THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT

NO. 01-E-092

JUNE BALKE, MARK ROBERT, ALFRED M. GREER, JR., MARK E. HADLEY, THOMAS H. UPHAM, DAVID LARIVIERE, CAROLYN S. ATKINS, JEFF BELAND, ADRIEN E. ROY, EDWARD J. SMITH, DR. PATRICIA J. HECHT, ALBERT H. ROUX, JR., KATHERINE E. BANTIS, JANET MARCOUX, GEORGE SIDERIS, GLENDA BASINOW, DAN ZIARNIK, PETER J. PARKEY AND DAVID N. HEINLEIN,

PLAINTIFFS[1]

V.

CITY OF MANCHESTER, DEFENDANT

OPINION AND ORDER

LYNN, J.

The plaintiffs in this action are nineteen individuals who reside either in Manchester or in the surrounding towns of Auburn, Bedford, Goffstown, Hooksett and Londonderry. They seek declaratory and injunctive relief[2] against the defendant City of Manchester (City) arising out of the Manchester Water Works' (MWW) allegedly unlawful action in implementing a water fluoridation program through the addition of a substance known as hydrofluorisilic acid (hereinafter "HFS") to the public water supply serving Manchester and portions of the other towns.

[1] The petition as originally filed also named Lloyd Basinow as a plaintiff. By subsequent motion, to which the defendant did not object, Mr. Basinow was removed as a plaintiff. See Doc. #14.

[2] The plaintiffs' original petition also contained a claim for damages. See Petition, count VIII. By subsequent assented-to motion, plaintiffs withdrew counts VII and VIII of the petition. See Doc. #14. Consequently, there is no longer any claim for damages pending before the court.

Plaintiffs contend that HFS is an industrial waste product which, among other components, contains measurable quantities of arsenic and lead. The matter comes before the court at this time on the parties' cross motions for summary judgment.

I.

For a moving party to prevail on a motion for summary judgment, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits filed, [must] show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (1997). In ruling on the motion, the court must construe all materials submitted in the light most favorable to the nonmovant. Metropolitan Prop. & Liab. Ins. Co. v. Walker, 136 N.H. 594, 596 (1993). However, the party opposing the motion "may not rest upon [the] mere allegations or denials of his pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV; Gamble v. University of New Hampshire, 136 N.H. 9, 16-17 (1992); ERA Pat Demarais Assoc's. v. Alex. Eastman Foundation, 129 N.H. 89, 92 (1986). A dispute of fact is "genuine" if "the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party," and "material" if it "might affect the outcome of the suit." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)(construing analogous language of Fed.R.Civ.P. 56); accord. Horse Pond Fish & Game Club v. Cormier, 133 N.H. 648, 653 (1990).

Where the nonmoving party bears the burden of persuasion at

trial, it must "make a showing sufficient to establish the existence of [the] element[s] essential to [its] case" in order to avoid summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the moving party bears the burden of persuasion at trial, it must support its position with evidence "sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." Lopez v. Corporacion Azucarera de Puerto Rico, 938 F.2d 1510, 1516 (1st Cir. 1991).

II.

Most of the pertinent facts are undisputed, but in those instances where factual disputes do exist, I recite the respective assertions of the parties as reflected in the record. The MWW was established by a special act of the legislature in 1871 and has operated as a department of the City since that time. In addition to providing water service to residents and businesses in the City, beginning in approximately the 1920s, MWW extended its water distribution system to include areas outside the city limits of Manchester. At the present time, MWW has direct retail customers (i.e., residential or business properties that are connected to the MWW pipeline system) in the towns of Auburn, Bedford, Goffstown, Hooksett and Londonderry. MWW also has entered into wholesale water contracts with the town of Derry, the Grasmere Water Precinct, the Central Hooksett Water Precinct and Pennichuck/Consumers New Hampshire Water Company. These wholesale customers in turn provide water service to their own respective retail customers in Bedford, Derry, Goffstown, Hooksett and

Londonderry.

Because an MWW "customer" (either wholesale or retail) simply means a "connection" to its pipeline system, there is no easy way to correlate the number of customers with the actual number of consumers of MWW water. A "connection" may vary from a single family home to a duplex, a large apartment complex, or a commercial establishment. Despite this difficulty in correlating connections with consumers, the parties appear to agree that MWW provides water service to over ninety-nine percent (99%) of the residents of the City. There also is only a relatively slight divergence between the parties with respect to the percentage of MWW's total "connections" which are located outside the city limits: plaintiffs claim that the satellite towns account for approximately 28% of such connections, whereas the City contends that the figure is closer to 23%.

A more significant disagreement exists with respect to the parties' projections as to the percentage of the population served by MWW in each of the satellite towns. Based on demographic information and information supplied by the New Hampshire Department of Environmental Services (DES), the City estimates that these percentages range from a low of 4.7% for the town of Auburn to a high of 44.1% for the town of Derry. Plaintiffs, on the other hand, proffer an analysis prepared by an architect they have retained as an expert, who opines that the percentages range from 8% for Auburn to 57% for Hooksett.

Following a public hearing conducted by the City pursuant to

RSA 485:14 (2001), a question was placed on Manchester's 1999 municipal election ballot asking the voters to decide whether the City's public water supply should be fluoridated. By a margin of 11,594 to 10,938, the vote was in favor of adding fluoride to the water supply. No similar public hearings or referendums were held in any of the other towns which are serviced by MWW, although MWW did notify officials of these towns of its plans to fluoridate the water.

The City actually began adding HFS to the water supply as of December 19, 2000. Prior thereto, in June 2000, the City obtained approval of its fluoridation plan, including the use of HFS, from DES pursuant to RSA 485:8 (2001). In order to implement the fluoridation program, the MWW expended approximately $75,000.00 - $80,000.00 for capital improvements and the purchase of quantities of HFS. While there is no dispute that HFS does contain small quantities of arsenic and lead, it also is undisputed that the quantities of these materials are so minute that they do not exceed the maximum contaminant levels (MCL) for the materials established under federal and state regulations. In addition, the City also asserts that, because the cost of "pure" fluoride is prohibitively expensive, HFS is the substance most commonly utilized by public water systems around the country as the means of adding fluoride to drinking water. While disputing the City's contention that the cost of pure fluoride is excessive, plaintiffs do not dispute that HFS is widely utilized as the means of adding fluoride to public water supplies throughout the country.

III.

In their six count petition, the plaintiffs allege that (1) the City violated RSA 485:14 by introducing fluoride into the public water system without obtaining approval of the voters in the municipalities other than Manchester which are served by MWW (count I); (2) by failing to provide a hearing and a referendum vote on fluoridation to communities other than Manchester, while allowing such vote to its own citizens, the City violated the "consent of the governed" and the equal protection clauses of the New Hampshire Constitution (count II); (3) the ballot question as specified by statute violates plaintiffs' rights under part I, article 1 and the due process and equal protection clauses of the state constitution, by failing to allow voters to specifically consider whether they desire the addition of HFS as the vehicle through which fluoride would be added to their water and by failing to allow the voters to revisit the question of adding HFS more frequently than once every three years (counts III, IV and V); and (4) the addition of HFS to the water supply violates RSA 485:19, which makes it a criminal offense to knowingly and willfully add any "offensive material" to a water supply "in such a manner as to effect the purity of the water" (count VI). Because I conclude that plaintiffs' statutory claim as asserted in count I is meritorious and has the potential for affording them complete relief, I find it unnecessary to address plaintiffs' other claims at this time. See Appeal of Tancrede, 135 N.H. 602,

604 (1992); State v. Hodgkiss, 132 N.H. 376, 379 (1989) (noting "the strong public policy against reaching a constitutional issue in a case that can be decided on a nonconstitutional ground"); cf. Soares v. Town of Atkinson, 129 N.H. 313, 316 (1987) (refusing to address constitutional issues that may have become moot in light of amendments to zoning ordinance).

RSA 485:14 (2001) provides that:

> No fluorine shall be introduced into the water of any lake, pond, reservoir or stream tributary from which the domestic water supply is taken unless and until the municipality using said waters has held a public hearing as to the introduction of fluorine into the public water supply of said municipality, and the voters of such municipality have approved such action pursuant to RSA 44:16 or 52:23.

RSA 44:16 (1991), 52:23 (1991), and 31:17-a (2000)[3] establish the procedures by which voter approval must be obtained in cities, village districts and towns, respectively. The text of RSA 44:16 is representative of the language found in the other two statutes; it states:

> Upon the written application of 10 percent of the voters in any city, presented to the city clerk prior to the municipal election, the city clerk shall insert on the ballot to be used at said election the following question: "Shall permission be granted to introduce fluorides into the public water system?" Beside this question shall be printed the word "yes" and the word "no" with the proper boxes for the voter to indicate his choice. If a majority of the voters at said election do not approve the use of fluorides in the public water system for said city, no fluorides shall be introduced into the public water system. If fluorides have, prior to said vote, been so introduced, such use shall be discontinued until such time as the

[3] RSA 31:17-a (2000) apparently was inadvertently omitted from the text of RSA 485:14.

> voters of the city shall, by majority vote, approve the use of such fluorides. After such popular referendum, the city clerk shall not insert the aforementioned question relative to the use of fluorides in the public water system on the ballot to be used at the municipal election for a minimum period of 3 years from the date of the last popular referendum, and only upon written application at that time of not less than 10 percent of the registered voters of said city.

The plaintiffs contend that, under the plain language of RSA 485:14, each of the satellite towns whose residents receive water supplied by MWW is a "municipality using said waters," and therefore must hold a public hearing and a referendum before fluoride can be added to the waters of its residents. The City advances several arguments in opposition to this construction of the statue. First, it relies on an Opinion of the Attorney General which concludes that RSA 485:14 only mandates a referendum by the "core community" serviced by a public water system and therefore does not require voter approval from towns with inhabitants that receive water as contract customers of MWW. As noted in my earlier ruling on plaintiffs' application for a preliminary injunction, the Attorney General's Opinion is entitled to little weight since it is completely devoid of supporting legal analysis, reference to legislative history of the statute, citation of historical precedents, etc. Moreover, the statute obviously does not contain anything remotely approaching a "core community" limitation, and for me to insert such language into it would go far beyond the proper bounds of judicial authority. See, e.g., Labor Ready Northeast, Inc. v. Department of Labor, No.

2001-489 (N.H.Sup.Ct. May 23, 2002), slip op. at 2 ("We will not consider what the legislature might have said or add words that the legislature did not include.").

The City next argues that instead of the "municipality using said waters" language, the proper focus of the court's inquiry in construing the statute should be upon the word "taken." In essence, the City asserts that, since Manchester is the municipality that "takes" water from Lake Massabesic which is used for the MWW water supply, only Manchester is required to comply with the terms of RSA 485:14. Not only is the use of the passive tense "is taken" inconsistent with the notion that the "taking" (rather than the "using") was intended to be the operative act which triggers the statute's application, but this construction also makes no sense in light the fact that all parties (as well as the Attorney General) appear to agree that RSA 485:14 is not limited to municipal water suppliers. Thus, under the City's theory, if it was a privately owned water company rather than a municipally owned one which "took" the water from Lake Massabesic, presumably no referendum at all would be required -- a result completely at odds with the concession that the statute covers both municipal and privately owned suppliers of water to the public. The statute also cannot sensibly be construed to mean that only the municipality <u>where</u> the "taking" of water occurs is required to comply with the hearing and referendum requirements. Such a construction would mean, for example, that if the point at which MWW's pipeline taps into Lake Massabesic was in the town of

Auburn rather than in Manchester, only the voters of Auburn would be granted a public hearing and a referendum on fluoridation, even though Manchester residents comprise by far the greater number of users of the water taken from the lake.

The City also argues that allowing the satellite towns to vote on whether MWW should fluoridate its water would effectively remove MWW from the control of the City and convert it into something akin to a cooperative school district. See RSA ch. 195 (1999 and Supp. 2001). According to the City, such a result would be at odds with the intent of the legislature as expressed in RSA 38:14 (2000), which specifically contemplates that a municipal utility may operate outside its territorial boundaries subject only to regulation by the public utilities commission. See Blair v. Manchester Water Works, 103 N.H. 505 (1961) (holding that merely because MWW provided service to certain portion of Bedford did not give the public utilities commission authority to compel MWW to expand to other areas of Bedford). Again, however, this argument breaks down when it is remembered that RSA 485:14 is not limited to municipal water systems. A privately owned water system is not generally subject to the control of any municipality, yet the parties concede that even a privately owned water company would have to follow the dictates of RSA 485:14 before it could fluoridate its water supply. Under the City's construction of the statute, if a private water company (Pennichuck, for example) that serves several towns and has roughly equal customers or connections in each one wished to

fluoridate its water, how would it be decided which town was the "core community" wherein the hearing and referendum would be held? In my view, the difficulty in providing a reasoned answer to this question strongly supports the thesis that RSA 485:14 should be interpreted to mean what it says -- that before a public water supply which is used within a municipality may be fluoridated there must be a hearing and referendum in <u>that</u> municipality. It necessarily follows that where a single supplier services more than one municipality, there must be a hearing and vote in each of said municipalities.

Although I believe that this construction of the statute is the one most faithful to the legislative intent to allow direct voter input before a public water system can be fluoridated, I acknowledge that such construction creates difficulties of its own. First, because fluoridation is an all or nothing proposition, i.e., either <u>all</u> water supplied by MWW is fluoridated or none of it is, requiring a referendum in each municipality which receives MWW water effectively gives the voters of any one town the power to veto fluoridation on a system wide basis, even though the town in question may have only a small minority of the total population entitled to vote on the question.[4] Second,

[4] Because residents of Manchester were given an opportunity to vote on the issue of fluoridation, I agree with the City that those plaintiffs who are Manchester residents have no standing to seek relief under count I of the petition. Nonetheless, the inability to supply fluoridated water to only a part of the MWW system will mean that, under the present statutory scheme, the Manchester plaintiffs will benefit from the relief granted to the plaintiffs who are residents of the satellite towns.

because the statute casts the "municipality" as the relevant voting unit, it carries the very real potential of allowing all voters within a jurisdiction to have a say on issues that are of interest to only a small minority. For example, it is not at all clear that the public interest is furthered by allowing all the voters of Auburn to decide whether the roughly 4% to 8% of the town's citizens who are serviced by MWW should have fluoride added to their water. Third, because some of MWW's indirect customers are residents of village district water precincts, which are located within the boundaries of a larger municipality, such customers arguably would be entitled to vote twice on the fluoridation issue, once as a resident of the municipality and a second time as a resident of the village district.

The problems identified above plainly reveal that, although the legislature clearly desired to give public water supply users a direct voice in the fluoridation decision, it never specifically contemplated the possibility that a water supplier would serve more than one community. Under these circumstances, and given the additional facts that (1) at least three other inter-jurisdictional municipal water systems in New Hampshire have implemented fluoridation through voting procedures which this decision now calls into question and (2) plaintiffs have produced no evidence showing that they have suffered or are in imminent danger of suffering any adverse health consequences as a result of being supplied fluoridated water, I believe that the legislature should be given the first opportunity to provide a solution to the

various difficulties inherent in the present version of the RSA 485:14 statutory scheme. Only if the legislature fails to act within a reasonable time will it be appropriate for this court to grant injunctive relief. See Claremont School Dist. v. Governor, 142 N.H. 462, 476 (1997) (staying further proceedings in the school funding litigation to give the legislature "a reasonable time to effect an orderly transition to a new system").

The 2001-02 legislature recently adjourned and a new legislative session will not convene until January 2003. It is reasonable to assume that the legislature will require at least until the end of the 2003 session, or until June 2003, to consider and act upon proposed amendments to the statutory scheme. Furthermore, should the legislature determine to continue with some form of municipality-based voting system,[5] the earliest

[5] Perhaps the easiest way for the legislature to address the problems with the present statutory scheme would be to eliminate municipalities as the voting units for purposes of the fluoridation referendum. Given the nature of the question, instead of having each city, town or village district hold a separate referendum, it would seem to make more sense to allow all users served by the same public water supplier to vote in a single referendum on the question of whether that supplier should fluoridate its water. Of course, even a supplier-specific voting regime will not eliminate the difficulties posed by the fact that some customers of a supplier are wholesalers who resell the water to others and by the fact that more than one person may be a user of water supplied to even a direct retail customer of the supplier. These problems would not appear to be insurmountable, however. They could be overcome, for example, by requiring each "middle man" in the distribution system to furnish the supplier with a listing of its retail connections and by giving each connection a single vote. Additionally (or alternatively), some form of weighted voting system might be developed based upon each "connection's" amount of water usage. See Ball v. James, 451 U.S. 355 (1981) (holding one-person, one-vote principle inapplicable to special purpose elections for governmental bodies

reasonable time thereafter for a referendum in cities such as Manchester would be in connection with the November 2003 municipal elections, and the earliest reasonable time for a referendum in the satellite towns would be in connection with town meetings held in March 2004.

IV.

For the reasons stated above, summary judgment is hereby entered in favor of the plaintiffs and against the defendants on count I of the petition. By no later than April 1, 2004, the defendant City of Manchester shall cease and desist from fluoridating the water supplied, directly or indirectly, to any properties located in the towns of Auburn, Bedford, Goffstown, Hooksett or Londonderry[6] unless (1) prior to April 1, 2004, legislation amending RSA 485:14 and/or RSA 44:16, 52:23 and 31:17-a has been duly enacted into law and the defendant and/or the town(s) in question have fully complied with the terms of such legislation or (2) in the event the legislature fails to amend the existing statutes, the town in question holds a public hearing and

(..continued)
that do not exercise general powers of governance); Sayler Land Co. v. Tulare Water District, 410 U.S. 719 (1973) (same).

Another possible way to address the problem would be to eliminate the referendum requirement altogether as a prerequisite to fluoridation. In this regard, it is important to reiterate that the decision rendered herein expresses no opinion whatsoever on the question of whether a referendum of some kind as a prerequisite to fluoridation is constitutionally required.

[6] Because the present statutory scheme establishes municipalities as the pertinent voting units and because no plaintiff is a resident of Derry, plaintiffs have no standing to enjoin the distribution of fluoridated water to Derry.

a referendum at which a majority of the voters approve the addition

of fluoride to the public waters used in the town.

BY THE COURT:

June 4, 2002

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ROBERT J. LYNN