

SUPREME COURT NO. 73734-7
COURT OF APPEALS NO. 30032-0-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

PARKLAND LIGHT & WATER COMPANY, FRUITLAND MUTUAL
WATER COMPANY, MOUNTAIN VIEW-EDGEWATER WATER
COMPANY, SUMMIT WATER AND SUPPLY COMPANY,
SPANAWAY WATER COMPANY, LAKEWOOD WATER DISTRICT,
and CITY OF BONNEY LAKE,

Appellants,

v.

TACOMA-PIERCE COUNTY BOARD OF HEALTH and TACOMA-
PIERCE COUNTY HEALTH DEPARTMENT

Respondents.

BRIEF OF APPELLANT CITY OF BONNEY LAKE

Clifford D. Foster Jr., WSBA #9523
Jeffrey Ganson, WSBA #26469
Attorneys for City of Bonney Lake

Dionne & Rorick
Attorneys at Law
2550 First Interstate Center
999 Third Avenue
Seattle, Washington 98104
Tel: (206) 622-0203
Fax: (206) 223-2003

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR..... 1

 A. Assignment of Error..... 1

 B. Issues Pertaining to Assignment of Error..... 1

II. STATEMENT OF THE CASE..... 2

 A. The City and its water system. 2

 B. The Health Department and the Board of Health. 3

 C. The Resolution. 4

 D. Procedural History..... 5

III. ARGUMENT 6

 A. The Resolution infringes the rights of the City’s water customers to refuse medical treatment and to preserve their bodily integrity, in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. 6

 1. *The United States Supreme Court recognizes constitutional rights to refuse unwanted medical treatment and to preserve one’s bodily integrity. 7*

 2. *The Court has not previously considered whether government-mandated fluoridation violates recently-identified constitutional liberty interests. 11*

 3. *The fluoridation of municipal water systems violates individuals’ rights to refuse unwanted medical treatment and to preserve their bodily integrity because it erects substantial obstacles to the exercise of these rights, and is not narrowly tailored to further a compelling state interest. 13*

 B. The dilution of non-Tacoma residents’ voting rights in the selection of the Department’s Board of Health violates Article I, sections 12 and 19, of the Washington State Constitution..... 21

 1. *The agreement violates the equal voting rights clause of the Washington Constitution. 22*

 2. *Granting more strongly weighted votes to Tacoma residents is prohibited under Article I, section 12, of the Washington Constitution..... 27*

 3. *Eliminating the greater privileges granted to Tacoma residents would increase accountability of the Board of Health to those impacted by its regulations. 31*

 C. The Resolution was adopted in violation of the State Environmental Policy Act..... 33

 1. *The Department’s untimely SEPA threshold determination merely justified the fluoridation expansion plan decided upon by the Health Director in 2001. 34*

2. Given demonstrated environmental and human health impacts, the Department was required to prepare an environmental impact statement prior to adoption of the Resolution.....39

IV. CONCLUSION..... 43

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Pierce County</i> , 86 Wn. App. 290, 936 P.2d 432 (1997).....	40, 41
<i>Asarco Inc. v. Air Quality Coalition</i> , 92 Wn.2d 685, 601 P.2d 501 (1979)	40, 41
<i>Board of Estimate v. Morris</i> , 489 U.S. 688, 109 S. Ct. 1433, 103 L. Ed. 2d 717 (1989).....	26
<i>Boehm v. City of Vancouver</i> , 111 Wn. App. 711, 47 P.3d 137 (2002).....	40, 41
<i>Breithaupt v. Abram</i> , 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957)	8, 10
<i>Cruzan v. Director of Mo. Dept. of Health</i> , 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990).....	8, 10, 11, 14
<i>Cunningham v. Municipality of Metropolitan Seattle</i> , 751 F. Supp. 899 (W.D. Wash. 1990).....	32
<i>Cunningham v. Municipality of Metropolitan Seattle</i> , 751 F.Supp. 885 (W.D. Wash. 1990).....	21, 26, 32
<i>Gold Bar Citizens v. Whalen</i> , 99 Wn.2d 724, 665 P.2d 393 (1983)	30
<i>Grant County Fire Prot. Dist. v. City of Moses Lake</i> , 145 Wn.2d 702, 42 P.3d 394 (2002).....	22, 24, 27, 28, 29, 30, 31
<i>Kaul v. Chehalis</i> , 45 Wn.2d 616, 277 P.2d 352 (1954)	12, 17, 18
<i>King County v. Wash. State Boundary Review Board</i> , 122 Wn. 2d 648, 860 P.2d 1024 (1993)	35, 40, 41
<i>Kucera v. State</i> , 140 Wn.2d 200, 995 P.2d 63 (2000)	39
<i>Lassila v. City of Wenatchee</i> , 89 Wn.2d 804, 576 P.2d 54 (1978)	36
<i>Minnesota Board of Helath v. City of Brainerd</i> , 241 N.W.2d 624 (Minn. 1976).....	17, 18
<i>Norway Hill Preservation & Protection Assoc. v. King County</i> , 87 Wn.2d 267, 552 P.2d 674 (1976)	34, 37, 40, 41
<i>Paduano v. City of New York</i> , 257 N.Y.S.2d 531 (N.Y. Sup. Ct. 1965)	17
<i>Palko v. Connecticut</i> , 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937).....	8
<i>Pease Hill Community Group v. County of Spokane</i> , 62 Wn. App. 800, 816 P.2d 37 (1991).....	41
<i>Planned Parenthood of Southeastern Penn. v. Casey</i> , 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).....	7, 10, 11, 17
<i>Reno v. Flores</i> , 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)....	7, 11
<i>Reynolds v. Sims</i> , 377 U.S. 555, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1974)....	30
<i>Rochin v. California</i> , 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952) .	8, 12
<i>Roe v. Wade</i> , 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) ...	8, 9, 11

<i>Seattle v. State</i> , 103 Wn.2d 663, 694 P.2d 641 (1985)	22, 23, 31
<i>Snohomish County Board of Equalization v. Washington State Dep't of Revenue</i> , 80 Wn.2d 262, 493 P.2d 1012 (1972).....	6
<i>Sisley v. San Juan County</i> , 89 Wn.2d 78, 569 P.2d 712 (1977)	40, 41
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986)	28, 29
<i>Stempel v. Dept. of Water Resources</i> , 82 Wn.2d 109, 508 P.2d 166 (1973)	36
<i>Story v. Anderson</i> , 93 Wn.2d 546, 611 P.2d 764 (1980).....	22, 24, 25, 26
<i>Washington v. Glucksberg</i> , 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)	8, 9, 11, 12
<i>Washington v. Harper</i> , 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990)	8

Statutes

21 U.S.C §§ 301 <i>et seq.</i>	14
21 U.S.C. § 321	14
Ch. 43.21C RCW	1, 33
Ch. 70.05 RCW	3
Ch. 70.08 RCW	3
RCW 43.21C.010	34
RCW 43.21C.030	34, 36
RCW 43.21C.031	39
RCW 70.05.060	4
RCW 70.08.010	3
Title 35A RCW	2

Other Authorities

<i>Random House Webster's College Dictionary</i> (1991)	14, 15
Richard L. Settle, <i>The Washington Environmental Policy Act: A Legal and Policy Analysis</i>	36, 38
<i>Taber's Cyclopedic Medical Dictionary</i> (17 th ed. 1993).....	14, 15
U.S. Const. amend. XIV, § 1	7
United States Environmental Protection Agency, <i>Dermal Exposure Assessment: Principles and Applications</i> (1992) < http://www.epa.gov/ncea/pdfs/derexp.pdf >	16
WAC 197-11-055	34, 36
WAC 197-11-310	36
WAC 197-11-330	42, 43
WAC 197-11-784	36
Wash. Const. Art. I sec 12	1, 27, 29, 30, 31
Wash. Const. Art. I sec. 19	1, 22, 24, 26

Washington State Department of Ecology Handbook Pub. No. 98-114
(Sept. 1998).....36

Wilfred Airy, *A History of the Constitution and Government of Washington
Territory* (1945) (unpublished Ph.D. thesis available at Washington State
Library, Olympia, and University of Washington Library, Seattle).....29

I. ASSIGNMENTS OF ERROR

A. Assignment of Error.

The trial court erred in entering the Order of February 19, 2003, denying the City of Bonney Lake's Motion for Summary Judgment, granting Respondents' Motion for Summary Judgment, and dismissing the City's lawsuit.

B. Issues Pertaining to Assignment of Error.

1. Does government-mandated fluoridation of the public water supply violate fundamental liberty interests protected by the Due Process Clause of the United States Constitution, including the right to refuse unwanted medical treatment?

2. Does the constitution of the Tacoma-Pierce County Board of Health violate Article I, sections 12 and 19 of the Washington State Constitution, rendering its Resolution No. 2002-3366A-2 void?

3. Was Tacoma-Pierce County Board of Health Resolution No. 2002-3366A-2 adopted in violation of the State Environmental Policy Act, Ch. 43.21C RCW ("SEPA") because the SEPA process was not undertaken in a timely manner, and because the Resolution was adopted in disregard of identified impacts on human health and the environment?

II. STATEMENT OF THE CASE

A. The City and its water system.

The City of Bonney Lake (“the City”) is a code city organized under Title 35A RCW, with a population of just over 10,000 people. CP 1634.¹ The City operates a domestic water system both within and beyond its corporate boundaries. *Id.* The City’s water system includes over 8900 residential connections and over 230 commercial connections, serving a total of over 26,000 people with domestic water supply. CP 1634-35.

The City has operated its water system for over 50 years. CP 1635. The City maintains and uses a number of water sources, including both wells and springs. *Id.* These sources produce exceptionally clean, high-quality water. *Id.* The City does not currently fluoridate its water supply, and, unless required to do so, would not anticipate doing so in the future. *Id.* The City Council is opposed to fluoridation of the water supply. *Id.* City water customers responding to a survey mailed to all customers in June 2002 overwhelmingly opposed the fluoridation of the City’s water supply. *Id.*

¹ The City understands that there are two sets of overlapping Clerk’s Papers before the Court in the matter, each paginated without reference to the other. For the sake of clarity, the City’s citations to the Clerk’s Papers (“CP”) herein are citations to the papers designated as the “Court of Appeals Clerk’s Papers.” Citations to “CP SC” herein are citations to the papers designated as the “Supreme Court Clerk’s Papers.”

B. The Health Department and the Board of Health.

The Tacoma-Pierce County Health Department is a combined city-county health department created pursuant to Chs. 70.05 and 70.08 RCW. CP 1518-28, 1530-31, 1533. It is made up of the Board of Health, Director of Health, and staff under the direction of the Director of Health. *Id.*

RCW 70.08.010, governing the establishment of combined city-county health departments, does not prescribe guidelines for the creation of a board of health for a combined city-county health department, but instead provides that a combined health department is authorized “as shall be agreed upon between the respective governing bodies.” Tacoma and Pierce County created the Board of Health as a component of the Tacoma-Pierce County Health Department and prescribed the selection of the Board members as follows:

1. The Pierce County Executive, or his or her designated representative;
2. Two members of the Pierce County Council (elected by the County Council);
3. The Mayor of Tacoma, or his or her designated representative;
4. One member of the Tacoma City Council (elected by the City Council);
5. One member to be nominated from elected representatives by the other cities and towns within Pierce County and appointed by the County Executive and the Mayor of Tacoma; and
6. One member at large to be selected by the unanimous vote of the six elected officials on the Board.

CP 1519-20.

The Board's powers are extensive. RP 5 (Feb. 19, 2003). It supervises "all matters pertaining to the preservation of the life and health" of Pierce County residents by both enforcing state public health laws and enacting its own regulations. RCW 70.05.060; CP 1520.

Based on 2000 federal census data, Tacoma is the largest city in Pierce County, with a population almost 20 times the size of Bonney Lake's and representing 28% of the population of Pierce County. CP 1552-54.

C. The Resolution.

On October 2, 2002, the Department adopted Resolution No. 2002-3366A-2 ("the Resolution"). CP 1508-16. The Resolution purports to require water purveyors serving 5000 or more people within Pierce County to "provide optimally fluoridated drinking water throughout its system using a method of system-wide fluoridation," no later than January 1, 2004. CP 1513.

In addition to actually implementing the fluoridation mandate, purveyors are purportedly required by the Resolution to return a "letter of intent" and, "to the extent possible, negotiate and execute a Fluoridation Implementation Agreement with [the Department] no later than December 31, 2002," if electing to accept certain funds to be made available by the

Department. CP 1515. In the alternative, those purveyors “not electing to accept funds” are purportedly required to “provide the [Department] no later than December 31, 2002 a completed and executed Compliance Schedule . . . (to be provided to the water purveyor by [the Department]) setting forth the detailed timeline benchmarks for activities to be undertaken by the water purveyor in compliance with” the Resolution. *Id.*

Finally, the Resolution purports to impose a penalty of \$250.00 per day upon “[a]ny person or other entity that violates the Resolution,” with each day of “continuing violation” constituting “a separate and distinct violation.” *Id.* A breach of an implementation agreement or “failure to meet a timeline benchmark or to satisfy a condition set forth in the Compliance Schedule” also purportedly constitutes a violation of the Resolution, subjecting the violator to penalties. *Id.*

D. Procedural History.

On November 8, 2002, the City filed a Complaint For Declaratory Judgment and For Injunction in Pierce County Superior Court, alleging, *inter alia*, that the Resolution violates the Due Process Clause of the United States Constitution; that the Board of Health’s constitution violates Article I, sections 12 and 19, of the Washington State Constitution; and that the Resolution was adopted in violation of SEPA. CP 1856-62. The City’s suit

was consolidated with those filed by three other sets of plaintiffs, and all parties filed cross motions for summary judgment. On February 19, 2003, Pierce County Superior Court Judge Lisa Worswick entered an Order Granting Defendant's Motion For Summary Judgment and Denying Plaintiffs' Cross-Motions For Summary Judgment ("Order"). CP 1845-50. The City appeals this Order. CP SC 1094-95.

III. ARGUMENT

A. The Resolution infringes the rights of the City's water customers to refuse medical treatment and to preserve their bodily integrity, in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

In its Motion for Summary Judgment, the City asserted that government-mandated fluoridation of the public water supply would violate water customers' rights to refuse medical treatment and to preserve their bodily integrity under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. CP 1594-1605. Judge Worswick rejected this argument. CP 1848. Because fluoridation would unconstitutionally burden these fundamental liberty interests, the Order should be reversed.²

² Because the City could be held responsible for any violation of its customers' constitutional liberty interests resulting from the fluoridation of its water supply, it has standing to assert those customers' constitutional rights in a declaratory judgment action. See *Snohomish County Board of Equalization v. Washington State Dep't of Revenue*, 80 Wn.2d 262, 264-65, 493 P.2d 1012, 1013-14 (1972) (holding that board of equalization had

1. **The United States Supreme Court recognizes constitutional rights to refuse unwanted medical treatment and to preserve one’s bodily integrity.**

The rights to refuse medical treatment and preserve one’s bodily integrity are protected by the Due Process Clause of the 14th Amendment. According to the 14th Amendment, no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. In the course of its jurisprudence, the Supreme Court has held that the Due Process Clause bars governmental interference with the exercise of certain fundamental rights and liberty interests, regardless of the process used in implementing them. *See, e.g., Reno v. Flores*, 507 U.S. 292, 301-302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1, 16-17 (1993) (noting that “due process” includes “a substantive component, which forbids the government to infringe certain ‘fundamental’ liberty interests *at all* . . . unless the infringement is narrowly tailored to serve a compelling State interest”); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 851, 112 S. Ct. 2791, 2807, 120 L. Ed. 2d 674, 698 (1992) (noting that “matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are

standing to challenge statute where statute placed board “in a position of making a determination of a difficult question of constitutional law with the possibility of facing both civil and criminal penalties if they made the wrong choice”).

central to the liberty protected by the Fourteenth Amendment”). These “fundamental” rights and liberty interests that are protected by the 14th Amendment are “implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772, 788 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S. Ct. 149, 82 L. Ed. 288 (1937)). The Supreme Court has held that the right to preserve one’s bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952); *Breithaupt v. Abram*, 352 U.S. 432, 439, 77 S. Ct. 408, 412, 1 L. Ed. 2d 448, 452-53 (1957), and refuse medical treatment, *Cruzan v. Director of Mo. Dept. of Health*, 497 U.S. 261, 278, 110 S. Ct. 2841, 2851, 111 L. Ed. 2d 224, 241-42 (1990); *Washington v. Harper*, 494 U.S. 210, 221-222, 110 S. Ct. 1028, 1036, 108 L. Ed. 2d 178, 197 (1990), are included among the fundamental rights especially protected by the Due Process Clause. *Glucksberg*, 521 U.S. at 719-20, 117 S. Ct. at 2267, 138 L. Ed. 2d at 787. Like the right to privacy (encompassing a right to abortion) which the Supreme Court found in the Due Process Clause in *Roe v. Wade*, 410 U.S. 113, 153, 93 S. Ct. 705, 727, 35 L. Ed. 2d 147, 177 (1973), the Due Process Clause provides “heightened protection against governmental interference with [these] fundamental rights and liberty interests.” *Glucksberg*, 521 U.S. at 720, 117 S. Ct. at 2267, 138 L. Ed. 2d at 787; *see*

also *Roe*, 410 U.S. at 155, 93 S. Ct. at 728, 35 L. Ed. 2d at 178 (“Where certain ‘fundamental rights’ are involved, . . . regulation limiting these rights may be justified only by a ‘compelling state interest,’ [and] legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”) (citations omitted).

The right to exert dominion over one’s body is one of the fundamental elements of liberty and can be readily divined from the Supreme Court’s precedent. *See, e.g., Glucksberg*, 521 U.S. at 721 n.17, 117 S. Ct. at 2268, 138 L. Ed. 2d at 788 (“[T]he right to refuse unwanted medical treatment was so rooted in our history, tradition, and practice as to require special treatment under the Fourteenth Amendment.”); *Glucksberg*, 521 U.S. at 777, 117 S. Ct. at 2288, 138 L. Ed. 2d at 824 (Souter, J., concurring) (“This liberty interest in bodily integrity was phrased in a general way by then Judge Cardozo when he said, “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body” in relation to his medical needs. *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 129, 105 N.E. 92, 93 (1914). The familiar examples of this right derive from the common law of battery and include the right to be free from medical invasions into the body, *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S., at 269-279, as well as a right generally to resist

enforced medication, see *Washington v. Harper*, 494 U.S. 210, 221 -222, 229 (1990). Thus '[i]t is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about . . . bodily integrity.' *Casey*, 505 U.S., at 849 (citations omitted); see also *Cruzan*, 497 U.S., at 278; *id.*, at 288 (O'Connor, J., concurring); *Washington v. Harper*, *supra*, at 221-222; *Winston v. Lee*, 470 U.S. 753, 761 -762 (1985); *Rochin v. California*, 342 U.S., at 172."); *Cruzan*, 497 U.S. at 278-79, 110 S. Ct. at 2851, 111 L. Ed. 2d at 241 (holding that a mentally competent person has a constitutionally protected right to refuse medical treatment); *Breithaupt*, 352 U.S. at 439, 77 S. Ct. at 412, 1 L. Ed. 2d at 453 (finding a "right of an individual that his person be held inviolable"); *Casey*, 505 U.S. at 896, 112 S. Ct. at 2830, 120 L. Ed. 2d at 727 ("The effect of state regulation on a [pregnant] woman's protected liberty is doubly deserving of scrutiny . . . as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman.").

As these cases illustrate, the preservation of bodily integrity is an underlying principle in defining liberty interests that are protected by the Due Process Clause. Although the right of an individual to exert dominion over his or her body is not absolute, the Fourteenth Amendment forbids the government from infringing upon "fundamental" liberties unless the

infringement is narrowly tailored to serve a compelling state interest. *Flores*, 507 U.S. at 302, 113 S. Ct. at 1447, 123 L. Ed. 2d at 16; *Glucksberg*, 521 U.S. at 721, 117 S. Ct. at 2268, 138 L. Ed. 2d at 787-88; *Roe*, 410 U.S. at 155, 93 S. Ct. 705, 35 L. Ed. 2d 147. Thus, the government is prohibited from taking actions that pose a substantial obstacle to an individual's exercise of his or her rights to refuse medical treatment or preserve his or her bodily integrity, unless the actions are narrowly tailored to serve a compelling state interest.

2. **The Court has not previously considered whether government-mandated fluoridation violates recently-identified constitutional liberty interests.**

The City recognizes that courts have, in the past, generally upheld fluoridation as a valid exercise of the state's police power. However, in the past half century the U.S. Supreme Court has significantly expanded individual rights and protections under the constitution. *See, e.g., Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (identifying within the Due Process Clause a privacy right encompassing a right to abortion); *Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (finding protection against the state's unduly burdening abortion rights); *Cruzan*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (finding a constitutional liberty interest in refusing unwanted medical treatment); *Glucksberg*, 521 U.S. at 720, 117

S. Ct. at 2267, 138 L. Ed. 2d at 787 (noting the Supreme Court’s identification of a right “to bodily integrity” in *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952)). Therefore, the constitutionality of government-mandated fluoridation must be reexamined in light of our current, expanded understanding of fundamental individual liberty interests protected by the Fourteenth Amendment.

The Washington Supreme Court has decided only one case that challenged fluoridation, *Kaul v. Chehalis*, 45 Wn.2d 616, 277 P.2d 352 (1954). In *Kaul*, the plaintiff was a resident of Chehalis, Washington and was opposed to the city’s plan to fluoridate the water. In its decision, the Court rested the bulk of its holding that no constitutional guarantees were implicated on the fact that no affirmative act was required, and the plaintiff was not subject to a penalty for not doing something. 45 Wn.2d at 621, 277 P.2d at 355. This holding was strongly questioned by the dissenting judges, who felt that fluoridation was an unconstitutional invasion of an individual’s liberty. 45 Wn.2d at 632-33, 277 P.2d at 361 (J. Hill, dissenting). In *Kaul*, the dissenting judges analyzed fluoridation in a manner that is very consistent with the Supreme Court’s current liberty interest analysis, first determining that a liberty interest had been infringed and then balancing the state interest involved. *Id.* While the reasoning of the

Kaul majority may have been consistent with the law regarding an individual's liberty interests in 1954, it is no longer viable given the U.S. Supreme Court's more-recent decisions regarding Fourteenth Amendment liberty interests, such as *Roe*, *Casey*, *Cruzan*, and *Glucksberg*, where the court has repeatedly stated that the "liberty" that the Due Process Clause protects includes more than the absence of physical restraint, and that an individual's rights under the Fourteenth Amendment can be violated without the requirement to take an affirmative action. In short, *Kaul* is not dispositive of the issues in this case, and even if it had addressed the City's arguments made in this case, this Court should overrule *Kaul* as inconsistent with the U.S. Supreme Court decisions discussed above.

3. The fluoridation of municipal water systems violates individuals' rights to refuse unwanted medical treatment and to preserve their bodily integrity because it erects substantial obstacles to the exercise of these rights, and is not narrowly tailored to further a compelling state interest.

(a) *Fluoridation of municipal water systems is a medical treatment which individuals have a right to refuse.*

In examining the right to refuse "medical treatment," that term has been broadly interpreted in the Supreme Court's precedent. In *Cruzan* the Supreme Court did not evaluate whether or not the administration of artificial nutrition and hydration was a medical treatment. Rather, it simply concluded it was a treatment that a mentally competent person had a

constitutional right to refuse. 497 U.S. at 278-79, 110 S. Ct. at 2851, 111 L. Ed. 2d at 241-42.

Surely, the “medical treatment” that a competent person has a constitutional right to refuse includes the administration of medicine or drugs for the purpose of treating or preventing disease. *See, e.g., Random House Webster’s College Dictionary* 842 (1991) (defining “medical” as “of or pertaining to the science or practice of medicine,” and defining “medicine” as “any substance used in treating disease or illness” and “the art, science, or profession of preserving health and of curing or alleviating disease”); *Taber’s Cyclopedic Medical Dictionary* 1178 (17th ed. 1993) (defining “medical” as “1. [Pertaining] to medicine or the study of the art and science of caring for those who are ill. 2. Requiring therapy with medicines as distinct from surgical treatment.”); *id.* at 2031 (defining “treatment” as including “any specific procedure used for the cure or the amelioration of a disease”). Further, under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* (2002), fluoride is a drug. According to 21 U.S.C. § 321(g)(1), the term “drug” includes “articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals,” and “articles (other than food) intended to affect the structure or any function of the body of man or other animals.” Because the sole purpose

for fluoridation of the water supply is the treatment and prevention of a disease, known as dental caries, and it is intended to affect the structure and function of the human body, fluoride is a drug under the Federal Food, Drug, and Cosmetic Act. Fluoridation also meets any plain-language definition of the term “medicine,” *supra*; see also *Taber’s* at 1181 (defining “medicine” to include “a drug or remedy”), or the term “drug,” see, e.g., *Random House Webster’s College Dictionary* 842 (1991) (defining “drug” as “a chemical substance used in the treatment, cure, prevention, or diagnosis of disease or to otherwise enhance physical or mental well-being”); *Taber’s* at 578 (defining “drug” as “any substance that, when taken into the living organism, may modify one or more of its functions”).

Thus fluoridation is a medical treatment because it is the administration of fluoride, a chemical that constitutes a medicine or drug, for medical purposes, the treatment and prevention of caries, by the ingestion and absorption of a solution containing a specified dosage. This constitutes a medical treatment that an individual has a constitutional right to refuse. The government may not erect substantial obstacles to the exercise of this right, unless its actions are narrowly tailored to serve a compelling governmental interest. In the case of fluoridation this compelling state interest is lacking, and fluoridation is a very broadly

tailored method of serving the state interest, rendering the Resolution's fluoridation mandate unconstitutional.

(b) *Fluoridation places a substantial obstacle in the way of individuals' ability to exercise their rights to refuse medical treatment and to preserve their bodily integrity.*

Under the Department's fluoridation mandate, the only way for a City water customer to avoid being treated with fluoride or having artificially added fluoride taken into their body would be to stop using City water for significant domestic purposes, including drinking water, food preparation, dish washing, and hygiene.³ Even though special drinking water filtration systems and bottled drinking water may be available, these alternate sources are surely expensive and cumbersome (particularly for uses beyond direct consumption). Many individuals will not be able to afford to use these alternate sources, and others may be barred from using them by physical handicaps or other constraints, such as lease provisions barring permanent improvements. Gathering water for daily domestic use from non-municipal sources is virtually impossible for many people and, at the very least, impractical for most people.

³ Fluoride may also be taken into the body by dermal absorption. *See, e.g.,* United States Environmental Protection Agency, *Dermal Exposure Assessment: Principles and Applications* (1992) <<http://www.epa.gov/ncea/pdfs/derexp.pdf>>. In that event, an individual wishing to avoid the introduction of fluoride into his or her body would have to avoid contact with the municipal water supply altogether—clearly a substantial obstacle to the exercise of the right to preserve one's bodily integrity.

This is similar to the situation in *Casey*, where the Supreme Court held that the inability of a woman to have an abortion without notifying her husband unduly burdened her right to an abortion because it was likely to prevent a significant number of women who for personal reasons do not wish to notify their husbands from having abortions. 505 U.S. at 893-94, 112 S. Ct. at 2828-29, 120 L. Ed. 2d at 725. Fluoridation is similarly likely to prevent a number of individuals from choosing not to be treated with or exposed to artificially added fluoride, presenting a substantial obstacle to the exercise of these fundamental liberty interests protected by the Fourteenth Amendment. This view has also been echoed by a number of courts in their decisions on fluoride (though pre-dating the U.S. Supreme Court's extension of these liberty interests). *Kaul*, 45 Wn. 2d at 618, 277 P.2d at 353 ("If the water is fluoridated, it will be necessary for appellant and all other users 'to use it for domestic purposes including drinking, because there is no other practical supply.'") (quoting the trial court); *Minnesota Board of Health v. City of Brainerd*, 241 N.W.2d 624, 632 (Minn. 1976) (acknowledging that "forced fluoridation does intrude on an individual's decision whether or not to ingest fluoride"); *Paduano v. City of New York*, 257 N.Y.S.2d 531, 540 (N.Y. Sup. Ct. 1965) (characterizing the issue in a challenge to New York City's proposed fluoridation of its water

supply as “whether a state, in the proper exercise of the police power, can force individuals to take medication”). Because Department-mandated fluoridation places a substantial obstacle to an individual’s ability to refuse fluoride treatment or prevent artificially added fluoride from entering their body, the Resolution may only be upheld upon a showing by the Department that there is a compelling state interest at stake, and that the Resolution is narrowly tailored to that interest.⁴

- (c) *The state interest in the use of fluoridation for the prevention of caries is minor, because caries are neither contagious nor life threatening, and fluoridation is not necessary for the prevention of caries.*

The prevention of dental caries involves only minor state interests. An individual who has untreated caries does not place others at risk because caries are not contagious. *See, e.g., Kaul*, 45 Wn.2d at 620, 277 P.2d at 354 (“Dental caries is neither infectious nor contagious.”). If a disease is not

⁴ In the trial court, the Department quoted *Minnesota State Board of Health v. City of Brainerd*, 241 N.W.2d 624, 632 (Minn. 1976), for the proposition that recognition of the unconstitutionality of fluoridation “would confer upon the individual the prerogative to refuse to allow the government to chlorinate the water or to take similar actions which it has determined to be in the best interests of public health.” CP SC 67-68. However, that result would not follow from the holding urged by the City here. Chlorination, for instance, is intended not to treat any human disease or otherwise alter human physiology, but rather purifies water for human consumption by killing impurities in the water; it is not medication. *See, e.g., Kaul*, 45 Wn.2d at 618, 277 P.2d at 353 (“[C]hlorine is added to water to affect either bacteria or plant life in the water, while fluoride has no effect upon the water or upon the plant life in the water but remains free in the water and is *artificially added solely for the effect it has on the individual drinking the water.*”) (quoting the trial court’s unchallenged findings of fact) (emphasis added). The fact that governments may be prohibited from adding medication to the drinking water supply does not mean that they would not be free to ensure that the drinking water supply is safe and potable.

contagious it significantly diminishes the state interest in its treatment and prevention, because untreated individuals cannot place others at risk for contracting it. While the state may have an interest in the preservation of life in general, caries do not pose any significant risk to the lives of those who have them. Therefore, the only interest that the state possesses in the prevention and treatment of caries is to promote optimum dental health, which is not a compelling state interest warranting substantial burdens on individuals' fundamental liberty interests.

The state's interest in fluoridation is further diminished by the fact that fluoridation of the public water supply is not narrowly tailored to serve the state interest. While fluoride has proven to be an effective measure against caries, it "works primarily via topical mechanisms: inhibition of demineralization, enhancement of remineralization and inhibition of bacterial enzymes." CP 1558. While fluoridation of drinking water does provide some topical application of fluoride, it is far from the only or most targeted means of doing so. CP 1563. There exist other, more targeted and effective, ways that the Department may treat willing individuals with fluoride without unduly burdening the constitutional rights of all. These might include offering to the public and encouraging the use of fluoride tablets, topical fluoride treatments, and fluoridated toothpaste. The

Department could also target those most in need of dental care for these services, rather than mandating the ingestion of fluoride by the public at large. These methods would avoid forcing the ingestion of fluoride upon every City water customer, regardless of those individuals' dental health. They would also eliminate the waste associated with the wholesale fluoridation of the water supply. Thus the Department's interest in fluoridation is decreased by the lack of necessity to fluoridate the water supply given the availability of more effective and narrowly tailored methods of promoting dental health.⁵

Because there exist more narrowly tailored methods of serving the Department's interest without unduly burdening the liberty interests of individuals, and because the Department's interest is at any rate not sufficiently compelling to warrant infringement of fundamental liberty interests, the Resolution's mandated fluoridation of the public water supply violates those fundamental constitutional liberty interests.

⁵ The Department's Director of Health, Dr. Federico Cruz-Uribe has himself admitted that fluoridation is a broadly tailored method of combating caries. CP 1536 (referring to fluoridation as "a broad solution to a community problem").

B. The dilution of non-Tacoma residents' voting rights in the selection of the Department's Board of Health violates Article I, sections 12 and 19, of the Washington State Constitution.

The manner in which Board of Health members are selected assures Tacoma residents disproportionate power in Health Department governance. It is clear that Tacoma voters have greater weight just from the fact that two seats are filled by Tacoma elected officials, while Tacoma's population is only 28% of the entire county's population. CP 1552-54.

Nevertheless, the City measured the extent of the apparent voting weight disproportionality. First, the respective ratios of population-per-Board member for Tacoma and the area outside Tacoma were calculated. Then the ideal population-per-Board member ratio—as if each of the six elected Board members was elected from a district of equal population—was calculated.⁶ To measure the extent of the disparity in voting rights the deviation of those ratios from the ideal ratio of the Pierce County population-per-Board member was calculated.⁷ The disparity is 79%. CP 1654-56, 1671. This is a disparity that Washington law will not bear.

⁶ The City excluded the seventh member, who holds no elected office, from the calculation. Addition of the seventh member to the analysis has no effect on the outcome because the seventh member would directly reflect the weighting of the other six. CP 1656.

⁷ The City's methodology for measuring the disparity in voting power tracked the analysis adopted in *Cunningham v. Municipality of Metropolitan Seattle*, 751 F.Supp. 885, 894 (W.D. Wash. 1990). The scheme for constituting the Metro council was similar to the scheme for creating the Board of Health. The City was assisted in the analysis by the expert cited in the *Cunningham* decision. CP 1655.

1. **The agreement violates the equal voting rights clause of the Washington Constitution.**

Article I, section 19, of the Washington Constitution provides that “[a]ll Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” This clause has been broadly interpreted to prohibit any use of an election process that directly or indirectly accords disproportionate power to a particular class:

When the State has chosen to submit . . . an issue to a vote, the election must be “free and equal.” The State may not restrict the vote . . . either directly, through limitations on the right to vote, or indirectly, by giving a particular class the power to prevent an election.

Grant County Fire Prot. Dist. v. City of Moses Lake, 145 Wn.2d 702, 718, 42 P.3d 394, 402 (2002), *motion for reconsideration granted Oct. 11, 2002* (quoting *Seattle v. State*, 103 Wn.2d 663, 673, 694 P.2d 641 (1985)) (emphasis added by the *Moses Lake* Court); *see also Story v. Anderson*, 93 Wn.2d 546, 611 P.2d 764 (1980) (holding that voting right disparities may be unconstitutional whether the grant of greater voting power to one group is direct or indirect).

Thus, when Tacoma and Pierce County’s wholly-elected legislative authorities *chose* to fill six of seven Board of Health seats with *elected* officials, Article I, section 19, prohibited them from reserving two seats on

the Board—one elected directly (Tacoma mayor) and one elected indirectly (Tacoma city council member)—for elected officials from Tacoma without including more elected officials representing non-Tacoma residents.⁸

In *Seattle*, the annexations statute in question impermissibly restricted the right to vote by granting certain property owners the right to prevent an annexation election by filing a petition. Relying on cases in which the *final decision* on annexation was made in an *election*, the Court found the statute granting additional influence over the outcome to property owners unconstitutional. *Seattle*, 103 Wn.2d at 670-671, 694 P.2d at 646-47. Similarly, although the agreement at issue here arguably “appoints” Board of Health members—a point erroneously relied upon by the trial court, RP 8 (Feb. 19, 2003)—the *final decision* on the occupants of six of the seven Board seats is made, directly or indirectly, by an *election*.

In contrast to the *Seattle* case, the petition method of annexation contested in *Moses Lake* did not directly block an election. Consequently, the constitutionality of the petition method in *Moses Lake* depended on whether it interfered *indirectly* with the right to vote. Since that annexation method was simply an alternative to a method that involves voting, the

⁸ The additional seats could have been filled by county council members, suburban cities and towns elected officials, or members elected at large county-wide.

Court held that the petition method of annexation did not *indirectly* interfere with the right to vote. 145 Wn.2d at 718; 42 P.3d at 402.

The instant case falls between the two annexation cases. The Board of Health selection scheme is an example of an *indirect* infringement on the right to an equal vote, resulting in one particular class—Tacoma residents—gaining a disproportionate voice on the Board. Article I, section 19, has not previously been invoked in such circumstances. But in *Story v. Anderson* the Washington Supreme Court found that a voting scheme that was similar in key aspects violated the narrower equal protection clause of the federal constitution.

In *Story*, the primary election scheme specifically created for Island County directed the creation of three county commissioner districts comprised of each of the three islands comprising the county.⁹ 93 Wn.2d at 547-48, 611 P.2d at 765-66. The inequality of populations of the three districts resulted in more strongly weighted votes for the residents of the two districts with the smaller populations. *Id.* The combination of the primary and general elections assured the voters from the smallest district that, even though they comprised less than ten percent of the total

⁹ All other non-home rule counties in Washington were governed by commissioners elected from districts comprising, as nearly as possible, one-third of the population of the county.

population, a candidate chosen by that district *alone* in the *primary* election will exercise one-third of the voting power of the entire county as an elected county commissioner. 93 Wn.2d at 548-49, 611 P.2d at 766. The Court upheld the trial court's holding that the scheme violated equal protection and its grant of a writ of mandamus to redivide the districts. 93 Wn.2d at 553-54, 611 P.2d at 768-69.

The particularly instructive point for this case, and a key element in the *Story* decision, is the holding that even though the inequality of population did not directly affect the general election, that inequality did affect the primary election, *which was the procedure generally used to nominate county commissioner candidates* in Island County. Because each primary is held solely within the respective district, the voters of the smallest district nominated a candidate for a commissioner position, just as did the voters of the other two districts. As a result, the voters of the smallest district impermissibly exercised a voting strength *in the primary election* that equaled the voting strength of each of the other two districts, even though these other districts were far larger in population. Thus, the *Story* Court held that the one person, one vote principle required equal representation in the candidate nominating procedure, just as it requires equality in the general election because the inequality of population, in addition to a direct impact

on the primary, had an *indirect* effect on the general election. 93 Wn.2d at 551-552, 611 P.2d at 768. Similarly, in the instant case, because the election of two of the six elected Board of Health members is held solely within Tacoma, Tacoma exercises a voting strength on the Board out of proportion to its 28% of the Pierce County population. The broad protection of voting rights under Article I, section 19, clearly prohibits the inequality created by providing for the election of two of six elected Board members by a body comprising only 28% of the county population.

Because *Story* involved only a challenge under the federal constitution, the Court followed applicable federal cases and determined whether the degree of inequality of voter representation, as measured by the ratio of the largest district to the smallest and by the combined percentage deviation from the average, was so substantial as to require invalidating the Island County district scheme. 93 Wn.2d at 553, 611 P.2d at 769. In *Board of Estimate v. Morris*, 489 U.S. 688, 109 S. Ct. 1433, 103 L. Ed. 2d 717 (1989), decided nine years after *Story*, a deviation of 78% was found to violate the Equal Protection Clause.¹⁰ Thus, the 79% deviation in the instant case is too substantial under even the federal constitution.

¹⁰ Judge Dwyer found this 78% threshold meaningful. *Cunningham*, 751 F. Supp. at 895.

2. Granting more strongly weighted votes to Tacoma residents is prohibited under Article I, section 12, of the Washington Constitution.

In *Grant County Fire Prot. Dist. v. City of Moses Lake*, 145 Wn. 2d 702, 42 P.3d 394 (2002), the Washington Supreme Court has demonstrated the broad protection of the privileges and immunities clause, Article I, section 12, of the Washington Constitution. The necessity of such broad protection under the privileges and immunities clause—and the increased accountability that would be achieved by bringing the Board into compliance with the clause—is especially evident in this case where the Board of Health has such broad governing powers and has mandated actions considered by many to be highly intrusive in their personal lives.¹¹

In *Moses Lake* the Washington Supreme Court held that Article I, section 12, also provided greater protection than the federal Equal Protection Clause. In coming to this conclusion, the Court analyzed six nonexclusive criteria: (1) the textual language of the state constitution; (2) significant differences in the tests of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal state constitutions; and (6) matters of particular state interest or local

concern. 145 Wn.2d at 725-26, 42 P.3d at 405-06 (discussing factors derived from *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986)).

Of particular interest here in the analysis of factors one and two, is the court's discussion of the differences in the proscribed behavior. The federal constitution is concerned with majoritarian threats of invidious discrimination while the state constitution protects against laws serving special interests to the detriment of the majority. 145 Wn.2d at 726, 42 P.3d at 406. Thus, the court concluded that the state provision has a harder "bite" when a small class is given a benefit and the burden is spread among the majority. 145 Wn.2d at 727, 42 P.3d at 406. In this case, Tacoma residents have a greater voice in the Board's decisions, but the burden of the Resolution at issue in this case falls only on certain water purveyors and customers outside Tacoma.¹² Similarly, with respect to the third and fourth factors (history of the clause and preexisting state law), the Court concluded that the history of the state privileges and immunities clause also indicates that the Washington Constitution gives greater protection where the issue

¹¹ In the Department's survey of county residents, the second most frequent reason given for opposing fluoridation was that it impinges on personal freedom. CP SC at 1003.

¹² Tacoma had been fluoridating its water prior to enactment of the Resolution. CP SC 532. After three decades of lobbying and two "hard-fought" elections, Tacoma residents agreed to fluoridate their water in 1989. CP 1701.

concerns favoritism rather than discrimination. 145 Wn. 2d at 729, 42 P.3d at 407-08.¹³

The fifth *Gunwall* factor—the structural differences between the state and federal constitutions—will always support an independent analysis. 145 Wn.2d at 730, 42 P.3d at 408. Finally, factor six favors independent analysis because the regulation of public health is a matter of state and local concern. 145 Wn.2d at 731, 42 P.3d at 408. Therefore, Article I, section 12, of the Washington Constitution provides greater protection than the federal Equal Protection Clause when the issue is favoritism for one class of voters.

The question next presented is the appropriate standard of review under Article I, section 12. The level of scrutiny applied to determine if there is a reasonable ground for the favoritism differs depending on the issues involved. 145 Wn.2d at 731-32, 42 P.3d at 408-09. In our representative form of government, the right to vote for a candidate of one's

¹³ The Organic Act had been amended to prohibit the territorial legislature from granting “private charters or especial privileges.” 145 Wn.2d at 729, 42 P.3d at 408 (quoting Organic Act, as amended, The Territories Act, 18 Stat. Title 23, ch. 1 § 1889, at 333 (1873-74) (2d ed. 1878)). Congress was concerned that the Territorial legislature had been chartering all types of societies and companies by special acts, including many presumably worthy entities, such as literary associations, music organizations, lodges, churches, fire companies, and water companies. Wilfred Airy, *A History of the Constitution and Government of Washington Territory* 208-9 (1945) (unpublished Ph.D. thesis available at Washington State Library, Olympia, and University of Washington Library, Seattle).

choice is fundamental and cannot be diluted. *Reynolds v. Sims*, 377 U.S. 555, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1974); *Gold Bar Citizens v. Whalen*, 99 Wn.2d 724, 730, 665 P.2d 393 (1983). Tacoma and Pierce County are prohibited from creating a Board of Health that, either directly or indirectly, is not representative of the county population.

The *Moses Lake* Court concluded that, although in theory both property owners and nonproperty owners have a voice in the annexation process, *in reality*, the petition method of annexation effectively grants owners of highly valued property a greater voice in the annexation process—a privilege not equally afforded to owners of lower valued property and nonproperty owning residents. 145 Wn.2d at 735, 42 P.3d at 410. Similarly, here, the Board member selection scheme, nominally an appointive process under the agreement, *in reality* grants residents of Tacoma a privilege not equally afforded to non-Tacoma residents in the composition of the Board of Health.

The final question to be answered in the Article I, section 12, analysis is whether there is a reasonable ground for granting one class the privilege. 145 Wn.2d at 735, 42 P.3d at 410-11. Because the Board's enactments "similarly affect all people" who live in Pierce County, but its makeup grants Tacoma residents a privilege not afforded to other Pierce

County residents, the Board member selection scheme violates Article I, section 12. *See* 145 Wn.2d at 735, 42 P.3d at 411.

3. Eliminating the greater privileges granted to Tacoma residents would increase accountability of the Board of Health to those impacted by its regulations.

The application of the Equal Voting Rights and the Privileges and Immunities Clauses of the Washington Constitution in this case is not an abstract exercise. Here, where the privilege is afforded in the scheme for constituting a board with extensive powers over Pierce County residents, the key policy issue at stake is accountability. *See e.g., Seattle*, 103 Wn.2d at 672, 694 P.2d at 647 (holding that because annexation affects governmental services and regulations, it is a matter of “substantial interest” to all residents).

In addition to the four lawsuits filed by six small government entities and a citizens’ group, scores of people spoke at various meetings in opposition to the fluoridation mandate. CP 1376-78, 1387-93, 1474-75, 1499-1503, 1726-28, 1742-46. Our representative form of government depends on maximizing the accountability of the government to the governed. And one role for the Washington state and federal constitutions is to ensure that representative government thrives.

Cunningham v. Municipality of Metropolitan Seattle, 751 F. Supp. 885 (E.D. Wash. 1990), provides an example of the manner in which constitutional protections can promote accountability through representative governance. When the Washington legislature authorized the creation of Metro, it prescribed a selection process for Metro's governing board that, as here, afforded residents of certain cities greater voting power than residents of other cities and the unincorporated parts of the county. *Id.* at 891. Residents of the underrepresented areas of King County challenged the constitutionality of the method by which the Metro governing council was selected in order to make Metro "more democratic and responsive." *Id.* at 889. Judge Dwyer found that the scheme for constituting the Metro governing board violated the federal equal protection clause. *Id.* at 895.

Instead of leaving it to the legislature to devise a constitutional scheme, King County voters dissolved Metro, and placed its functions under the jurisdiction of King County. *Cunningham v. Municipality of Metropolitan Seattle*, 751 F. Supp. 899, 900-02 (W.D. Wash. 1990); King County Charter Amendments, Proposition No. 1, Metro Assumption, Ordinance 10530 (Nov. 3, 1992). Because all county council members are

elected from equally apportioned voting districts, all county residents affected had equally weighted voting rights. CP 1792.

In this case, Tacoma residents have a greater voice on the Board of Health by virtue of voting for the Tacoma City Council and also having a voice in the election of the Pierce County Council. Tacoma and Pierce County could cure the cumulative constitutional defects by providing for countywide at-large elections, or for the election of representatives from districts of equal population, or a combination. Even the current scheme could provide a basis for a constitutionally sound selection process if it is amended to provide for more elected officials representing non-Tacoma residents. As it exists today, however, the Board's makeup is unconstitutional.

C. The Resolution was adopted in violation of the State Environmental Policy Act.

In its Motion, the City asserted that the Resolution was adopted in violation of SEPA, Ch. 43.21C RCW, because the required process of environmental review was not undertaken in a timely manner, and because the Resolution was adopted in disregard of identified, substantial impacts upon human health and the environment, without preparation of an environmental impact statement. CP 1617-31.

1. **The Department’s untimely SEPA threshold determination merely justified the fluoridation expansion plan decided upon by the Health Director in 2001.**

SEPA’s procedures promote the policy of fully informed decision making when government bodies undertake actions significantly affecting the quality of the environment. *Norway Hill Preservation & Protection Ass’n. v. King County Council*, 87 Wn.2d 267, 272, 552 P.2d 674, 677 (1976) (citing RCW 43.21C.010, RCW 43.21C.030). In support of that policy, the Department of Ecology’s regulations require that a threshold determination be made at “the earliest possible point in the planning and decision-making process, when the principal features of a proposal . . . can be reasonably identified.” WAC 197-11-055(2).

The Health Director was on record as early as July 2, 2001, that the Department intended to expand fluoridation in Pierce County: “At this point the single most effective approach would necessitate getting our local water systems fluoridated” CP 1362. However, the SEPA threshold determination process was not commenced until a year later. CP 1475.¹⁴

¹⁴ In the meantime, the Department publicly repeated its commitment to expanded fluoridation. For example, Board member Ladenburg endorsed fluoridation at the Pierce County Oral Health Summit held by the Department on September 21, 2001. CP 1699, 1701. And later, in March 2002, the Health Director was reported to favor mandating fluoridation because it was more “expedient” than allowing a public vote and then wrote a guest editorial which illustrated his intent to implement fluoridation on a fast track: “Fluoride is safe and effective and will help a whole lot of people. Let’s just do it!” CP 1688-89, 1701.

The Washington Supreme Court has made it abundantly clear that SEPA demands an environmental review early in the planning process, *before an agency becomes fixed on its course*:

Even a boundary change . . . may begin a process of government action which can “snowball” and acquire virtually unstoppable administrative inertia. *See* Rodgers, *The Washington Environmental Policy Act*, 60 Wash. L. Rev. 33, 54 (1984) (the risk of postponing environmental review is a “dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds”). Even if adverse environmental effects are discovered later, the inertia generated by the initial governmental decisions (made without environmental impact statements) may carry the project forward regardless. When government decisions may have such snowballing effect, decisionmakers need to be apprised of the environmental consequences *before* the project picks up momentum, not after.

King County v. Wash. State Boundary Review Board, 122 Wn.2d 648, 664, 860 P.2d 1024, 1033 (1993).

From the time the Health Director proclaimed the Department’s intention to expand fluoridation, the momentum for fluoridation grew and became so strong that no countervailing force could dampen or slow it down. The momentum was so strong that, even after the June 5, 2002 decision to engage in the SEPA process, the Department’s attorneys wrote a three-page letter to one water purveyor stating the Department’s legal theory for mandating fluoridation, and then followed that up with another three-

page letter to the Pierce County Auditor admonishing her to deny the water purveyor's anticipated request to put the question of fluoridation to an advisory vote. CP 1771-73, 1461-63.

An early SEPA threshold determination is critical to ensure objective planning and decision-making that carefully considers environmental values. *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978); *Stempel v. Dept. of Water Resources*, 82 Wn.2d 109, 117-18, 508 P.2d 166, 171 (1973); WAC 197-11-055(1); Washington State Department of Ecology Handbook Pub. No. 98-114 at 118 (Sept. 1998) (“Environmental review of a proposal should be incorporated into the *entire planning process*. Documentation of this review should be issued with the *draft planning document . . .*”) (emphasis added); Richard L. Settle, *The Washington Environmental Policy Act: A Legal and Policy Analysis* § 13.01 (noting that courts recognized early that SEPA's policies could be thwarted by “official nonchalance” and provided for “rigorous” process requirements).

One of the most important reasons for requiring a threshold determination at the earliest possible time in the planning process is to promote early decision-making that does not rank economic or technical considerations above environmental considerations. RCW 43.21C.030(2)(b); WAC 197-11-310; WAC 197-11-784; *Norway Hill*, 87

Wn.2d at 272, 552 P.2d at 677. However, contrary to SEPA's prohibition on decision-making based solely on economics or feasibility, the Department decided to mandate expanded fluoridation simply because it was less costly and easier to implement than several alternatives. CP at 1365.¹⁵ Moreover, the Department felt compelled to rush through the SEPA process in order to protect funds solicited from the Washington Dental Service Foundation. CP 1474.

Once committed to fluoridation, the Department devoted substantial time and resources to its implementation, demonstrating a perfect example of "project momentum" that leads to bias in a threshold determination. The Department held several meetings with water purveyors, hired an engineering firm to analyze costs, paid for an opinion survey, solicited grant money, drafted letters of intent for purveyors to sign by May 22, 2002, researched and presented reports on legal and medical issues, and developed an implementation plan for presentation at the June 2002 Board meeting. CP at 1721, 1748-57, 1441, 1428-55, 1419-20, 1471-73, 1375, 1383-86, 1414-17, 1457, 1712-20.

¹⁵ The Department decided against a plan to mandate that all Pierce County dentists see children who were on Medicaid (apparently due to the dentists' unwillingness to cooperate and threats to litigate to prevent adoption of such a plan), and rejected hygiene campaigns, providing dental sealants and fluoride varnishes or rinses to high-risk children, on the basis of costs. CP 1695, 1759.

The environmental analysis cannot be a justification or a recordkeeping exercise, *see* Settle, *supra*, § 11.01[4], yet those are clearly the only two purposes served by the Department's threshold determination in this case. Staff comments to the Board just prior to the vote requiring the SEPA environmental analysis (that the Department "will come back to you with a modified [Implementation Plan] once SEPA has been performed;" answering a Board concern that a delay would put grant money at risk by assuring them that the SEPA process would move forward expeditiously and that it was not anticipated that funding would be impacted by the SEPA process) illustrate the Department's impermissible intentions. CP 1472, 1474.

Here, the Department commenced the SEPA threshold determination at least a year after the Department first decided that fluoridation should be mandated, during which time Department staff devoted considerable time, money and political capital to carrying out its decision to expand fluoridation. In so doing, the Department ensured that, no matter what the threshold determination process revealed in terms of

environmental or human health impacts, the political and economic momentum would preclude appropriate consideration of such effects.¹⁶

Due to the Department's failure to comply with SEPA's requirement that the threshold determination be commenced by or before July 2002, and the bias resulting in a determination of nonsignificance, the Department's SEPA environmental review and threshold determination of nonsignificance should be disregarded and the Department should be ordered to perform a full environmental impact study.

2. Given demonstrated environmental and human health impacts, the Department was required to prepare an environmental impact statement prior to adoption of the Resolution.

"SEPA requires that governmental agencies prepare environmental impact statements on 'major actions having a probable significant, adverse environmental impact.'" *Kucera v. State*, 140 Wn.2d 200, 214, 995 P.2d 63, 70 (2000) (quoting RCW 43.21C.031(1)). Not every government action requires preparation of an environmental impact statement ("EIS"), however. "If an agency determines an action will not have a significant adverse effect upon the environment, it may issue a determination of non-significance, or DNS." *Id.* The process of determining whether a project is

¹⁶ The fact that the Department's environmental review was biased gives added weight to the City's argument, subsection (2), *infra*, that the negative threshold determination was clearly erroneous.

likely to have a “probable significant adverse environmental impact” requiring preparation of an EIS is referred to as a “threshold determination.” *Anderson v. Pierce County*, 86 Wn. App. 290, 301, 936 P.2d 432, 438 (1997); *Sisley v. San Juan County*, 89 Wn.2d 78, 83, 569 P.2d 712, 715-16 (1977).

Because SEPA’s full disclosure policies may be thwarted whenever an incorrect threshold determination is made, the scope of judicial review of a “negative threshold determination” or DNS is extremely broad. *Asarco Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 700-01, 601 P.2d 501, 512 (1979); *Sisley*, 89 Wn.2d at 85, 569 P.2d at 716; *Norway Hill Preservation & Protection Assoc. v. King County*, 87 Wn.2d 267, 273-74, 552 P.2d 674, 677-78 (1976). A negative threshold determination is reviewed under the liberal, “clearly erroneous” standard. *King County v. Wash. State Boundary Review Board*, 122 Wn. 2d 648, 661, 860 P.2d 1024, 1031 (1993); *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137, 141 (2002). Under this standard, the court must do more than “merely determine whether there is substantial evidence to support” the DNS. *Sisley*, 89 Wn.2d at 84, 569 P.2d at 716; *Boehm*, 111 Wn. App. at 718, 47 P.3d at 141. Instead, the court must review the “entire record” in light of “the public policy and environmental values of SEPA,” and decide whether “environmental factors

were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.” *Sisley*, 89 Wn.2d at 84, 569 P.2d at 716; *Boehm*, 111 Wn. App. at 718, 47 P.3d at 141-42; *Pease Hill Community Group v. County of Spokane*, 62 Wn. App. 800, 810, 816 P.2d 37, 42 (1991). The court must also evaluate whether the DNS was “based upon information reasonably sufficient to determine the environmental impact of [the] proposal.” *Boehm*, 111 Wn. App. at 718, 47 P.3d at 142; *Anderson*, 86 Wn. App. at 302, 936 P.2d at 439; *Pease Hill*, 62 Wn. App. at 810, 816 P.2d at 43. A DNS should be overturned when “the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Boundary Review Board*, 122 Wn.2d at 661, 860 P.2d at 1031-32; *Norway Hill*, 87 Wn.2d at 274, 552 P.2d at 678. The purpose of this broad standard of review is to “ensure that an agency, in considering the need for an EIS, does not yield to the temptation of expediency thus short circuiting the thoughtful decision-making process contemplated by SEPA.” *Asarco*, 92 Wn.2d at 700, 601 P.2d at 512.

In deciding whether an EIS is warranted, the SEPA regulations require an agency to consider whether the proposed action “may to a significant degree” affect endangered or threatened species or their habitat; affect public health or safety; or involve unique and unknown risks to the

environment. WAC 197-11-330(3)(e)(ii), (iv) (emphasis added). Because each of these significance factors is present in this case, the Department's determination of non-significance was "clearly erroneous."

Both in the environmental review process and in its Motion, the City included extensive discussion of the effects of fluoridation upon human health, as well as upon threatened and endangered fish. As to human health, the City pointed out that epidemiological studies have found a correlation between fluoridation of water supplies and various forms of cancer, including cancers of the oral cavity and pharynx, colon and rectum, hepato-biliary and urinary organs, and bones. CP 1580-82, 1233-41, 1244-61. The City also pointed out numerous studies finding a relationship between fluoridated drinking water and hip fractures. CP 1582-83, 1274, 1282-84, 1286-89, 1291, 1293-94, 1296-1303. Finally, the City cited to numerous studies linking fluoride exposure to adverse neurological effects, including brain damage and behavioral problems. CP 1583, 1274-75.

The City also discussed the uncertainties regarding the effects of the discharge of fluoridated water upon threatened and endangered fish species. CP 1583-85, 1200-01, 1305-07, 1309-26, 1346-51, 1353-60.

In view of the entire record, including numerous scientific studies submitted in the public comment period suggesting positive associations

between long-term ingestion of fluoridated drinking water and serious health effects, the Department's determination that fluoridation posed no significant risks to public health was clearly erroneous. Moreover, the record demonstrated the existence of "unique and unknown risks to the environment," requiring preparation of an EIS under WAC 197-11-330(3)(e)(iv). The DNS should be set aside, and the Department should be ordered to prepare an EIS reviewing these risks.

IV. CONCLUSION

The Superior Court's Order Granting Defendant's Motion For Summary Judgment and Denying Plaintiffs' Cross-Motions For Summary Judgment should be reversed. Because the Resolution, by mandating the fluoridation of the public water supply, unconstitutionally burdens individuals' rights to refuse unwanted medical treatment and to preserve their bodily integrity, and because the scheme for selecting the Tacoma-Pierce County Board of Health violates Article I, sections 12 and 19, of the Washington Constitution, declaratory judgment should be issued invalidating the Resolution, and an injunction should be issued prohibiting the Department from enforcing it. However, even if the Resolution is not void for these reasons, it was adopted in violation of SEPA, and the Department should be ordered to prepare a full environmental impact

statement prior to readoption and enforcement of the fluoridation
mandate.

RESPECTFULLY SUBMITTED this 30th day of April, 2003.

DIONNE & RORICK

**By: Clifford D. Foster Jr., WSBA #9523
Jeffrey Ganson, WSBA #26469
Attorneys for City of Bonney Lake**

g:\bonlk\077a\30422appealbrief.pld.doc