Finance + Facilities Committee Report BH.04.NOV0918.R17
November 9, 2018

Report To:	**Finance + Facilities Committee, Board of Health**
Submitted by:	**Dr. Nicola Mercer, Medical Officer of Health & CEO**
Subject:	**FOLLOW-UP: INVESTMENT STRATEGY DIRECTION**

RECOMMENDATION(S):

(a) That the Finance + Facilities Committee makes recommendation to the Board of Health to receive this report, as presented, for information.

(b) That the Finance + Facilities Committee makes recommendation to the Board of Health to provide direction to staff on next steps.

BACKGROUND:

Staff provided preliminary information and requested direction about the possible development of an investment policy and procedure for the Board of Health through Finance + Facilities Committee Report BH.04.JUN1418.R15 – Investment Strategy Direction. In response, the Finance + Facilities Committee directed staff to:

1. Obtain a legal opinion on the investment powers of The Board of Health, considering: constating documents, funding agreements and relevant legislation.
2. Examine staff administrative time commitment to put an investment strategy in place or to outsource same with costs; and
3. Find out what other autonomous boards of health are doing with respect to an investment strategy.

This report is provided in follow-up to the preliminary report.

PUBLIC HEALTH AND/OR FINANCIAL IMPLICATIONS:

Follow-up information

1. Legal opinion – a legal memorandum has been provided by Miller Thomson and is attached at Appendix "A" to this report for your information.

   Miller Thomson has provided the opinion that "Given that (a) there are no express prohibitions or restrictions applicable to the investment powers of WDGPH and (b) WDGPH is specifically empowered to generate policies with respect to such matters, it is our opinion that WDGPH is within its right to develop an investment policy that need not fall within the parameters set out in *O Reg 438/97: Eligible Investments, Related Financial Agreements and Prudent Investment*. However, given that the Investment Funds are municipally sourced, our recommendation is that it would be prudent for WDGPH to restrict its investment policy to the parameters set out in said regulation (Johnson, 2018)."

2. Staff administrative time commitment – staff reached out to the Treasurers at the County of Dufferin, County of Wellington, and City of Guelph and received good quality information from all three partners including information on time commitment, providers, methods for tracking investments, and copies of the investment policies and procedures of the organizations. While the staff positions involved in investing activities for each municipality varies, the amount of time spent on these activities is fairly consistent. At both counties, approximately 8 – 10% of one person's time is spent on buying, redeeming, maintaining portfolio spreadsheets, researching, soliciting information from multiple providers, and forwarding transaction info to staff to be posted in the accounting system. At the City approximate 15% of one staff's time is spent doing monthly entries, preparing committee reports, and preparing cash flow analysis to determine the amount of money available to invest. In addition, approximately 5% of a Manager's time is spent doing research and placing investments.

   The City of Guelph and County of Wellington report on investments to Committees of Council twice annually.

3. Staff reached out to other autonomous health units through the Association of Public Health Business Administrators and received four replies. While all four of the health units that replied have policies and procedures governing the use of reserves, only two of the four health units that replied have an investment policy and procedure; two do not.

Suggested next steps

Direction to staff to develop a draft Investment Policy and Procedure for the Board of Health based on the policies of the municipal partners and to bring this policy to the March Finance + Facilities Committee for discussion.

APPENDICES:

Appendix "A" – Legal Memorandum: Review of the investment powers of the Board of Health for the Wellington-Dufferin-Guelph Health Unit

REFERENCES:

Johnson, Trenton and Graham, Robert. (2018) Review of the investment powers of the Board of Health for the Wellington-Dufferin-Guelph Health Unit. Legal memorandum.

Original Signed Document on File

Prepared by:	Reviewed by:	Approved by:
Shanna O'Dwyer, Manager, Finance	David Kingma, Director, Administrative Services	Dr. Nicola Mercer, Medical Officer of Health & CEO

MEMORANDUM
Guelph

Private and Confidential

To: The Board of Health for the Wellington-Dufferin-Guelph Health Unit
Attention: Dr. Nicola Mercer

From: Trenton Johnson & Robert Graham
519.780.4651
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Date: October 2, 2018

Subject: Review of the investment powers of the Board of Health for the Wellington-Dufferin-Guelph Health Unit

File: 0067559.0024

A. INTRODUCTION

The purpose of this memorandum is to provide a review of the investment powers of The Board of Health for the Wellington-Dufferin-Guelph Health Unit (also known as Wellington Dufferin Guelph Public Health, and hereinafter referred to as "**WDGPH**") in view of its constating documents, its agreements with its funding providers and the relevant legislation and guidance materials available on the subject.

Specifically, we have been asked to comment on the extent and manner to which WDGPH is empowered to invest the Investment Funds, as defined below.

B. EXECUTIVE SUMMARY

The Constating Agreement (as defined below) of WDGPH, together with its amendments, is silent on the matter of the investment powers of WDGPH. Nonetheless, the most recent iteration of the Constating Agreement, together with the *Municipal Act, 2001*[1] (the "***Municipal Act***") provide that WDGPH is empowered to create reserve funds with its surplus monies.

The *Municipal Act* provides guidance to certain categories of public bodies with respect to the investment of their surplus monies;[2] however, it is silent regarding autonomous Boards of Health ("**autonomous BoH**") which is the board of health ("**BoH**") category to which WDGPH belongs. For clarity, although we acknowledge that *O Reg 438/97: Eligible Investments, Related Financial Agreements and Prudent Investment*[3] may be applicable to regional BoH or municipal BoH (as defined below), in our opinion, it is not applicable to autonomous BoH.

The *Health Protection and Promotion Act*[4] (the "***HPPA***"), under which WDGPH was formed, provides that WDGPH is empowered to create by-laws with respect to the management of its property,

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[1] *Municipal Act, 2001*, SO 2001, c 25 ["*Municipal Act*"].

[2] *O Reg 438/97*, made pursuant to the *Municipal Act*.

[3] *O Reg 438/97*, made pursuant to the *Municipal Act*.

[4] *Health Protection and Promotion Act*, RSO 1990, c H7

banking and finance as well as any other matter necessary or advisable for the management of [its] affairs. By way of example, amongst the autonomous BoH canvassed in Ontario there are investment policies and by-laws which include investment strategies ranging from a conservative level to a medium-risk level.

Given that (a) there are no express prohibitions or restrictions applicable to the investment powers of WDGPH, and (b) WDGPH is specifically empowered to generate policies with respect to such matters, it is our opinion that WDGPH is within its right to develop an investment policy that need not fall within the parameters set out in *O Reg 438/97: Eligible Investments, Related Financial Agreements and Prudent Investment*.[5] However, given that the Investment Funds are municipally sourced, our recommendation is that it would be prudent for WDGPH to restrict its investment policy to the parameters set out in said regulation.

C. FACTS

The facts as we understand them and upon which this memorandum is based are set out below. It is important to advise us as soon as possible if any of the facts set out below are inaccurate or incorrect in any way, as this may have an impact on the conclusions and recommendations set out herein.

1. WDGPH receives funding from various sources, including:

    (a) Provincial funding ("**Provincial Funds**") pursuant to a Public Health Funding and Accountability Agreement (the "**Accountability Agreement**") between WDGPH and the Ministry of Health and Long-Term Care (the "**MOHLTC**"), dated January 1, 2014; and,

    (b) Municipal funding ("**Municipal Funds**") pursuant to an agreement (the "**Constating Agreement**") between The Corporation of the County of Wellington ("**County of Wellington**), The Corporation of the County of Dufferin ("**County of Dufferin**") and The Corporation of the City of Guelph ("**City of Guelph**"), dated April 13, 1967, as amended from time to time. The most recent executed version of said agreement, dated January 23, 1997, does not contemplate the treatment to be afforded to any surplus funds.

2. Pursuant to section 4.5 of the Accountability Agreement, to the extent that WDGPH does not require a portion of the Provincial Funds for its immediate use, such surplus funds must be placed in an interest bearing account in the name of WDGPH at a Canadian financial institution ("**Surplus Provincial Funds**"). All Surplus Provincial Funds must be returned by WDGPH to the MOHLTC at the end of each funding year.

3. To the extent that WDGPH has not required any portion of the Municipal Funds for its immediate use, such surplus funds have been placed into various reserve funds to be utilized by WDGPH for specific purposes (the "**Reserve Funds**").

4. A certain percentage of the monies in the Reserve Funds are available for investment purposes (the "**Investment Funds**").

C. ISSUE

1. What is the extent to which WDGPH is empowered to invest the Investment Funds?

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[5] *O Reg 438/97*, made pursuant to the *Municipal Act*.

D. LEGAL DISCUSSION AND ANALYSIS

1. Formation of the Wellington-Dufferin-Guelph Health Unit & Applicable Legislation

Generally speaking, it is the constating documents of a public body together with its governing legislation that provide guidance as to the public body's powers. Although there are dozens of statutes that affect WDGPH, the most pertinent statutes dealing with the subject matter of this memorandum are the *HPPA* and the *Municipal Act*.

a) *The Constating Agreement*

The Wellington-Dufferin-Guelph Health Unit was created pursuant to the Constating Agreement under the auspices of *The Public Health Act*,[6] which is known today as the *HPPA*. The Constating Agreement names the Wellington-Dufferin-Guelph BoH as the managing body of the Wellington-Dufferin-Guelph Health Unit.

The Constating Agreement does not contemplate the investment powers of WDGPH with respect to its use of Municipal Funds.

b) Municipal Act

The *Municipal Act* provides abundant guidance as to the manner in which a municipality[7] may invest its funds.[8] However, the *Municipal Act* is silent on the subject of whether a BoH or a health unit may likewise do so. The *Municipal Act* provides in subsection 417(1) that a local board (which includes a BoH),[9] may establish reserve funds.[10] Within the same section (subsection 417(3)), the *Municipal Act* states that *"[bodies] exercising a power with respect to municipal affairs under any Act in unorganized territory*" may invest their funds within prescribed limits.[11] Subsection 417(3) of the *Municipal Act* does not mention BoH. In our opinion, the *Municipal Act* is deliberately silent on the matter of how a BoH or a health unit may invest its funds.

c) HPPA

The *HPPA* contains significant guidance as to the construction and governance of BoH in Ontario.[12] For example, BoH, such as the BoH for WDGPH, are considered to be autonomous corporations.[13] Jurisprudence provides that autonomous BoH are "independent bod[ies] not under the control of the governing body of any municipality."[14] They are not statutory agents or servants of the municipality(ies) which they represent despite the fact that their members are the same persons who comprise the municipal council(s).[15] It follows then, that municipal councils cannot interfere with the management and control of the special functions of an autonomous BoH but, rather, they enjoy autonomy with respect to such functions.

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[6] *Public Health Act*, RSO 1960, c 321

[7] Pursuant to the *Municipal Act* at subsection 1(1), a municipality is defined as: "a geographic area whose inhabitants are incorporated" and does not include a board of health.

[8] *Municipal Act* at part XIII and *O Reg 438/97*.

[9] Pursuant to the *Municipal Act* at subsection 1(1) a local board is defined as: "a municipal service board, transportation commission, public library board, **board of health**, police services board, planning board, or any other board, commission, committee, body or local authority **established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities**, excluding a school board and a conservation authority."

[10] *Municipal Act* at subsection 417(1).

[11] *Municipal Act* at subsection 417(3).

[12] *HPPA* at part VI.

[13] *HPPA* at section 52.

[14] *Logan v Hurlburt* (1896) 23 OAR 628 at 644.

[15] *Butler v Charlottetown,* 1943 CarswellPEI 6, 17 MPR 196 [1944] 3 DLR 343 (PEI CA); *Brebner v Andreson* 1957 CarswellAlta 28 [1947] 1 WWR 1009 [1947] 2 DLR 877, affirmed 1948 CarswellAlta 20 [1948] 1WWR 592 [1948] 2 DLR 560 (Alta CA)

The *HPPA* states that autonomous BoH are required to pass by-laws respecting the management of their property, banking and finance[16] as well as any other matter necessary or advisable for the management of the affairs of the board of health."[17] Accordingly, it is our opinion that WDGPH is empowered to establish an internal policy with respect to the investment of its Reserve Funds, generally, and should do so by way of a by-law.

d) Ministry of Health and Long Term Care

Although guidelines or publications of the Ministry of Health and Long Term Care would not likely be determinative on this subject, none have been made available.

2. Categories of Boards of Health in Ontario

There are three categories of BoH in Ontario which include autonomous BoH, regional BoH and municipal BoH. BoH in each category are structured differently and are formed pursuant to differing statutes. Accordingly, BoH in each category are subject to differing legislation which, in turn, impacts the investment powers of each category of BoH. We believe that exploration of the differences between the categories of BoH is useful to assist in understanding the framework of the given legislation as it relates to the investment powers of BoH.

a) Autonomous BoH: There are twenty-five autonomous BoH in Ontario. Autonomous BoH are established under the *HPPA*. The health unit staff of an autonomous BoH operate separately from the respective municipal administrative structure. WDGPH is an autonomous BoH.

b) Regional BoH: There are seven regional municipalities in Ontario that have assumed the responsibilities of a BoH ("**regional BoH**"). Examples of a regional BoH include Durham, Halton, Waterloo and Peel. The health unit staff of a regional BoH operate under the administration of regional government.

c) Municipal BoH: There are four municipal BoH in Ontario, two of which operate independently of a municipal council (City of Toronto and City of Ottawa) and two of which have the municipal council directly acting as the BoH (City of Hamilton and County of Norfolk) ("**municipal BoH**"). Municipal BoH are established under city-specific legislation. The health unit staff of a municipal BoH operate under the municipal administrative structure.

Although it is not the mandate of this memorandum to examine the investment powers of a regional BoH or a municipal BoH, we think it is possible that these categories of BoH may be subject to the *Municipal Act*, and in particular to the investment related regulation to the *Municipal Act*, *O Reg 438/97: Eligible Investments, Related Financial Agreements and Prudent Investment.*[18] With respect to investment powers, we are of the opinion that autonomous BoH are not subject to the *Municipal Act*, nor to said regulation.

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[16] *HPPA* at 56(1)

[17] *HPPA* at 56(1) and 56(2).

[18] *O Reg 438/97*, made pursuant to the *Municipal Act.*

3. Investment policies of autonomous BoH in Ontario

The by-laws and policies of all the autonomous BoH in Ontario were canvassed to determine their policies with respect to the investment of their reserve funds in an effort to provide a framework to WDGPH within which it may establish its investment policy. The findings varied widely.

The autonomous BoH for the Hastings & Prince Edward Counties Health Unit, the Oxford Elgin St. Thomas Health Unit, the Peterborough County-City Health Unit and the Simcoe Muskoka District Health Unit have enacted by-laws which utilize identical terminology, providing their members and/or officers with the power to "invest excess or surplus funds in interest-bearing low risk accounts or short-term deposits."[19] The investment approach of these autonomous BoH occupies the conservative end of the spectrum.

Somewhat more aggressive, the autonomous BoH of Kingston, Frontenac, Lennox & Addington Public Health authorizes its members and/or officers to "invest surplus cash balances to obtain the highest rate of return possible on [such] funds." The policy provides that "[t]he first priorities in considering investment options are the preservation of capital and maintaining sufficient liquidity to meet operating requirements."[20] Similarly, the autonomous BoH for the Middlesex-London Health Unit provides in its governance manual that the "purpose of [its] investment policy is to set out a framework for investing to maximize investment income at minimal risk to capital while meeting the daily cash requirements of [its] board." The keystones of its policy include (a) adherence to statutory requirements, (b) preservation of capital, (c) liquidity, (d) diversification and (e) yield.[21]

The most aggressive policy of those canvassed was that of the autonomous BoH for the Thunder Bay District Health Unit. Its By-Law #2017, dealing with banking and finance, provides its members and/or officers with the power to "invest surplus funds in investment vehicles for the purpose of generating higher returns." Specifically, it authorizes entrance into hedging transactions including "interest rate swap agreements" and "commodity agreements."[22] This suggests that the autonomous BoH for the Thunder Bay District Health Unit is willing to take a high-risk approach with respect to its investment strategy which may not be congruent with the guidelines set out in the regulation to the *Municipal Act*, *O. Reg. 438/97: Eligible Investments, Related Financial Agreements and Prudent Investment*. Although this case study may be an outlier, it lends support to our opinion that the autonomous BoH are neither subject to the *Municipal Act*, nor its regulations, as they relate to the investment powers of an autonomous BoH.

We would be happy to discuss any of the above with you at your convenience.

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[19] Board of Health for the Hastings & Prince Edward Counties Health Unit, *By-Law No. 2016-01 - A by-law to govern the banking, financial activities and duties of the Auditor of the Board of Health*, at section 2.2; Board of Health for the Oxford Elgin St. Thomas Health Unit, *Banking & Finance policy number BOH-FIN-040*, at the Preamble; Board of Health for the Thunder Bay District Health Unit, *By-Law No. 2005-02 - To Provide for Banking and Finance for the Board of Health*, at section 6; and, Board of Health for the Thunder Bay District Health Unit, *By-Law Number 2 - Banking and Finance*, at section 5.

[20] Board of Health of Kingston, Frontenac, Lennox & Addington Public Health, *By-Law, Policy and Procedures Manual - Investments*, at section 50.

[21] Board of Health for the Middlesex-London Health Unit, *Governance Manual - Investment: Financial and Organizational Accountability*, which states:

a) Adherence to Statutory Requirements: All investment activities shall be in compliance with the relevant sections of any applicable legislation, related regulations, and applicable funding agreements.

b) Preservation of Capital: Safety of principal is a primary objective of the investment portfolio. Investments shall be undertaken in a manner that seeks to ensure the preservation of capital in the overall portfolio.

c) Liquidity: The investment portfolio shall remain sufficiently liquid to meet all operating or cash flow requirements and limit temporary borrowing requirements. Furthermore, since all possible cash demands cannot be anticipated, the portfolio shall consist largely of securities with active secondary or resale markets.

d) Diversification: The portfolio shall be diversified by asset class, issuer type, credit rating and by term to the extent possible, given legal and regulatory constraints.

e) Yield: The Health Unit shall maximize the net rate of return earned on the investment portfolio, without compromising the other objectives listed previously. Investments are generally limited to relatively low risk securities in anticipation of earning a fair return relative to the assumed risk."

[22] Board of Health for the Thunder Bay District Health Unit, *By-Law #2017 – 01 - Banking and Finance*, at section 34.