



Hamilton

INFORMATION REPORT

TO: Mayor and Members Board of Health	WARD(S) AFFECTED: CITY WIDE
COMMITTEE DATE: November 18, 2013	
SUBJECT/REPORT NO: Larviciding Comments In Response to the Municipal Services & Property Taxation on Condominium Properties Audit, Finance & Administration Report (BOH13041) (City Wide)	
SUBMITTED BY: Elizabeth Richardson, MD, MHSc, FRCPC Medical Officer of Health Public Health Services Department	PREPARED BY: Susan Harding-Cruz (905) 546-2424, Ext. 3576
SIGNATURE:	

Council Direction:

On April 10, 2012, the Audit, Finance and Administration Committee received report FCS12020/PW12011 "Municipal Services and Property Taxation on Condominium Properties" concerning municipal services for condominium properties. Following the report, staff were directed to work with the Board of Health Chair, as well as the relevant Standing Committee Chairs to develop a report outlining the costs involved with maintaining condominium catch basins, fire hydrants, larviciding within common areas of the condominium corporations' properties and street lighting; and report back to the Audit, Finance & Administration Committee.

Further, on November 14, 2012, Council adopted and received the minutes from the November 12, 2012 Audit, Finance, and Administration committee meeting which included Item 14, Services & Property Taxation on Condominium Properties (FCS12020(a)) (City Wide) (Item 8.7). This item outlined the following:

- (a) That, in adherence to the proposed Work Plan, attached as Appendix "A" to Report FCS12020(a), respecting Municipal Services & Property Taxation on Condominium Properties, staff be directed to report back to their respective Standing Committees on the following:

- (i) Potential options and costs involved with maintaining condominium catch basins, fire hydrants, larviciding within common areas of the condominium corporations' properties and street lighting.
- (b) That staff be directed to prepare a final, comprehensive Information Report to the Audit, Finance & Administration Committee, subsequent to reports of all Departments being considered by their respective Standing Committees, to provide an overview of who has done what in each category.

This Information Report is to provide the Board of Health with Public Health Service's response concerning the issues related to providing services for condominium properties, specifically larviciding within common areas of condominium corporations' properties.

Information:

It is anticipated that larviciding within common areas of condominium properties would involve the monitoring and treatment of catch basins, but could also extend to include some surface water treatments.

Issues and implications of providing larviciding services for private condominium properties needing to be considered include:

- Cost of service,
- The public health rationale for larviciding,
- Legal implications or liabilities,
- Larviciding contract issues,
- Ministry of Environment (MOE) permit implications, and
- Comparison to the other 35 Ontario health unit larviciding programs.

Developing a Cost Estimate

To determine costs associated with these services several factors must be considered:

- Obtaining an inventory of condominium properties,
- Locating each catch basin on these respective properties,
- Determining how many properties fall within the City's treatment zone of the urban boundary and settlement areas,
- In this same area, estimating the potential for water to accumulate on condominium properties, and
- Calculating the estimated treatment costs for catch basins and surface waters.

Public Health Services (PHS) and Public Works (PW) have a common need to know the accurate inventory of condominiums and the number and location of every catch basin to provide potential costs for their respective services. PHS requires the inventory of both to be able to calculate the costs required to larvicide each catch basin for the season.

To avoid duplication of work, PHS staff would ask PW to share their inventory information if they proceed with any catch basin services. PW estimates it may cost \$70,000 to obtain the accurate inventory and location information for the number of properties and number of catch basins (their inventory survey and code inspection would include inventories for catch basins but also lighting, hydrants, etc). Geographical Information Services (GIS) staff reviewed the City of Hamilton area and estimate there could be 400 condominium properties but this requires confirmation through a thorough assessment.

Once the number of condominiums and catch basins is known, the calculations for treatment can be forecasted. There are two types of larviciding treatment options for catch basins: single treatment and multiple treatments in a season. Single treatments use methoprene briquettes which provide a range of 90 to 120 days of effective control and cost an average of \$3.55 per catch basin. The other option would be to treat three, four or more times from June to September using methoprene pellets which cost approximately \$1.40 for each catch basin and provides effective control every 21 day cycle of treatment. Conservative annual treatment estimates would be between \$21,300 (briquette) and \$25,200 (pellets), if it is assumed there are 400 condominiums with an average of 15 catch basins at each property. PHS estimated 15 catch basins per property based on a comparison to the number of catch basins at each City Long-Term Care Home (two homes have a total of 36 combined catch basins). Larviciding product costs may also increase based on any new service provider's contract pricing.

If the condominium property locations are known, PHS staff would request GIS staff review soil types and land elevations to provide an estimate of surface water sites that may retain water and may require larviciding. PHS staff would need to groundtruth a sample of the properties by visiting them after rain events to discover if the potential surface water sites were holding water and then monitor those sites for possible treatment. Surface water treatment costs would be forecast based on the potential water sites. Without accurate information, a comprehensive cost estimate is not feasible to calculate at this time.

Public Health Rationale

Larviciding is one possible component of any monitoring, surveillance and control program for West Nile Virus (WNV) in Ontario. Regulation 199/03, Control of West Nile Virus, under the *Health Protection and Promotion Act*, requires that the Medical Officer

of Health perform a local risk assessment to determine what actions are required to control WNV in his/her community. Since late 2002, Hamilton's Medical Officer of Health has endorsed larviciding within the City as a control measure against WNV. PHS contracts a service provider to larvicide municipally owned lands as part of this control program. PHS also enforces By-law No. 03-173, a "By-law to Prohibit and Regulate the Accumulation of Standing Water at Specified Times of the Year between April 1st and October 31st". This by-law applies to both private and public lands.

The City's larviciding program is conducted to try to reduce the risk of human infection from WNV. If any treatment area expansion is to occur, the risk of having a severe infection outcome could be a factor to consider when deciding what properties to add to the City's larviciding program. People with certain medical conditions, such as cancer, diabetes, hypertension and kidney disease are at greater risk for serious illness¹, as are older adults.¹¹ A strategy to expand the larviciding program could be to target the areas in Hamilton where most of this population resides or is located.

PHS does not larvicide any other privately owned lands in the City, through its contractor.

Legal Implications or Comments

Legal Services was consulted and prepared a memo (Appendix A) which states, in part, "The City through the Public Health Services Department can provide a "larviciding service" to the catch basins on condominium property for no charge (covered by property taxes); or on a fee for service basis either at full cost recovery or something less if Council wishes to do so. At the same time, it is not compulsory for City Council to provide such service unless the Medical Officer of Health requires it to be done in order to meet a Public Health imperative."

"Further, if a municipality, in the provision of the larviciding service wishes to put the liability onus of the provision of that service, whether it be on a no charge or additional charge basis, on the condo properties to be larvicided then the municipality should enter into a "Service Agreement" with each of the condominiums receiving the service whereby that condominium agrees to indemnify and save harmless the municipality and any of its employees, agents and contractors. That contract should also include a right of entry to the municipality, its employees, agents and contractors as well as provide for any preparatory requirements or post-larviciding requirements that need to be in place for an effective larviciding program. If the City decides to provide the larviciding service but not to put any additional onus on the condominiums to be served, whether that be for a fee for service or regarding liability, there still should be a "Consent to Entry" for the purpose of the larviciding program executed on behalf of the condominium by the appropriate signing authority of the condominium duly authorized by its Board of

Directors and/or by an individual condo unit owner where the catch basin is located on any freehold property of that condo unit.”ⁱⁱⁱ

Larviciding Contract

Catch basin and surface water treatments are currently contracted services. Procurement was consulted and condominiums can be added to a bid document. Two considerations were noted:

1. Be clear on the estimated quantities and possibly break the estimates to areas on the City map as unit pricing currently includes fuel and extras, and therefore condominium locations could have an impact on pricing.
2. Estimates of the number of catch basins should be accurate to help decide whether condominium treatments should be added to the City estimates or if they should be provided on a separate line to Tender. This would have to be decided at the time of the tender process.

Ministry of Environment (MOE) Permit

MOE does not object and will not require any altering of the permit process provided that the Medical Officer of Health endorses the treatment of condominiums and PHS obtains landowner permission.

Environmental Scan of Ontario Health Units

An environmental scan of the other 35 health units was completed in 2013. Seventeen health units responded (Appendix B). Of those who responded, Ottawa Public Health (OPH) stated that they larvicide condominiums upon signed request from the condominium corporation. OPH stated, “While there is currently no charge to the condo corporation for this service, OPH will be re-evaluating these processes for next season”. At the time this report was prepared, OPH did not respond to a request for additional details about this re-evaluation.

Conclusion

In PHS staff’s opinion, the lack of a public health rationale to add condominium properties to the City’s larviciding program to try to further reduce WNV risk does not warrant the costs required for PW to obtain an accurate inventory of properties and catch basins which PHS would use to calculate accurate larviciding cost estimates, or to expand the current program to solely add condominium properties.

Removal of this item from the Audit, Finance, and Administration Outstanding Business List is pending further direction from Council concerning the requirements to provide services for condominium properties.

APPENDICIES / SCHEDULES

Appendix A – Legal Services Memo
Appendix B – Condominium Larviciding

References

- ⁱ <http://www.cdc.gov/westnile/faq/genQuestions.html#risk>
- ⁱⁱ <http://fightthebite.info/what-is-west-nile-virus/am-i-at-risk-of-wnv-infection/#are-some-people-more-at-risk-than-others?>
- ⁱⁱⁱ October 7 2013 Memo by Dennis Perlin, Solicitor, Legal Services Division, “Larviciding within the Common Areas of Condominium Properties”

REVISED Memorandum

Date: October 7, 2013

To: Susan Harding-Cruz, Program Manager
Public Health Services, Vector Borne Disease
1 Hughson Street North, 3rd Floor

From: Dennis Perlin, Solicitor
Legal Services Division

Subject: Larviciding within the Common Areas of Condominium Properties

PROBLEM STATEMENT:

In November of 2012, City Council passed a Motion entitled “Municipal Services and Property Taxation on Condominium Properties”, wherein City staff were “directed to report back to the respective standing committees” on potential options and costs involved with maintaining condominium catch basins, fire hydrants, larviciding within common areas of the condominium corporation’s properties, and street lighting.” In keeping with that direction, the Board of Health (a Standing Committee of Council) has requested that the Public Health Services Department report to it on larviciding within common areas of the condominium corporation’s properties. In turn, the Public Health Services Department has requested a Memorandum from Legal Services about the “potential legal implications of providing this level of service to this type of private land owner vs. not providing it to any other private land owner, such as apartment complexes, commercial properties, industrial properties, institutions, other government level lands (provincial/federal)”. Currently, the Public Health Services Department only treats City of Hamilton land; however, the Public Health Services Department has been asked to consider including condo catch basins into their larviciding programs. A condo group wishing this service believes they are deserving of that service.

Legal Services was also asked to comment on “whether there are any foreseeable legal issues with the City treating condo catch basins (at no fee) and not expanding this to any other property owner/customer.”

FACTS:

The City of Hamilton Public Health Services Department does have at present a significant larviciding program in the City which it does at the City's cost but it is only carried out on City of Hamilton land. That does include a small number of "rear yard catch basins" involving single residential homes where the catch basin is owned by the City but is located in that private back yard normally with easements for the City to get to and maintain the catch basins. There are about 20 such catch basins treated in the City and beyond that as stated the rest of the larviciding program is to treat City of Hamilton catch basins and surface water only.

LAW:

The applicable law considered in this Memorandum is the *Health Protection and Promotion Act* and Control of West Nile Virus (Larviciding) Regulation 199/03 thereunder; and the *Municipal Act*, Section 10 (1) and (2)(Provision of Services) and section 8(4) (discriminatory provision of service permitted) and Section 391 (charge fees for any service on cost recovery basis) and the *Pesticides Act*.

ANALYSIS:

This analysis addresses the provision of larviciding service to condominium properties on a "legal implication" basis. It does NOT address the issue on a policy basis. Even where larviciding of catch basins on condominium properties is permitted at law, there are many policy issues that should be addressed in terms of whether the service should or should not be provided. I understand that those policy issues will be dealt with by others.

In summary, the legal answer to the question posed in the Problem Statement is "Yes". The City through the Public Health Services Department can provide a

“larviciding service” to the catch basins on condominium property for no charge (covered by property taxes); or on a fee for service basis either at full cost recovery or something less if Council wishes to do so.

At the same time, it is not compulsory for City Council to provide such service unless the Medical Officer of Health requires it to be done in order to meet a Public Health imperative.

That conclusion is reached through the following detailed analysis.

1. The Public Health Services Department of the City of Hamilton is a department within the corporation; i.e., a municipal department providing municipal services
2. The City, subject to certain limitations, can provide any service it wishes to provide to the public and citizens of its community (Municipal Act section 10(1) and (2)); i.e., any service it “considers necessary or desirable for the public”.
3. There are no limitations at law, whether constitutionally, federally, provincially or within the *Health Protection and Promotion Act* or the *Municipal Act* which prevent the municipality from offering larviciding as a municipal service.
4. The municipality can provide larviciding service on private property as part of its power to provide services PROVIDED it has the consent of the owner of that property. It can only provide larviciding service on private property without the consent of the owner if the Medical Officer of Health under the *Health Promotion and Protection Act* and the Larviciding Regulation orders that it be done to decrease the risk of West Nile Virus to persons in Hamilton.
5. A Municipal Council can limit its provision of larviciding service on private property to condominiums if it wishes to do so as the *Municipal Act* does

permit the discriminatory provision of service in that fashion pursuant to Section 8(4) of the *Municipal Act*.

6. A municipality can provide the larviciding service to catch basins on condominium properties at no charge if it so wishes as part of its delivery of municipal services funded by the property tax OR it can provide the larviciding service by way of an additional charge to the Condominium through its “fees and charges” powers under Section 391 of the *Municipal Act*.
7. If a municipality is going to provide larviciding services to Condominium properties on a “fee for service” basis then pursuant to Section 391 the fee must be no greater than that which achieves full cost recovery although it can be something less.
8. The Public Health Services Department can provide that service if the municipality requires it to do so as part of the municipality’s service mandate.
9. The Public Health Services Department does NOT have to provide that service other than as part of a municipal service mandate UNLESS a Medical Officer of Health pursuant to the Larviciding Regulation determines that the condominium catch basins concerned need to be larvicided in the interest of protecting some or all of the citizens of Hamilton from West Nile Virus. In such a situation, the Medical Officer of Health can order the municipality to carry out that larviciding (Regulation 199/03) and, in Hamilton, the Public Health Services Department would carry out that direction because it does provide the larviciding program for the City of Hamilton.
10. Even where the Medical Officer of Health believes the larviciding program needs to be provided and directs the municipality to do so, the municipality could charge a fee for service as commented on previously in this

memorandum or could provide that service at no charge as part of those services funded by the property tax.

11. The commentary within this analysis does not take away from the ability of the Medical Officer of Health pursuant to the Larviciding Regulation 199/03 to direct larviciding on any other private property or, indeed, on any specific condominium property rather than all condominium property where she believes that the West Nile Virus threat is coming from other private property or just one or more condominium properties but not all condominium properties.
12. In addition to the questions already addressed, there are also the legal implications related to the actual carrying out of the service.
13. One such implication is to ensure that the service is done with the appropriate duty of care to ensure it is not carried out in a negligent manner which might result in undue injury or damage to a person or a person's property such as their pets. To that end, a municipality should ensure that its Risk Management Program can handle the provision of that service and that any liability insurance the municipality has will cover the provision of a larviciding service.
14. If the department and/or municipality intend to contract out the provision of that larviciding service then appropriate contracts should be entered into that address the City's liability and preferably indemnify and save harmless the City and the department with respect to the larviciding by the contractor.
15. Further, if a municipality, in the provision of the larviciding service wishes to put the liability onus of the provision of that service, whether it be on a no charge or additional charge basis, on the condo properties to be larvicided then the municipality should enter into a "Service Agreement" with each of the

condominiums receiving the service whereby that condominium agrees to indemnify and save harmless the municipality and any of its employees, agents and contractors. That contract should also include a right of entry to the municipality, its employees, agents and contractors as well as provide for any preparatory requirements or post-larviciding requirements that need to be in place for an effective larviciding program. If the City decides to provide the larviciding service but not to put any additional onus on the condominiums to be served, whether that be for a fee for service or regarding liability, there still should be a "Consent to Entry" for the purpose of the larviciding program executed on behalf of the condominium by the appropriate signing authority of the condominium duly authorized by its Board of Directors and/or by an individual condo unit owner where the catch basin is located on any freehold property of that condo unit.

16. In addition to any contractual issues and permission to enter issues, the other legal implication to be mentioned would be the obtaining of any permits which may be required from the Provincial Government by virtue of the provision of such a program under the *Pesticides Act*. It may be that no such additional permits will be required but that should be cleared with the Province to be sure that that is the case by virtue of the program being offered on condominium property.

CONCLUSION:

In conclusion, as stated in the summary, the City can provide a larviciding service to condo properties if it so wishes and do so at no charge or for an additional charge BUT it is not mandatory that the municipality provide any such service UNLESS the Medical Officer of Health directs the municipality to do so under the *Health Protection and Promotion Act*, and Larviciding Regulation as an action needed to protect the community from West Nile Virus. If the municipality is to provide such service then there are other

legal implications including “Consent to Enter” private property, coverage of liability concerns and permitting under the *Pesticides Act* that need to be addressed.

RESPECTFULLY SUBMITTED

Dennis Y Perlin,
Solicitor

2013 Environmental Scan Ontario Health Units - Larviciding Condominium Properties

	Health Unit	# 1. Larvicide Condominiums (by health unit or by municipality?)		Comments
		YES	NO	
	Responses			
1	Chatham-Kent Public Health		X	
2	Durham Region Health Department		X	
3	Grey Bruce Health Unit		X	No we don't. Mosquito testing in previous years provided information that we do not have adequate numbers of the mosquito species of concern for amplification and spread of the virus to humans.
4	Haldimand -Norfolk (NON-ALPHA MEMBER)		X	We don't larvicide at all, but wouldn't [treat] condos for a variety of reasons (permits, liability, access).
5	Haliburton, Kawartha, Pine Ridge District Health Unit		X	
6	Halton Region Health Department		X	Halton does not treat the CBs located on condominium properties or any other commercial lands.
7	City of Hamilton Public Health Services		X	
8	Hastings & Prince Edward Counties Health Unit		X	If larviciding expanded would need to hire contractor
9	Niagara Region Public Health		X	No. We have talked to the larviciding contractor about adding private properties to their itinerary, but this would require another application to the MOE for them to do so.
10	North Bay Parry Sound District Health Unit		X	
11	Ottawa Public Health	X		Yes - condominiums who submit their request to be included in the WNV prevention program are provided service through OPH's contracted WNV consultant-company. Requests need to come in and be signed by the condo corporation, as they are the only body with the required authorization to service the property as a whole (as opposed to 1 person who wants a catch basin near their home treated). Instead of the traditional 3 rounds of larviciding that are done to all public catch basins, briquettes are used to service these kind of requests. While there is currently no charge to the condo corporation for this service, OPH will be re-evaluating these processes for next season.
12	Oxford County Public Health		X	
13	Peel Public Health		X	
14	Peterborough County-City Health Unit		X	
15	Simcoe Muskoka District Health Unit		X	
16	Toronto Public Health		X	
17	York Region Public Health		X	
	Total Responses = 17			

No Response

1	Algoma Public Health			
2	Brant County Health Unit			
3	Eastern Ontario Health Unit			
4	Elgin-St. Thomas Public Health			
5	Huron County Health Unit Health & Library Complex			
6	Kingston, Frontenac, Lennox & Addington Public Health			
7	County of Lambton Community Health Services Dept.			
8	Leeds, Grenville and Lanark District Health Unit			
9	Middlesex-London Health Unit			
10	Northwestern Health Unit			
11	Perth District Health Unit			
12	Porcupine Health Unit			
13	Renfrew County & District Health Unit			
14	Sudbury & District Health Unit			
15	Thunder Bay District Health Unit			
16	Timiskaming Health Unit			
17	Region of Waterloo, Public Health			
18	Wellington-Dufferin-Guelph Public Health			
19	Windsor-Essex County Health Unit			
Total No Response = 19				
Grand Total = 36				