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MEMORANDUM OF LAW

DATE: March 14, 2013

TO: Roger Bailey, Director, Public Utilities Department

FROM: City Attorney

SUBJECT: Continuation of Fluoridation Funding Offer From First 5 Commission

INTRODUCTION

Following an offer of outside funding from the First 5 Commission of San Diego County, the City of San Diego became legally obligated under the California Safe Drinking Water Act to fluoridate its public water supply. See City Att’y MOL No. 2008-2 (Mar. 27, 2008). This Memorandum is in response to your recent request for legal guidance on issues related to the City’s obligation to continue its fluoridation program.

QUESTIONS PRESENTED

1. Does the availability of outside funding to fluoridate the City’s water supply effect whether the California Safe Drinking Water Act preempts San Diego Municipal Code (SDMC) section 67.0101?
2. What are the City’s options to continue fluoridating its public water supply after the outside funding is exhausted?
3. If the City wishes to continue fluoridating the City’s public water supply, will such action require ratepayer approval through the Proposition 218 protest process?

SHORT ANSWERS

1. The California Safe Drinking Water Act, pre empts SDMC 67.0101, regardless of whether outside funding is available for fluoridation of the City’s water supply.

2. The City must continue to fluoridate its water supply as long as outside funding is available. If no outside funding is available, the City may discontinue fluoridation. The City may, in its discretion, continue to fund fluoridation whether or not outside funding is available.

3. The City may use existing Water Enterprise funds to fluoridate its water supply without going through the Proposition 218 process, provided the funds are available and not earmarked for any purpose that was specifically identified as being funded by a previous Proposition 218 fee increase.

LEGAL ANALYSIS

1. SDMC SECTION 67.0101 IS PREEMPTED BY STATE LAW.

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 (Cal. Health & Safety Code §§ 116409-116415), by requiring public water systems with 10,000 or more service connections (including the City) to fluoridate their water supplies. As a result, SDMC section 67.0101 was preempted by state law because the Act fully occupies the field of fluoridation of public water systems. City Att'y MOL No. 2007-1 (Jan. 25, 2007); *City of Watsonville v. State Dept. of Health Services*, 133 Cal. App 4th, 875 (2005) (any local attempt to regulate within the field that the Legislature has expressly occupied in full actually conflicts with the state law). (*Id.* at 885-886).

The State legislature expressly intended to preempt local fluoridation ordinances in the Act: "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" Cal. Health & Safety Code § 116409, subdiv. (b).

For more than a decade, the City has been exempt from complying with the Act's fluoridation requirements. However, this exemption has often been confused with the City's ban on fluoridation. Cal. Health & Safety Code section 116415 (Section 116415) grants an exemption from the fluoridation requirements if the local agency does not have an "outside" source of funding for its fluoridation system. An outside source would be one that is other than "the system's ratepayers, shareholders, local taxpayers, bondholders, or any fees or charges levied by the water system." Cal. Health & Safety Code § 116415, subdivs. (a)(1)(A), (a)(1)(B).

II. THE CITY MAY BUT IS NOT REQUIRED TO CONTINUE FLUORIDATING ITS WATER SUPPLY IF OUTSIDE FUNDING IS NOT AVAILABLE.

Under the Act, an exemption from the fluoridation requirement applies unless sufficient outside funding is available. *See* Cal. Health & Safety Code §§ 116410-116415. The City became legally obligated under the Act to fluoridate its public water supply when the City Council accepted an offer of outside funding from the First 5 Commission of San Diego County on June 10, 2008. (Resolution R-303832.)

There are two separate funding conditions that trigger compliance with the state fluoridation mandate. The first concerns the installation of a fluoridation system, which has already been completed by the City. The second concerns the operation of the fluoridation system. Compliance with this requirement is necessary “in any given fiscal year (July 1-June 30)” when funds from an outside source become available “sufficient to pay noncapital operation and maintenance costs.” (Cal. Health & Safety Code § 116415, subd. (a)(1)(B).) *Coshov v. City of Escondido*, 132 Cal. App. 4th 687, 705 (2005).

Conversely, absent outside funding, the City does not have a legal obligation to continue fluoridating its public water supply after the initial outside funding is exhausted. Section 116415 provides certain exemptions from the fluoridation requirements. Section 116415 states:

- (a)(1) A public water system is not required to comply with Section 116410, or the regulations adopted thereunder by the department, in either of the following situations: [¶ . . . ¶]
- (B) If the public water system has obtained the capital and associated funds necessary for fluoridation as set forth in subparagraph (A), however, in any given fiscal year (July 1-June 30) funding is not available to the public water system sufficient to pay the noncapital operation and maintenance costs described in subdivision (g) from any source other than the system’s ratepayers, shareholders, local taxpayers, bondholders, or any fees or charges levied by the water system.

Notwithstanding, if the City wishes to continue fluoridation even if outside funding is unavailable, it may do so. San Diego Municipal Code section 67.0101 would not need to be repealed prior to taking this action¹, because it is already preempted by State Act. There are no other impediments to fluoridating the City’s water supply in the Charter or the Municipal Code.

¹ *See* City Att’y Memorandum dated September 25, 2008, Regarding Legal Procedure for Repealing San Diego Municipal Code section 67.0101 [City Charter provides that an ordinance adopted by voter initiative can only be amended or repealed by voters through an election].

III. THE CITY MAY USE WATER ENTERPRISE FUNDS TO PAY FOR OPERATION AND MAINTENANCE OF THE FLUORIDATION SYSTEM.

The City's available options for spending water enterprise funds for the continued operation and maintenance of fluoridation of the City's water supply is similar to its options for other water projects. Fluoridation of the City's water supply is sufficiently related to the operation and maintenance of the water system to allow the use of water ratepayer funds. *See* City Att'y MOL No. 2013-01 (Jan. 14, 2013) (Water funds may only be used for water system purposes). The City must first confirm that the water funds it intends to use have not been earmarked for another water purpose pursuant to the Proposition 218 process. *See* City Att'y MOL No. 2011-02 (Feb. 3, 2011). Alternatively, the City could follow the Proposition 218 notice, hearing and protest procedure as part of a future rate case to generate devoted funds for continued fluoridation of the City's water supply.

CONCLUSION

SDMC section 67.0101 is preempted by state law, and is therefore not an impediment to continued fluoridation of the City's water supply. If further outside funding is unavailable, the City has discretion to continue or to stop fluoridation. Water enterprise funds may be used to continue fluoridation, but a Proposition 218 process may be necessary if sufficient water funds are not available.

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By /s/ Raymond C. Palmucci
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