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MEMORANDUM OF LAW

DATE: January 25, 2007

TO: Alejandra Gavaldon, Policy Advisor, Mayor's Office

FROM: City Attorney

SUBJECT: Purchase of Fluoridated Water from San Diego County Water Authority

INTRODUCTION

The City of San Diego [City] has learned that the Metropolitan Water District of Southern California [MWD] will begin voluntarily fluoridating water this calendar year. The San Diego County Water Authority [CWA] will be purchasing this fluoridated water from MWD. Therefore, after MWD commences fluoridation, any imported water that the City purchases from CWA will be fluoridated.

QUESTION PRESENTED

Whether the City is legally prohibited from purchasing fluoridated water from CWA?

SHORT ANSWER

No. As will be explained in detail below, in our opinion the City may legally purchase fluoridated water from CWA. Even assuming that the San Diego Municipal Code [SDMC] prohibits such a purchase, the courts should hold that the prohibition is preempted by state law and is therefore void and of no effect.

BACKGROUND

In 1951, the San Diego City Council adopted a resolution directing the City Manager to apply for a permit allowing the City to add fluoride to its water. *DeAryan v. Butler*, 119 Cal. App. 2d 674 (1953). The City Council's action was unsuccessfully challenged by an individual who sought to enjoin the City from adding a fluoride compound to the City's water supply. *Id.* Subsequently, at a special election held in 1954, the voters passed an initiative prohibiting the City from fluoridating its water supply. The initiative is codified in the SDMC as section 67.0101.

In 1995, the State legislature enacted a law amending the California Safe Drinking Water Act [Act] by requiring public water systems with 10,000 or more service connections (which includes the City) to fluoridate their water supplies. A public water system is exempt from fluoridating, however, until sufficient outside funding is available. *See* Cal. Health & Safety Code §§ 116410-116415. Both the California Attorney General and this office opined that when sufficient funding became available, the SDMC provision prohibiting the City from fluoridating would be preempted by the state law. 83 Ops Cal. Att’y Gen. 24 (February 18, 2000); Report to the Committee on Natural Resources & Culture dated September 6, 1996. The City is currently exempt from fluoridating under state law.

The City purchases approximately 90% of its water supply from CWA. The City purchases both raw and treated imported water from CWA in order to provide an adequate water supply to the City’s customers. Currently, CWA purchases its treated water supply from the MWD. The Water Department has indicated that it would not be able to provide an adequate water supply to a certain segment of its customers without purchasing the fluoridated water.

ANALYSIS

The City may legally purchase fluoridated water. Assuming that the SDMC prohibits such a purchase, the courts should hold that the prohibition is preempted by state law, and as such, is void and of no force or effect.

I. Local Law: SDMC Section 67.0101

The SDMC prohibits any person, including the City, from adding fluoride compounds to the City’s water supply. Specifically, the SDMC provides:

BE IT ORDAINED, by the people of the City of San Diego, California, as follows:

SECTION 1. It is hereby declared to be unlawful for any person, including the City of San Diego and for its elective or appointed officers or employees, to use in or add to the water supply of this City any Fluorine, Sodium Fluoride, Sodium Silicon Fluoride or any Fluoride compound, or to treat such water supply with aforesaid chemicals before delivery to the consumers thereof.

SECTION 2. This ordinance shall become effective upon receiving a majority of votes of the electors of the City of San Diego, California, at an election held in said City.

SDMC § 67.0101.

For the purposes of this memorandum, we will assume that Section 67.0101 prohibits the City from purchasing imported fluoridated water. We note, however, that the Section does not specifically prohibit such a purchase.

II. State Law: The California Safe Drinking Water Act

As mentioned above, in 1995 the Legislature added mandatory fluoridation provisions to the Act. In 2004, the Legislature amended the fluoridation provisions. Among other things, the amendments made it clear that the Legislature intended to preempt local regulations prohibiting the fluoridation of drinking water:

The Legislature finds and declares all of the following:

(a) Promotion of the public health of Californians of all ages by protection and maintenance of dental health through the fluoridation of drinking water is a paramount issue of statewide concern.

(b) It is the intent of the Legislature in enacting this article to preempt local government regulations, ordinances, and initiatives that prohibit or restrict the fluoridation of drinking water by public water systems with 10,000 or more service connections, without regard to whether the public water system might otherwise be exempt from Section 116410 or the requirements of this section, pursuant to Section 116415.

(c) It is further the intent of the Legislature in establishing this article to decrease the burden the Medi-Cal and the Denti-Cal programs place upon the state's limited funds.

Cal. Health & Safety Code § 116409. Thus, the Legislature clearly stated its intent to preempt voter initiatives prohibiting fluoridation of large public water systems.

III. Fluoridation of Drinking Water by Large Public Water Systems is a Matter of Statewide Concern and Therefore SDMC Section 67.0101 is Preempted

SDMC section 67.0101 is preempted by state law. As a charter city, San Diego enjoys autonomous rule over municipal affairs pursuant to article XI, section 5 of the California Constitution, subject only to conflicting provisions in the federal and state constitutions and to preemptive state law. *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal. 4th 352, 363 (1999). When a court is asked to resolve a claimed conflict between a state statute and the law of a charter city, it must first satisfy itself that an actual conflict exists. *California Fed. Savings & Loan Assn. v. City of Los Angeles*, 54 Cal. 3d 1, 16 (1991). There is a conflict between a state law and a local ordinance if the ordinance duplicates or contradicts the state law, or if the ordinance enters into an area fully occupied by general law, either expressly or by implication. *City of Watsonville v. State Dept. of Health Services*, 133 Cal. App. 4th 875, 883 (2005).

If a conflict is found, the pivotal questions are whether the subject of the conflicting laws is one of statewide concern and whether the state statute is reasonably related to a resolution of that concern and narrowly tailored to limit incursion into legitimate municipal interests. *Johnson*

v. Bradley, 4 Cal. 4th 389, 404 (1992). If it is, then the subject in question is not a municipal affair and the city's law is preempted. *Id.* A legislative finding that a particular subject is a matter of statewide concern does not necessarily make it so, but it is well settled that courts should accord great weight to the Legislature's evaluation of this issue. *Domar Electric, Inc. v. City of Los Angeles*, 41 Cal. App. 4th 810, 821-22 (1995). Where there is doubt as to whether a matter is a municipal affair, such doubt must be resolved in favor of the state's legislative authority. *Id.* If a matter is one of statewide concern, the citizens of a charter city cannot by initiative override state law. *L.I.F.E. Committee v. City of Lodi*, 213 Cal. App. 3d 1139, 1149 (1989).

The Sixth District Court of Appeal has squarely addressed the issues presented here. In the fall of 2002, the City of Watsonville, a charter city subject to the state's fluoridation law, had entered into a funding agreement with an outside source and was poised to begin a water fluoridation project when the city's voters passed a ballot initiative known as "Measure S." *City of Watsonville*, 133 Cal. App. 4th at 881-82. Measure S effectively prohibited the introduction of fluoride into the city's water supply. *Id.* at 881. After Measure S passed, the city ceased work on the project and terminated the funding agreement. *Id.* at 882. The Department of Health Services [DHS] issued an order directing the city to fluoridate, but because the city could not comply with the DHS order without violating Measure S, the city filed an action for declaratory and injunctive relief. *Id.*

The court held that Measure S was preempted by state law and was therefore void and without effect. *City of Watsonville*, 133 Cal. App. 4th at 890. The court reasoned that there was a conflict between state law and Measure S because state law fully occupies the area of fluoridation of public water systems having more than 10,000 hookups. *Id.* at 883-84. The court explained that the Legislature's express intent to fully occupy the area is set forth in Health and Safety Code section 116409. *Id.* at 884. The court also explained that section 116409 was introduced in response to local initiatives like Measure S that were designed to curtail fluoridation. *Id.*

The court, in rejecting the city's argument that there was no conflict because the city was currently exempt from fluoridating, held that Measure S conflicts because it purports to regulate an area that is fully occupied by state law. *Id.* at 885. The court also rejected the city's argument that Health and Safety Code section 116409 was not applicable to the case because it was enacted after judgment had been entered in the trial court. *Id.* at 884. The court reasoned in part that the question was whether the city could legally enforce its ordinance now and in the future. *Id.* at 885. Thus, the court explained that the appropriate way to determine whether Measure S conflicted with state law was to "examine the law as it currently exists." *Id.*

The court further held that fluoridation of public water systems for the purpose of improving dental health is a matter of statewide concern. *City of Watsonville*, 133 Cal. App. 4th at 888. The court reasoned that public health and water quality are matters of statewide concern, and that there is a need for uniform standards for water quality. *Id.* at 886-87. The court explained that introduction of any substance, including fluoride, into the public drinking water necessarily implicates water quality. *Id.* at 887. The court also reasoned that the cost of healthcare is a matter of statewide concern, and that decreasing the burden of Medi-Cal and Denti-Cal programs on the state's limited funds is unquestionably a statewide issue. *Id.* at 888.

Finally, the court held that the state's water fluoridation law is reasonably related to the identified statewide concern and is narrowly tailored to avoid infringing legitimate municipal affairs. *City of Watsonville*, 133 Cal. App. 4th at 888-89. The court reasoned that the law affects only the statewide interest of promoting public health by protecting and maintaining dental health while insuring the quality of the state's drinking water. *Id.* at 889. The court found the law has no significant effect on other legitimate municipal affairs. *Id.*

Based on *City of Watsonville*, the courts should hold that SDMC section 67.0101 is void and without effect. As with Measure S, Section 67.0101, by prohibiting fluoridation, conflicts with state law because state law fully occupies the field of fluoridation of public water systems with 10,000 or more service connections. In other words, Section 67.0101 purports to regulate an area that is fully occupied by state law. It is irrelevant whether Section 67.0101 preceded Health and Safety Code section 116409, because the courts will look to the law as it currently exists. As with the City of Watsonville, the conflict exists regardless of whether the City is currently exempt from fluoridating under the state law.

Finally, the subject of the conflicting laws, fluoridation of public water systems with 10,000 or more service connections, was specifically held to address a matter of statewide concern. The state law was upheld as: 1) reasonably related to the statewide interest of promoting public health by protecting and maintaining dental health while insuring the quality of the state's drinking water; and 2) narrowly tailored to avoid infringing legitimate municipal affairs.

CONCLUSION

The City may legally purchase fluoridated water from CWA. Even assuming that SDMC section 67.0101 prohibits the City from purchasing imported fluoridated water, the courts should find that the SDMC prohibition is preempted, void, and without effect. State law fully occupies the area of fluoridation of public water systems having more than 10,000 service connections (which includes the City). Such fluoridation was held to be a matter of statewide concern, and the state law was found to be both reasonably related to the concern and narrowly tailored.

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By

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