

OPINION  
66-40

March 8, 1966 (OPINION)

Mr. John Richardson

City Attorney

Hazen, North Dakota

RE: Cities and villages - Powers - Water Fluoridation

This is in response to your request for an opinion of this office in regard to fluoridation of a city water supply.

That statutes of this state do not in express terms make provision for fluoridation of water supplies. Section 40-05-01 of the North Dakota Century Code does, however, provide in part:

"POWERS OF ALL MUNICIPALITIES. The governing body of a municipality shall have the power:

1. ORDINANCES. To enact or adopt all such ordinances, resolutions, and regulations, not repugnant to the constitution and laws of this state, as may be proper and necessary to carry into effect the powers granted to such municipality or as the general welfare of the municipality may require, and to repeal, alter, or amend the same.

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6. WATERWORKS SYSTEM. To purchase, acquire by eminent domain, erect, lease, rent, manage, and maintain any system of waterworks, well reservoirs, pipes, machinery, buildings, and all other property comprising a waterworks system, such as hydrants, supply of water, fire stations, fire signals, fire engines, or fire apparatus that may be of use in the prevention and extinguishment of fires; and to fix and regulate the rates, use, and sale of water;

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5. HEALTH REGULATIONS. To make regulations necessary or expedient for the promotion of health or for the suppression of disease;

\* \* \*

1. PUBLIC WATER SUPPLY. To prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within, or within one mile of, the limits of the municipality;

\* \* \*."

Section 40-05-02 of the North Dakota Century Code further

provides:

"ADDITIONAL POWERS OF CITIES. The city council in a city operating under the council form of government and the board of city commissioners in a city operating under the commission system of government, in addition to the powers possessed by all municipalities, shall have power:

\* \* \*

9. WATER SUPPLY - ACQUIRE NECESSARY PROPERTY. To acquire by gift, grant, lease, easement, purchase, or by eminent domain, and to own, operate, maintain, and improve, all lands, structures, power plants, public works, and personal property, whether within or without this state, necessary for the maintenance and conservation of its water supply;

\* \* \*

At page 79, 1965 Cumulative Supplement to Volume 56 Am. Jur., Waterworks, Section 76, we note the statement:

"As a general rule public water purification and medication-fortification (specifically, fluoridation) measures have been held to be valid exercises of the police power. The legislature, in authorizing a health agency to require purification or medication of water supplies, does to thereby attempt unlawful delegation of legislative power. And water purification and medication-fortification measures have been held not to be defective from the standpoint of due process of law, nor, in the case of medication-fortification by the addition of fluorides, do they constitute the illegal practice of medicine, or (notwithstanding the objection of certain religious sects to medical treatment generally) a violation of the guaranty of freedom of religion."

At page 26, 1965 Cumulative Supplement to Volume 7 McQuillin Municipal Corporations, Third Edition, Section 24.265, we note:

"Fluoridation of the municipal water supply, widely credited as an effective preventive of tooth decay, may be carried out by a municipality as an exercise of its general police power, and may also be authorized under charter grant of power to a city to promote the health of its citizens. Ordinances providing for fluoridation have been sustained against the contentions that they infringe personal and religious liberty, and supplant parental prerogatives, by subjecting the individual consumer and his children to compulsory medication; or that tooth decay - unlike, for example, contagious disease - is a private health problem not warranting public measures. These ordinances do not violate the First or Fourteenth Amendments of the United States Constitution or state statutes regulating the practice of medicine, and are not discriminatory in that the beneficial results of a community-wide fluoridation program will be largely limited to children of formative years. That fluoridation might be further justified as an exercise of the proprietary power of a municipality to serve the needs of its

inhabitants has not been touched on in the decisions. However, the determination to add fluorides to the municipal water supply is a legislative (as distinguished from an administrative function, and an ordinance designed to accomplish such purpose is subject to referendum for the ascertainment of the will of the electorate. It has, moreover, been observed that the addition of fluorides to a public water supply differs from the addition thereto of chlorine and certain other chemicals commonly used in that the fluorides are not added for the purpose of purifying or making more palatable the water, but rather for the alleged therapeutic effect upon persons (or some of them) using the water for drinking. The highly controversial character of the question of fluoridation of public water supplies has been judicially noticed, and therefore, it has been declared, the question becomes one of policy for the decision of the city council rather than one of law for the courts, and a council resolution directing the fluoridation of water was not subject to a temporary injunction."

You might also consider such cases from other jurisdictions as *DeAryan v. Butler*, 260 P. 2d. 98, 119 C.A. 2d. 674, cert. den. 74 S. Ct. 863, 347 U.S. 1012 98 L. Ed. 1135, *Kaul v. City of Chehalis*, 277 P. 2d. 352, 45 Wash. 2d. 616 and *Wilson v. City of Council Bluffs*, 110 N.W. 2d. 569 in this regard.

While this office or the courts do not concern themselves with the desirability of such projects, that being a legislative function of the governing body of the municipality concerned, it would appear from the authorities cited above, that such fluoridation projects have been almost universally accepted as properly within the general power of municipal governing bodies even in the absence of specific statutory authorization therefor. On such basis it is our opinion that a fluoridation project in conjunction with the municipal water supply is within the general powers of North Dakota municipalities.

HELGI JOHANNESON

Attorney General