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SUPREME COURT  
OF THE STATE OF WASHINGTON

CLERK

CITY OF PORT ANGELES, Respondent,

v.

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

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,  
Respondent.

AMICUS CURIAE MEMORANDUM  
IN SUPPORT OF PETITION FOR REVIEW

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A. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae Fluoride Class Action is an association that opposes using public water systems to medicate people. The work of Fluoride Class Action may be viewed by going to the following web sites:

<http://fluorideclassaction.wordpress.com> and

<http://dealmortgage.net/fluoride-class-action/fluoride-class-action.htm>.

B. ISSUES ADDRESSED

This Amicus Curiae Memorandum addresses Issues 1 and 2 presented in the Petition for Review.

C. BRIEF STATEMENT OF THE CASE

In the published opinion that is the subject of the Petition for Review in the instant case, Division II of the Court of Appeals considered, in pre-election review, two local initiatives that sought to make it unlawful in defined circumstances for people to put drugs into public water systems serving the City of Port Angeles. The initiative petitions are in the Appendix to the Petition for Review at pages A-16 to A-19. The said published opinion ruled that the initiatives were invalid, finding them 1) administrative in nature, and 2) exceeding the local initiative power because the city council, and not the corporate city, is delegated to operate the city water system and because the initiatives attempt to limit that power. Appendix to the Petition for Review at A-1 to A-14.

In the Petition for Review, Petitioners Our Water - Our Choice and Protect Our Waters ("Committees") request that this Court reverse the decision of the Court of Appeals and issue a decree to place the initiatives

on the ballot.

D. ARGUMENT IN SUPPORT OF REVIEW

Fluoride Class Action supports this Court in accepting the instant case for review because it involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

It is of substantial public interest for this Court to decide for this State if a Legislative grant of power to a city council or other local legislative body to operate a waterworks limits the power solely to this local legislative body to determine whether or not to fluoridate or add other drugs to its municipal water system. In the instant case, Division II of the Court of Appeals ruled that with such a Legislative grant, this power to determine whether or not to add drugs to a municipal water system is solely within the authority of the local legislative body and therefore beyond the local initiative power. Appendix to the Petition for Review at A-10 to A-11.

While this is a case of first impression in this State, it has been addressed by the Ohio Supreme Court in Canton v. Whitman, 44 Ohio St.2d 62, 337 N.E.2d 766 (1975) where the Court determined that despite a constitutional grant of power to cities to own and operate public utilities, a police power regulation involving fluoridation would not unreasonably limit or otherwise interfere with the operation of a municipal utility. Canton at 67-68. Appendix hereto at pages A-1 to A-7.

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 waterworks, such a statute could not be construed in any way authorizing fluoridation. Wilson at 100 N.W.2d at 570-71. Appendix hereto at pages A-8 to A-12.

This Court can take judicial notice that the public has expressed great interest in the adding of drugs to municipal water supplies and a great number of initiatives and referendums on fluoridation have been passed in this nation either opposing or supporting fluoridation when local legislative bodies have constitutional or statutory authority to operate waterworks. It is an issue of substantial public interest as to whether in this state, a statutory grant of power to a city council to operate a waterworks, gives the city council the sole authority to decide whether or not drugs including fluoride can be added to all public water supplies serving the city. This question will be resolved by this Court when it addresses Issue No. 1 in the Petition for Review.

A second issue of substantial public interest is the issue of whether initiatives opposing fluoridation and other drugs being added to local public water supplies are legislative or administrative. If they are administrative rather than legislative, the public initiative and referendum processes will no longer be allowed. This will disenfranchise the public from being able to vote to fluoridate or being able to vote to prevent fluoridation or other drugs from being put in their public water supplies. If the reasoning of the Court of Appeals Division II prevails, citizens will lose initiative and referendum rights to vote on fluoridation and on

whether other drugs can be put in their drinking water. There is a great deal of controversy regarding putting drugs in drinking water and so this issue is of substantial public interest.

The Court of Appeals District II ruled that because the State has comprehensive regulations regarding water additives, regulations that put more strict controls on these additives are in pursuit of a plan of some power superior and are therefore administrative. Appendix to Petition for Review at A-8. The comprehensive water regulations of the State only regulate one drug and that is fluoride. *Id.* at A-49 to A-62. The fluoride regulation, WAC 246-290-460, does not mandate or prevent fluoridation but rather leaves the decision to fluoridate to the local jurisdiction. Appendix hereto at page A-18. The state's comprehensive water regulations do not regulate the putting of other drugs in public water supplies.

While this is a matter of first impression for this State, other states have ruled that a local decision to add or not to add drugs to municipal water supplies is inherently a legislative decision made under the police power. Hughes v. City of Lincoln, 232 Cal.Rptr.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 hereto at pages A-13 to A-17. Because the Court of Appeals Division II decision will generally prevent future citizen votes on whether or not to fluoridate, or whether other drugs can be put in local public water supplies, its ruling that initiatives presenting such

issues are administrative is of substantial public interest. This question will be resolved by this Court when it addresses Issue No. 2 in the Petition for Review.

There is a third issue of substantial public interest that is raised by the Court of Appeals Division II decision. It is the issue of whether a corporate city has authority under the police power or under RCW 35A.70.070(6) and Chapter 35.88 RCW to adopt stricter local water purity standards for all public water systems serving the inhabitants of the City. Issue No. 1 in the Petition for Review. The Court of Appeals Division II decision ruled that these authorities were not available because of the exclusive authority granted to the City Council under RCW 35A.11.020 to operate waterworks. Appendix to Petition for Review at A-11 to A-12. But as discussed above, the authority to operate waterworks should be seen as the authority to have a business to supply water and should not trump the corporate city's police power and authority under RCW 35A.70.070(6) and Chapter 35.88 RCW to protect the safety and health of its citizens. Supra, this Memorandum at 2-3.

City voters have a substantial public interest it being able to use the corporate city's police power and authority under RCW 35A.70.070(6) and Chapter 35.88 RCW to adopt water pollution regulations more strict than the State's regulations. These statutes give the corporate city the authority to enact the initiatives. If the corporate city's action violates Chapter 70.142 RCW as found by the Court of Appeals Division II, then that should be considered an issue of substantive invalidity that is

inappropriate for pre-election review. See Petition for Review at 12-13. It is of substantial public interest for this Court to clarify that substantive invalidity challenges are inappropriate for pre-election review of local initiatives, as they are for statewide initiatives. Id.

The Court of Appeals Division II erred in finding conflict with Chapter 70.142 RCW. RCW 70.142.010 authorizes the State Board of Health to set maximum contaminant standards and states that State and local standards can be more strict than federal standards. The Court of Appeals Division II interpreted RCW 70.142.010 and 70.142.040 to find that more strict local standards could only be established by local health departments of County's with population over 125,000. Appendix to Petition for Review at A-7.

However, no provision in Chapter 70.142 RCW prevents corporate cities from using their police power and authority under RCW 35A.70.070(6) and Chapter 35.88 RCW to adopt water pollution regulations more strict than the State's regulations. To accept the Court of Appeals interpretation that Chapter 35.88 RCW may not be applied would require a repeal by implication which is disfavored. Our Lady of Lourdes v. Franklin Cy., 120 Wn.2d 439, 450, 842 P.2d 956 (1993).

There is a fourth issue of substantial public interest that is raised by the Court of Appeals Division II decision. There is a statute that has already determined that fluoridation is a legislative policy issue. I refer to RCW 57.08.012. It reads as follows:

Fluoridation of water authorized.

A water district by a majority vote of its board of commissioners may fluoridate the water supply system of the water district. The commissioners may cause the proposition of fluoridation of the water supply to be submitted to the electors of the water district at any general election or special election to be called for the purpose of voting on the proposition. The proposition must be approved by a majority of the electors voting on the proposition to become effective.

According to this statute, the issue of whether or not water will be fluoridated is a policy issue that is suitable to being submitted to a vote of the electorate. This means that the decision whether to fluoridate or not is a legislative policy issue of substance and not just procedural or administrative.

The addition of other chemicals such as chlorine or lime or soda ash are administrative matters and not subject to a public vote, and this is because such chemicals merely kill bacteria, clean the water, and adjust the pH. Fluoride is a chemical too, but there the similarity ends. Fluoride is not added to water to kill bacteria, clean the water, or change its pH. It is added to do something to those who drink the water. It is added as medicine and drug.

The Respondents' quibble over administrative vs. legislative is irrelevant. RCW 57.08.012 is determinative.

E. FLUORIDATION POLICY CONSIDERATIONS LINKED TO THE LEGISLATIVE VS. ADMINISTRATIVE ISSUE

We know much more about the health problems associated with fluoridation than we did back when the legislature passed RCW 57.08.012. However, even then there was controversy about whether fluoridation was safe and appropriate. The Legislature acknowledged this by making the issue one which could be put to a public vote. Fluoridation was a policy issue at the time RCW 57.08.012 was passed, and it remains a policy issue today. The fact that it was a policy issue from the very beginning means that it was and remains a legislative and not an administrative matter.

Fluoride Class Action takes the position that within the next few years, class action law firms will file suit against water districts and local governments for actual harm caused by water fluoridation. Half of all fluoride ingested remains in the body and accumulates in bones and other organs.

Fluoride hardens and protects teeth only if applied topically, as in toothpaste or mouthwash. When taken internally, it only affects teeth for the short time that the water is in contact with the teeth in the mouth, but it makes bones harder, less flexible, and more brittle. The fluoride changes the very chemistry of bone, creating a new compound.

When fluoride is ingested, it gradually causes a host of problems, all of which are made clear in a report done by the National Research Council, an arm of the prestigious National Academies of Science, which report was commissioned by the Environmental Protection Agency. See <http://www.nationalacademies.org/morenews/20060322.html> or do a

Google search for "National Research Council report fluoridation."

That conservative NRC study confirmed the new science on fluoride, facts not known when our waters were first fluoridated half a century ago.

The NRC study and others conclude that fluoride in drinking water contributes to dental fluorosis, bone cancer, arthritis, bone fractures, thyroid reduction, diabetes, obesity, kidney damage, reproductive problems, lower IQ and retardation.

Fluoride is in everything made with fluoridated water. It is in all the food cooked with tap water. It is in reconstituted orange juice, bread, cake, beer, and even bottled water. Those who drink a lot of tap water ingest more fluoride, and this includes those who do hard physical labor and athletes.

The first plaintiffs who will be likely to sue will be populations particularly vulnerable to fluoridation chemicals, including young children. The American Dental Association cautions parents against giving fluoridated water to infants in reconstituted formula and reconstituted juice.

Fluoride lowers thyroid function, so those with thyroid problems likely will be among the first to sue as well as those with kidney problems. Those receiving kidney dialysis must avoid fluoridated water and likely will be among the first to sue. Those who perform hard physical labor and athletes likely will be among the first to sue.

There was opposition to fluoridation at the time RCW 57.08.012

was passed, and safety issues were raised then. Whether fluoridation should be considered safe is a policy issue. It is because it is a policy issue that the Legislature left the question ultimately to the voters of each water district. This confirms that this issue is legislative and not merely administrative.

F. CONCLUSION

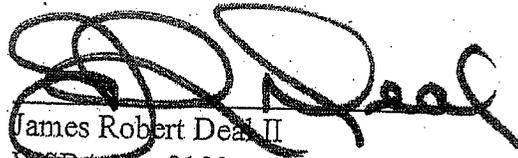
Fluoride Class Action opposes using public water systems to medicate people. There is strong public support for this position in the State of Washington. This Court should accept review of the decision of the Court of Appeals Division II because this decision, if allowed to stand, would prevent people in cities from being able to directly vote on whether or not fluoride and other drugs could be put in their local public water systems. Because this issue is of great public interest in this State, this Court should give the citizens the benefit of its review.

Dated this 24<sup>th</sup> day of November, 2008.

Respectfully submitted,

JAMES ROBERT DEAL PS

By:



James Robert Deal II

WSBA No. 8103

Attorneys for Fluoride Class Action

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CERTIFICATE OF SERVICE

BY RONALD R. CARPENTER

I certify that on the 24<sup>th</sup> day of November, 2008, I caused a true and correct copy of this certificate and the Amicus Curiae Memorandum in Support of Petition for Review and Motion to File Amicus Curiae Memorandum to be served on the following by email, fax, and first class mail:

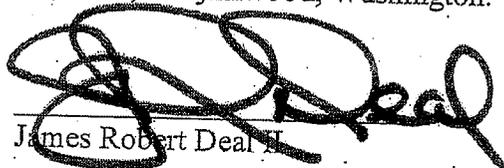
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James Robert Deal

## APPENDIX INDEX

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A-1	<u>Canton v. Whitman</u> , 44 Ohio St.2d 62, 337 N.E.2d 766 (1975)
A-8	<u>Wilson v. City of Council Bluffs</u> , 253 Iowa 162, 100 N.W.2d 569 (1961)
A-13	<u>Hughes v. City of Lincoln</u> , 232 Cal.Rptr..2d 741, 43 Cal.Rptr. 306 (Cal.App.Dist. 3 1965)
A-18	WAC 246-290-460

**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.

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Footnotes:

1 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.

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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.

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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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Cal.Rptr.

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246-290-455 &lt;&lt; 246-290-460 &gt;&gt; 246-290-470

**WAC 246-290-460**

No agency filings affecting this section since 2003

**Fluoridation of drinking water.**

- (1) Purveyors shall obtain written department approval of fluoridation treatment facilities before placing them in service.
- (2) Where fluoridation is practiced, purveyors shall maintain fluoride concentrations in the range 0.8 through 1.3 mg/L throughout the distribution system.
- (3) Where fluoridation is practiced, purveyors shall take the following actions to ensure that concentrations remain at optimal levels and that fluoridation facilities and monitoring equipment are operating properly:
  - (a) Daily monitoring.
    - (i) Take daily monitoring samples for each point of fluoride addition and analyze the fluoride concentration. Samples must be taken downstream from each fluoride injection point at the first sample tap where adequate mixing has occurred.
    - (ii) Record the results of daily analyses in a monthly report format acceptable to the department. A report must be made for each point of fluoride addition.
    - (iii) Submit monthly monitoring reports to the department within the first ten days of the month following the month in which the samples were collected.
  - (b) Monthly split sampling.
    - (i) Take a monthly split sample at the same location where routine daily monitoring samples are taken. A monthly split sample must be taken for each point of fluoride addition.
    - (ii) Analyze a portion of the sample and record the results on the lab sample submittal form and on the monthly report form.
    - (iii) Forward the remainder of the sample, along with the completed sample form to the state public health laboratory, or other state-certified laboratory, for fluoride analysis.
    - (iv) If a split sample is found by the certified lab to be:
      - (A) Not within the range of 0.8 to 1.3 mg/l, the purveyor's fluoridation process shall be considered out of compliance.
      - (B) Differing by more than 0.30 mg/l from the purveyor's analytical result, the purveyor's fluoride testing shall be considered out of control.
- (4) Purveyors shall conduct analyses prescribed in subsection (3) of this section in accordance with procedures listed in the most recent edition of *Standard Methods for the Examination of Water and Wastewater*.
- (5) The purveyor may be required by the department to increase the frequency, and/or change the location of sampling prescribed in subsection (3) of this section to ensure the adequacy and consistency of fluoridation.

[Statutory Authority: RCW 43.02.050 [43.20.050]. 99-07-021, § 246-290-460, filed 3/9/99, effective 4/9/99. Statutory Authority: RCW 43.20.050. 91-02-051 (Order 124B), recodified as § 246-290-460, filed 12/27/90, effective 1/31/91. Statutory Authority: RCW 34.04.045. 88-05-057 (Order 307), § 248-54-235, filed 2/17/88. Statutory Authority: RCW 43.20.050. 83-19-002 (Order 266), § 248-54-235, filed 9/8/83.]

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