

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: December 3, 2009

**MEMORANDUM**

TO: Ald. Lauren Cnare

FROM: Michael P. May  
City Attorney

RE: City's Authority for Fluoridation of Water Supply

The City of Madison fluoridates its water supply. The City has done this at least for 60 years, beginning in the late 1940's. The policy of fluoridating the water supply has come back before the Board of Health for Madison and Dane County (BOH) and the City's Water Utility Board (Water Board).

You indicated that some persons are questioning whether the fluoridation policy should be continued. As part of their questions, they challenged the authority of the Water Board and BOH to make determinations with respect to fluoridation. You asked for my legal opinion as to the authority of the City to adopt a fluoridation policy. In particular, you were interested in knowing whether such a policy required a City ordinance or resolution of the Common Council, or whether it could be adopted without action by the Common Council.

**SHORT ANSWER**

Under the current statutes and ordinances, a fluoridation policy may be adopted by the City of Madison by action of the BOH and the Water Board without any action by the Common Council.

**DISCUSSION**

**A. History of Fluoridation in Madison.**

A publication of the Water Utility from 1955 contains the following statement:

Upon recommendation of the City Board of Health, the  
Common Council, in December of 1948, adopted a  
resolution providing for such treatment. Complete

fluoridation equipment has been installed and is in service at the present time.

Despite a search of City records, a reference to the resolution in 1948 was not found. However, the Common Council proceedings for August 17, 1949, include the following under File No. 12-745:

By a committee of the whole,

Resolved that the City Manager and Water Utility of the City of Madison be and they are hereby authorized to make application to the Public Service Commission of Wisconsin for an increase in water rates to cover costs of fluoridating water in accordance with the provisions of §66.069(1)(a) and §196.03(3), Wisconsin Statutes.

Copies of both documents are attached to this memorandum as Appendix A.

The City has continued the fluoridation policy since the late 1940's. In January of 2009, the Madison-Dane County Health Department prepared a policy statement regarding the fluoridation of public drinking water. A copy of that policy is attached to this memorandum as Appendix B.

**B. Legal Framework.**

Both the BOH and the Water Board have authority independent of the Madison Common Council.

The BOH is a combined City/County Board of Health which operates as a combined local health department, pursuant to §251.04, Wis. Stats. The BOH and the City/County Health Department were formed by an Intergovernmental Agreement between the City of Madison and Dane County for creation of a City/County Health Department, dated October 25, 2007. Pursuant to Sec. V. A., of that agreement, the Health Department and Board of Health have all the powers of a local health department and a local board of health as set forth in Chapter 251, Wisconsin Statutes. Among the powers given to the Board of Health are the following:

§251.04(6) and (7), Wis. Stats:

- (6) A local board of health shall:
  - (a) Assess public health needs and advocate for the provision of reasonable and necessary public health services.

. . .

- (7) A local board of health shall assure that measures are taken to provide an environment in which individuals can be healthy.

Those same powers, among others, are provided in the Intergovernmental Agreement in Section VI, A. 3.

In addition to that authority, the Board of Health has the power under §251.04(3), Wis. Stats., to “adopt those regulations, for its own guidance and for the governance of the local health department, that it considers necessary to protect and improve public health.”

In none of these instances do the statutes or the Intergovernmental Agreement indicate the Common Council approval is needed for such health policies, rules or regulations.

The authority of the Water Utility Board is established by §13.01, MGO. The City has elected to utilize an alternative arrangement for the Water Utility Board as allowed pursuant to §66.0805(6), Wis. Stats.

Sec. 13.01(3), MGO, establishes the general duties of the Water Board and provides for independence from the Common Council on some issues. This section of the ordinance provides in part:

The Board shall have the management and supervision of the Water Utility and all matters connected therewith, subject to the general control and supervision of the Water Utility Board by the Mayor and Common Council. The Council shall exercise such supervision by enacting ordinances governing the Board’s operation, and approving contracts for the Water Utility as it does for other departments. The Board shall have the general power and authority to make rules and regulations for the management of said Utility as it shall from time to time find necessary for the safe, economical and efficient management and protection of the Water Utility.

When the Water Utility Board ordinance was revised recently, the Director of Public Health was made an ex-officio, non-voting member of the Board “in order to provide advice and information to the Board on health issues related to the Water Utility.” Sec. 13.01(2), MGO.

**C. Application of Legal Authority to the Issue of Fluoridation.**

It is clear from the statutes and ordinances cited above that both the BOH and the Water Board have independence from the Madison Common Council with respect to matters of health and operation of the Water Utility, respectively. State statute gives the BOH the authority to adopt rules and regulations meant to further public health. They are also given the authority to take other actions to improve public health, both pursuant to statute and the Intergovernmental Agreement with the County. None of these actions (assuming adequate budget authorization) require approval of the Common Council. Moreover, it is doubtful that the Common Council could change this authority because it is set forth in state law.

With respect to the Water Board, it also has independence from the Common Council regarding the management and operation of the Water Utility, and is given the authority to adopt its own rules and regulations for the safe and efficient management of the Utility. While the Board is subject to the general control and supervision of the Mayor and Common Council, that control and supervision is to be exercised not by reviewing individual policy decisions made by the Water Utility (other than the approval of certain contracts under the same rules that apply to all City departments), but by amendment of the ordinances governing the Board's operation.

Based upon these legal authorities, I conclude that the BOH and Water Board may, assuming adequate budget authorization, adopt a policy of fluoridation of the City's water supply without any action by the Common Council. Absent a significant modification of the ordinances, the Council could not overrule the Water Board in its decisions with respect to what shall be placed in the water supply. It is doubtful that the Common Council has the authority to overrule the Board of Health's determinations in this matter, both because of the authority granted by state statute, and because the Intergovernmental Agreement would require the concurrence of both the Common Council and the Dane County Board of Supervisors to make any change in the authority of the BOH.

There is a final interesting legal question that I need not reach at this time because the hypothetical is not presented: Whether the Water Board or the BOH would have final authority to determine a fluoridation policy if there were to be a disagreement between the BOH and the Water Board. Because no such disagreement exists at the moment, I am not going to attempt to answer that question in a vacuum.

## **CONCLUSION**

The authority given to the Board of Health for Madison and Dane County and the Madison Water Utility Board allow those bodies to adopt a policy of fluoridation of the Madison water supply without the need for any action by the

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Madison Common Council.

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Michael P. May  
City Attorney

MPM:pah

cc: Tom Heikkinen, Water Utility Manager  
Joe Grande, Water Utility  
Dr. Tom Schlenker, Director, City/County Public Health Department  
Jeff Lafferty, City/County Public Health Department