such issue is raised by the pleadings; was not before the trial court and will not be considered here. In re *Estate of Lundgren*, 250 Iowa 1233, 98 N.W.2d 839.

[32] [9] V. Appellees contend in support of the decree that the [253 Iowa Page 168]

[33] court erred in holding that the ordinance was not in violation of chapter 205, Code of 1958, and hence void. This may be done without a cross-appeal. *Brandt v. Schucha*, 250 Iowa 679, 96 N.W.2d 179.

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[34] [10] Chapter 205 deals with the sale and distribution of poisons. Section 205.5 specifically prohibits any person except a licensed pharmacist from selling at retail any of the poisons listed therein. Included in this list is sodium fluoride. It may be assumed that sodium silicofluoride, the ingredient the City proposes to inject into the water, is included in the fluoride prohibition. The record shows that the fluoride concentration of the water, after the injection thereof, is 1.2 to one million p.p.m., which is in accord with the rules and regulations of the State Department of Health of Iowa. It also appears that much of the water in Iowa has, in its natural state, a fluoride concentrate equal to or in excess of that involved here. It is also stipulated that no claim is made that the fluoride will poison the water or that it will make it less pure or potable.

[35] It is clear that the purpose of section 205.5 is to regulate and restrict the retail sale of poisons as such. Conceding that the City of Council Bluffs is engaged in the sale at retail of water, the fact that such water may have a concentrate of fluoride of 1.2 to one million p.p.m., either naturally or due to action by the City, cannot under any reasonable theory be held to be a sale at retail of fluoride within the meaning

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of section 205.5. Nicotine is also included in the prohibition found in said section, yet we doubt that anyone would seriously contend that the sale of a package of cigarettes (we take judicial notice of the fact that cigarettes contain nicotine) was a sale of nicotine within the meaning of such statute. We can see no difference in the sale of water which contains fluoride as set forth in this record. The trial court was clearly correct.

[36] For the reasons above stated the decree of the trial court should be and is reversed and plaintiffs' petition dismissed. — Reversed.

[37] All JUSTICES concur. [253 Iowa Page 169] 19610919

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43 Cal.Rptr. 306; D BEVERLY HUGHES ET AL., PLAINTIFFS AND RESPONDENTS, v. CITY OF LINCOLN ET AL., DEFENDANTS AND APPELLANTS; 1965.CA.40766; 43 Cal.Rptr. 306; 232 Cal.App.2d 741

Hughes v. City of Lincoln, 232 Cal.App.2d 741, 43 Cal.Rptr. 306 (Cal.App.Dist.3 03/10/1965)

[1] DISTRICT COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

[2] Civ. No. 10927

[3] 1965.CA.40766; 43 Cal.Rptr. 306; 232 Cal.App.2d 741

[4] March 10, 1965

[5] D BEVERLY HUGHES ET AL., PLAINTIFFS AND RESPONDENTS, v. CITY OF LINCOLN ET AL., DEFENDANTS AND APPELLANTS

[6] APPEAL from a judgment of the Superior Court of Placer County. Vernon Stoll, Judge.*fn* Proceeding in mandamus to compel a city council to submit to an election a proposed initiative ordinance to prohibit addition of fluorides to the city's public water supply.

[7] Robert J. Trombley for Defendants and Appellants.

[8] Bowers & Sinclair and Floyd H. Bowers for Plaintiffs and Respondents.

[9] Friedman, J. Pierce, P. J., and Van Dyke, J.,*fn* concurred.

[10] Friedman

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[11] On July 10, 1962, the City Council of the City of Lincoln adopted a resolution directing fluoridation of the municipal water supply, subject to the approval of the State Board of Public Health. A group of electors circulated

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[12] a petition proposing an initiative ordinance to prohibit addition of fluorides to the city's public water supply. On September 15, 1963, the city clerk submitted the petition to the council with a certificate showing that it was signed by more than 15 per cent of the municipal voters. When a proposed initiative ordinance bearing that percentage of signatures is presented to the city council, the law requires it either to adopt the ordinance or immediately call a special election for its submission to the voters. (Elec. Code, § 4011.) The Lincoln city council refused to take either step. Several electors then filed this mandate action to force the city council to submit the proposed ordinance to election. After a hearing the lower court issued a peremptory writ and the city appeals.

[13] Essentially, the city's position may be described as follows: An ordinance proposed by initiative must be one that the city council could itself enact; the Legislature has adopted a comprehensive scheme entrusting control of domestic water supplies to the State Department of Public Health, as a result of

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which a municipal decision to fluoridate becomes an administrative rather than legislative act, hence not subject to the initiative power of the municipal electors. We reject this position.

[14] The courts have evolved various tests for ascertaining the scope of the initiative and referendum powers in their application to counties and cities. These powers apply to county and city measures which are legislative in character. (*Johnston v. City of Claremont*, 49 Cal.2d 826, 834 [323 P.2d 71]; *Hopping v. Council of City of Richmond*, 170 Cal. 605, 611 [150 P. 977]; *Reagan v. City of Sausalito*, 210 Cal.App.2d 618, 621 [26 Cal.Rptr. 775]; *Martin v. Smith*, 184 Cal.App.2d 571, 575 [7 Cal.Rptr. 725].) They do not extend to executive or administrative actions of the local legislative body. (*Simpson v. Hite*, 36 Cal.2d 125, 129 [222 P.2d 225]; *Housing Authority v. Superior Court*, 35 Cal.2d 550, 558 [219 P.2d 457]; *Chase v. Kalber*, 28 Cal.App. 561, 568, et seq. [153 P. 397].)

[15] The vague legislative-administrative dichotomy has been crystallized to some extent in the oft-quoted formulation in *McKevitt v. City of Sacramento*, 55 Cal.App. 117, 124 [203 P. 132]: "Acts constituting a declaration of public purpose, and making provision for ways and means of its accomplishment, may be generally classified as calling for the exercise of legislative power. Acts which are to be deemed as acts of administration, and classed among those governmental powers

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[16] properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence." (*Reagan v. City of Sausalito*, supra, 210 Cal.App.2d at pp. 621-622; *Fletcher v. Porter*, 203 Cal.App.2d 313, 321 [21 Cal.Rptr. 452]; *Martin v. Smith*, supra, 184 Cal.App.2d at p. 575; see also 5 *McQuillin on Municipal Corporations* (3d ed.) pp. 255-256; Comment, *Limitations on Initiative and Referendum*, 3 *Stan.L.Rev.* 497, 502-504.)

[17] A second test is superimposed upon the first when the local proposal deals with a subject affected by state policy and state law. If the subject is one of statewide concern in which the Legislature has delegated decision-making power, not to the local electors, but to the local council or board as the state's designated agent for local implementation of state policy, the action receives an "administrative" characterization, hence is outside the scope of the initiative and referendum. (*Simpson v. Hite*, supra, 36 Cal.2d at p. 131; *Riedman v. Brison*, 217 Cal. 383, 387-388 [18 P.2d 947]; *Mervynne v. Acker*, 189 Cal.App.2d 558, 562, 565 [11 Cal.Rptr. 340]; *Alexander v. Mitchell*, 119 Cal.App.2d 816, 826 [260 P.2d 261].) "When the sole basis for a determination is whether a certain 'contingent effect' exists to warrant local application of state legislation, the exercise of that narrow authority is an administrative act and not a legislative one." (*Housing Authority v. Superior Court*, supra, 35 Cal.2d at p. 558; *Andrews v. City of San Bernardino*, 175 Cal.App.2d 459, 462 [346 P.2d 457].)

[18] On the other hand, the matter may be one of local rather than statewide concern. In that case a local decision which is intrinsically legislative retains that character even in the presence of a state law authorizing or setting limits on the particular field of action. (*Reagan v. City of Sausalito*, supra, 210 Cal.App.2d at pp. 625-628; *Fletcher v. Porter*, supra, 203 Cal.App.2d at pp. 318-319; *Mefford v. City of Tulare*, 102 Cal.App.2d 919, 923-924 [228 P.2d 847].) If the proposal is an exercise of police power directly delegated to counties and cities by article XI, section 11, of the State Constitution, then it is likely to constitute an act of legislation rather than administration. (See *Dwyer v. City Council of City of Berkeley*, 200 Cal. 505, 511-512 [253 P. 932].)

[19] A third test has been formulated to delineate scope of the initiative power, as distinguished from the referendum:

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[20] It is well recognized that "an ordinance proposed by the electors of a county, or of a city in this state under the initiative law must constitute such legislation as the legislative body of such county or city has the power to enact under the law granting, defining and limiting the power of such body." (*Hurst v. City of Burlingame*, 207 Cal. 134, 140 [277 P. 308], and quoted in *Blotter v. Farrell*, 42 Cal.2d 804, 810 [270 P.2d 481].)

[21] The operation of public water systems by chartered cities has been characterized as a "municipal affair" rather than a matter of statewide concern. (*City of South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 579, 593-594 [93 P. 490]; *Mefford v. City of Tulare*, supra, 102 Cal.App.2d at p. 294.) Nonchartered cities such as Lincoln are authorized by state law to acquire and operate domestic water supply facilities. The authorizing statutes (Gov. Code, §§ 38730, 38742) are very general and evince no intent to exclude local autonomy in the administration of municipal water systems. In California, as in other states, the action of city councils directing fluoridation of municipal water supplies is regarded as an exercise of the local police power. (*DeAryan v. Butler*, 119 Cal.App.2d 674, 681-682 [260 P.2d 98], cert. den. 347 U.S. 1012 [74 S.Ct. 863, 98 L.Ed. 1135]; *Schuringa v. City of Chicago*, 30 Ill.2d 504 [198 N.E.2d 326]; *Wilson v. City of Council Bluffs*, 253 Iowa 162 [110 N.W.2d 569]; *Readey v. St. Louis County Water Co. (Mo.)* 352 S.W.2d 622; see Note 43 A.L.R.2d 453; *Dietz, Fluoridation and Domestic Water Supplies in California*, 4 *Hast.L.J.* 1; *Nichols, Freedom of Religion and the Water Supply*, 32 *So.Cal.L.Rev.* 158; Notes, 12 *Am.U.L.Rev.* 97; 38 *Notre Dame Law.* 71; 24 *Md.L.Rev.* 353.)

[22] In recent years fluoridation of public water supplies as a means of reducing the incidence of dental caries among children has been the subject of widespread and heated controversy. Strenuously advocated by the dental and medical experts, it is widely opposed upon a variety of religious, political and scientific grounds. The debate has been heavily annotated and we need not restate easily available references. Many are collected in *Dietz, op. cit.*, and in 38 *Notre Dame Lawyer* 71, et seq. The traditional goals of water treatment are purity and potability. Fluoridation -- aside from claims of merit or demerit -- seeks a different goal, medication of public water supplies for a therapeutic purpose.

[23] In meeting its responsibility for local health and safety, a city legislative body may decide that the traditional,

[24] accepted goals of water treatment are enough. Alternatively, it may decide to fluoridate, thus aiming for the relatively new and relatively controversial goal of preventive dental therapy. In a real sense, such a decision is one "constituting a declaration of public purpose, and making provision for ways and means of its accomplishment . . ." (*McKevitt v. City of Sacramento*, supra, 55 Cal.App. at p. 124.) Intrinsically therefore, as well as in its police power origin, the decision to fluoridate is legislative rather than administrative.

[25] This view was adopted by the Supreme Court of Missouri in *State ex rel. Whittington v. Strahm* (Mo.) 374 S.W.2d 127. There the court upheld a referendum against a municipal ordinance clothed as a routine appropriation for the purchase of fluoridation equipment for the city water plant. Noting that the addition of fluoride went beyond the established policy of adding chemicals for purification, the court held that the decision to fluoridate was legislative. (See also discussion in 43 A.L.R.2d at pp. 453-454.)

[26] Contrary to the position taken by the city of Lincoln, the statutory scheme empowering the State Board of Public Health to approve or disapprove methods of water treatment does not transmute the city

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council into an administrative agent of state policy. The Health and Safety Code requires municipal and other suppliers of water for domestic purposes to secure permits from the state board. (§ 4011.) Methods of water treatment pursuant to an existing permit may not be changed without application for and receipt of an amended permit. (§ 4011.5.) Permit applications must be accompanied by plans and specifications showing all the sanitary and health conditions affecting the system. (§ 4012.) If the state board determines, it may require an applicant or permit holder to make changes necessary to ensure that the water shall be "pure, wholesome, and potable." (§§ 4016-4019.) Upon finding that the water is pure, wholesome and potable, the board shall grant a permit. (§ 4021.) A permit may be rejected or suspended if the board finds that the permittee is supplying impure, unpotable or health-endangering water. (§ 4022.) It is unlawful to furnish water for human consumption or domestic purposes which is impure, unwholesome, unpotable, polluted or dangerous to health. (§ 4031.)

[27] These statutes, constituting the only statutory regulation of the quality of water for human consumption, are aimed at the objectives of safety and potability. (*DeAryan v. Butler*, supra, 119 Cal.App.2d at p. 681.) Essentially, they cast the

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[28] state board in the role of a censor upon local decisions. Within the relatively wide latitude permitted by health and potability standards, proposals for treatment or changes in treatment originate with the municipal water supplier, not with the state. Section 4021, in mandatory terms, requires that a permit be granted if the board makes a finding of purity and potability, demonstrating a design to promote rather than destroy local autonomy over treatment methods up to the point where purity and potability are threatened.

[29] This statutory plan does not incorporate any standard dealing with the fortification of water for therapeutic purposes. To be sure, the addition of fluoride to public water, or the cessation of fluoridation under an existing permit, may be accomplished only with permission of the state board. This permission, however, does not turn on the protection of dental health. If the state board finds that the initiation of fluoride treatment will not affect the purity, potability or safety of the water, section 4021 demands that a permit be issued. If the board finds that cessation of fluoride treatment will not make the water impure, unpotable or dangerous, it must permit cessation. This scheme of statutory regulation does not express any state policy, one way or the other, on fluoridation as a therapeutic measure. Instead, it is focused on the orthodox "pre-fluoridation" goals of water treatment. Thus, in deciding whether or not to fluoridate, a city council acts as the legislative exponent of local policy, not as the administrative instrumentality of state policy. The scheme of state legislation does not affect the intrinsically legislative character of a decision for or against fluoridation of municipal water supplies.

[30] On December 4, 1963, the State Board of Public Health issued an amended permit to the city of Lincoln for a program of water treatment including fluoridation. We take judicial notice of that action. (Code Civ. Proc., § 1875, subd. 3.) The proposed initiative ordinance would prohibit the method of treatment now allowed by the state permit. State law, however, prevents modification of the city's treatment method without a further amendment of its permit. (Health & Saf. Code, § 4011.5.) Adverting to the pronouncement that an initiative ordinance must constitute such legislation as the council itself has power to pass, the city now urges that the city council would not have power to decree cessation of fluoridation without a state permit, ergo the voters possess no greater power.

[31] The argument comes close to an assertion that a council

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[32] decision to fluoridate, once implemented, may not be reversed by the very council which made it. As we have held, the proposed initiative ordinance would operate in an area of local concern only partially occupied by state law. (Cf. *In re Lane*, 58 Cal.2d 99 [22 Cal.Rptr. 857, 372 P.2d 897].) It may be enforced, of course, only if it is "not in conflict with general laws." (Cal. Const., art. XI, § 11; *Simpson v. City of Los Angeles*, 40 Cal.2d 271, 278 [253 P.2d 464].) The fallacy of the city's argument is its assumption of a nonexistent conflict. If adopted by the electors, the initiative ordinance will receive an interpretation which confers validity rather than one which results in nullity. (Civ. Code, § 3541; *Brooks v. Stewart*, 97 Cal.App.2d 385, 390 [218 P.2d 56]; 6 *McQuillin on Municipal Corporations* (3d ed.) pp. 122-123.) Unless such a construction will defeat its apparent purpose, it is to be construed in harmony with applicable provisions of state law. (6 *McQuillin*, op. cit., p. 101.) Upon adoption of the ordinance the state permit law would become one of its implicit conditions, contemplating the city's application to the State Board of Public Health for an amended permit and termination of fluoridation upon issuance of a permit approving termination.

[33] Judgment affirmed.

[34] Disposition

[35] Affirmed. Judgment granting writ affirmed. General Footnotes

[36] *fn* Assigned by Chairman of Judicial Council. Judges Footnotes

[37] *fn* Retired Presiding Justice of the District Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

March 10, 1965

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 300j-3. Special project grants and guaranteed loans.
 300j-3a. Grants to public sector agencies.
 300j-3b. Contaminant standards or treatment technique guidelines.
 300j-3c. National assistance program for water infrastructure and watersheds.
 300j-4. Records and inspections.
 300j-5. National Drinking Water Advisory Council.
 300j-6. Federal agencies.
 300j-7. Judicial review.
 300j-8. Citizen's civil action.
 300j-9. General provisions.
 300j-10. Appointment of scientific, etc., personnel by Administrator of Environmental Protection Agency for implementation of responsibilities;

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- compensation.
- 300j-11. Indian Tribes.
- 300j-12. State revolving loan funds.
- 300j-13. Source water quality assessment.
- 300j-14. Source water petition program.
- 300j-15. Water conservation plan.
- 300j-16. Assistance to colonias.
- 300j-17. Estrogenic substances screening program.
- 300j-18. Drinking water studies.

PART F - ADDITIONAL REQUIREMENTS TO REGULATE SAFETY OF DRINKING
WATER

- 300j-21. Definitions.
- 300j-22. Recall of drinking water coolers with lead-lined tanks.
- 300j-23. Drinking water coolers containing lead.
- 300j-24. Lead contamination in school drinking water.
- 300j-25. Federal assistance for State programs regarding lead contamination in school drinking water.
- 300j-26. Certification of testing laboratories.

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-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
 CHAPTER 6A - PUBLIC HEALTH SERVICE
 SUBCHAPTER XII - SAFETY OF PUBLIC WATER SYSTEMS
 Part B - Public Water Systems

-HEAD-

Sec. 300g-1. National drinking water regulations

-STATUTE-

(a) National primary drinking water regulations; maximum contaminant level goals; simultaneous publication of regulations and goals

(1) Effective on June 19, 1986, each national interim or revised primary drinking water regulation promulgated under this section before June 19, 1986, shall be deemed to be a national primary drinking water regulation under subsection (b) of this section. No such regulation shall be required to comply with the standards set forth in subsection (b)(4) of this section unless such regulation is amended to establish a different maximum contaminant level after June 19, 1986.

(2) After June 19, 1986, each recommended maximum contaminant level published before June 19, 1986, shall be treated as a maximum contaminant level goal.

(3) Whenever a national primary drinking water regulation is proposed under subsection (b) of this section for any contaminant, the maximum contaminant level goal for such contaminant shall be proposed simultaneously. Whenever a national primary drinking water regulation is promulgated under subsection (b) of this section for any contaminant, the maximum contaminant level goal for such contaminant shall be published simultaneously.

(4) Paragraph (3) shall not apply to any recommended maximum contaminant level published before June 19, 1986.

(b) Standards

(1) Identification of contaminants for listing. -

(A) General authority. - The Administrator shall, in accordance with the procedures established by this subsection, publish a maximum contaminant level goal and promulgate a national primary drinking water regulation for a contaminant (other than a contaminant referred to in paragraph (2) for which a national primary drinking water regulation has been promulgated as of August 6, 1996) if the Administrator determines that -

(i) the contaminant may have an adverse effect on the health of persons;

(ii) the contaminant is known to occur or there is a substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern; and

(iii) in the sole judgment of the Administrator, regulation of such contaminant presents a meaningful opportunity for health risk reduction for persons served by public water systems.

(B) Regulation of unregulated contaminants. -

(i) Listing of contaminants for consideration. - (I) Not later than 18 months after August 6, 1996, and every 5 years thereafter, the Administrator, after consultation with the scientific community, including the Science Advisory Board, after notice and opportunity for public comment, and after considering the occurrence data base established under section

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implementing section 300j-1(e) of this title the Administrator or the delegated State authority shall, where appropriate, give special consideration to providing technical assistance to small public water systems in complying with the regulations promulgated under this paragraph.

(9) Review and revision. - The Administrator shall, not less often than every 6 years, review and revise, as appropriate, each national primary drinking water regulation promulgated under this subchapter. Any revision of a national primary drinking water regulation shall be promulgated in accordance with this section, except that each revision shall maintain, or provide for greater, protection of the health of persons.

(10) Effective date. - A national primary drinking water regulation promulgated under this section (and any amendment thereto) shall take effect on the date that is 3 years after the date on which the regulation is promulgated unless the Administrator determines that an earlier date is practicable, except that the Administrator, or a State (in the case of an individual system), may allow up to 2 additional years to comply with a maximum contaminant level or treatment technique if the Administrator or State (in the case of an individual system) determines that additional time is necessary for capital improvements.

(11) No national primary drinking water regulation may require the addition of any substance for preventive health care purposes unrelated to contamination of drinking water.

(12) Certain contaminants. -

(A) Arsenic. -

(i) Schedule and standard. - Notwithstanding the deadlines set forth in paragraph (1), the Administrator shall promulgate a national primary drinking water regulation for arsenic pursuant to this subsection, in accordance with the schedule established by this paragraph.

(ii) Study plan. - Not later than 180 days after August 6, 1996, the Administrator shall develop a comprehensive plan for study in support of drinking water rulemaking to reduce the uncertainty in assessing health risks associated with exposure to low levels of arsenic. In conducting such study, the Administrator shall consult with the National Academy of Sciences, other Federal agencies, and interested public and private entities.

(iii) Cooperative agreements. - In carrying out the study plan, the Administrator may enter into cooperative agreements with other Federal agencies, State and local governments, and other interested public and private entities.

(iv) Proposed regulations. - The Administrator shall propose a national primary drinking water regulation for arsenic not later than January 1, 2000.

(v) Final regulations. - Not later than January 1, 2001, after notice and opportunity for public comment, the Administrator shall promulgate a national primary drinking water regulation for arsenic.

(vi) Authorization. - There are authorized to be appropriated \$2,500,000 for each of fiscal years 1997 through 2000 for the studies required by this paragraph.

(B) Sulfate. -

(i) Additional study. - Prior to promulgating a national primary drinking water regulation for sulfate, the Administrator and the Director of the Centers for Disease

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Subsec. (a)(6). Pub. L. 104-182, Sec. 113(b), added par. (6).
 Subsec. (c). Pub. L. 104-182, Sec. 112(a)(2), added subsec. (c).
 1986 - Subsec. (a)(1). Pub. L. 99-339 substituted "are no less stringent than the national primary drinking water regulations in effect under sections 300g-1(a) and 300g-1(b) of this title" for subpars. (A) and (B) which related to stringency of State drinking water regulations between period of promulgation and effective date of national interim drinking water regulations and during the period after such effective date.

-End-

-CITE-

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-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
 CHAPTER 6A - PUBLIC HEALTH SERVICE
 SUBCHAPTER XII - SAFETY OF PUBLIC WATER SYSTEMS
 Part B - Public Water Systems

-HEAD-

Sec. 300g-3. Enforcement of drinking water regulations

-STATUTE-

(a) Notice to State and public water system; issuance of administrative order; civil action

(1)(A) Whenever the Administrator finds during a period during which a State has primary enforcement responsibility for public water systems (within the meaning of section 300g-2(a) of this title) that any public water system -

(i) for which a variance under section 300g-4 or an exemption under section 300g-5 of this title is not in effect, does not comply with any applicable requirement, or

(ii) for which a variance under section 300g-4 or an exemption under section 300g-5 of this title is in effect, does not comply with any schedule or other requirement imposed pursuant thereto,

he shall so notify the State and such public water system and provide such advice and technical assistance to such State and public water system as may be appropriate to bring the system into compliance with the requirement by the earliest feasible time.

(B) If, beyond the thirtieth day after the Administrator's notification under subparagraph (A), the State has not commenced appropriate enforcement action, the Administrator shall issue an order under subsection (g) of this section requiring the public water system to comply with such applicable requirement or the Administrator shall commence a civil action under subsection (b) of this section.

(2) Enforcement in nonprimacy states. -

(A) In general. - If, on the basis of information available to the Administrator, the Administrator finds, with respect to a period in which a State does not have primary enforcement responsibility for public water systems, that a public water system in the State -

(i) for which a variance under section 300g-4 of this title or an exemption under section 300g-5 of this title is not in effect, does not comply with any applicable requirement; or

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(vi) A statement that the presence of contaminants in drinking water does not necessarily indicate that the drinking water poses a health risk and that more information about contaminants and potential health effects can be obtained by calling the Environmental Protection Agency hotline.

A public water system may include such additional information as it deems appropriate for public education. The Administrator may, for not more than 3 regulated contaminants other than those referred to in subclause (IV) of clause (iii), require a consumer confidence report under this paragraph to include the brief statement in plain language regarding the health concerns that resulted in regulation of the contaminant or contaminants concerned, as provided by the Administrator in regulations under subparagraph (A).

(C) Coverage

The Governor of a State may determine not to apply the mailing requirement of subparagraph (A) to a community water system serving fewer than 10,000 persons. Any such system shall

- (i) inform, in the newspaper notice required by clause (iii) or by other means, its customers that the system will not be mailing the report as required by subparagraph (A);
- (ii) make the consumer confidence report available upon request to the public; and
- (iii) publish the report referred to in subparagraph (A) annually in one or more local newspapers serving the area in which customers of the system are located.

(D) Alternative to publication

For any community water system which, pursuant to subparagraph (C), is not required to meet the mailing requirement of subparagraph (A) and which serves 500 persons or fewer, the community water system may elect not to comply with clause (i) or (iii) of subparagraph (C). If the community water system so elects, the system shall, at a minimum -

- (i) prepare an annual consumer confidence report pursuant to subparagraph (B); and
- (ii) provide notice at least once per year to each of its customers by mail, by door-to-door delivery, by posting or by other means authorized by the regulations of the Administrator that the consumer confidence report is available upon request.

(E) Alternative form and content

A State exercising primary enforcement responsibility may establish, by rule, after notice and public comment, alternative requirements with respect to the form and content of consumer confidence reports under this paragraph.

(d) Notice of noncompliance with secondary drinking water regulations

Whenever, on the basis of information available to him, the Administrator finds that within a reasonable time after national secondary drinking water regulations have been promulgated, one or more public water systems in a State do not comply with such secondary regulations, and that such noncompliance appears to result from a failure of such State to take reasonable action to assure that public water systems throughout such State meet such secondary regulations, he shall so notify the State.

- // (e) State authority to adopt or enforce laws or regulations respecting drinking water regulations or public water systems

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unaffected

Nothing in this subchapter shall diminish any authority of a State or political subdivision to adopt or enforce any law or regulation respecting drinking water regulations or public water systems, but no such law or regulation shall relieve any person of any requirement otherwise applicable under this subchapter.

(f) Notice and public hearing; availability of recommendations transmitted to State and public water system

If the Administrator makes a finding of noncompliance (described in subparagraph (A) or (B) of subsection (a)(1) of this section) with respect to a public water system in a State which has primary enforcement responsibility, the Administrator may, for the purpose of assisting that State in carrying out such responsibility and upon the petition of such State or public water system or persons served by such system, hold, after appropriate notice, public hearings for the purpose of gathering information from technical or other experts, Federal, State, or other public officials, representatives of such public water system, persons served by such system, and other interested persons on -

- (1) the ways in which such system can within the earliest feasible time be brought into compliance with the regulation or requirement with respect to which such finding was made, and
- (2) the means for the maximum feasible protection of the public health during any period in which such system is not in compliance with a national primary drinking water regulation or requirement applicable to a variance or exemption.

On the basis of such hearings the Administrator shall issue recommendations which shall be sent to such State and public water system and shall be made available to the public and communications media.

(g) Administrative order requiring compliance; notice and hearing; civil penalty; civil actions

(1) In any case in which the Administrator is authorized to bring a civil action under this section or under section 300j-4 of this title with respect to any applicable requirement, the Administrator also may issue an order to require compliance with such applicable requirement.

(2) An order issued under this subsection shall not take effect, in the case of a State having primary enforcement responsibility for public water systems in that State, until after the Administrator has provided the State with an opportunity to confer with the Administrator regarding the order. A copy of any order issued under this subsection shall be sent to the appropriate State agency of the State involved if the State has primary enforcement responsibility for public water systems in that State. Any order issued under this subsection shall state with reasonable specificity the nature of the violation. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be issued to appropriate corporate officers.

(3) (A) Any person who violates, or fails or refuses to comply with, an order under this subsection shall be liable to the United States for a civil penalty of not more than \$25,000 per day of violation.

(B) In a case in which a civil penalty sought by the Administrator under this paragraph does not exceed \$5,000, the penalty shall be assessed by the Administrator after notice and opportunity for a public hearing (unless the person against whom the penalty is assessed requests a hearing on the record in accordance with section 554 of title 5). In a case in which a civil

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