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Massachusetts Attorney General Rejects Local Ban on New Gas and Oil in Building Connections

On July 21, the Massachusetts attorney general ruled invalid a new general bylaw adopted by Brookline, MA, that would have broadly prohibited building permits for new construction and significant renovations to existing buildings if they included new natural gas or oil connections.

When Brookline passed this bylaw in November 2019, it became the first town in Massachusetts to seek through town regulation to reduce carbon emissions by requiring homeowners and developers to install electric heat, hot water and appliances. The city of Berkeley, CA, was the first in the United States to ban natural gas hookups in new buildings last July, and a number of California cities and towns, as well as several other states, have since followed suit.

While the attorney general's ruling invalidated the bylaws, it also made clear that Attorney General Maura Healy was very supportive of Brookline's policy goals. Indeed, early in June, she had petitioned Massachusetts utility regulators to open a proceeding to reexamine the operations of gas utilities during and following the transition by the commonwealth to electrify the heating sector in order to achieve carbon reduction goals.[1]

Brookline's policy goals also were fully supportive of the commonwealth's goal, announced on Earth Day (April 22) to achieve "net zero greenhouse gas emissions" by 2050.[2] The commonwealth's road map to achieve that goal contemplates transitioning both building heating systems and transportation modalities from fossil fuel to electric, with substantially all the electric needs being met by renewable resources.[3]

Notwithstanding this consistency in objectives among the commonwealth, the attorney general and the town of Brookline, the attorney general explained in the ruling that she was compelled under Massachusetts General Laws (G.L.) chapter 40, section 32, to limit her office's review solely to whether the bylaw conflicts with the laws or constitution of the commonwealth. Based on that review, the attorney general concluded that the bylaw conflicted with three uniform statewide regulatory schemes: (1) G.L. ch. 143, § 95(c), which creates the State Building Code and establishes statewide standards for building construction; (2) G.L. ch. 142, § 13, through which the state plumbing board administers the gas code and regulates the construction and inspection of plumbing in the commonwealth; and (3) G.L. ch. 164, through which the Massachusetts Department of Public Utilities regulates the sale and distribution of electricity and natural gas in the commonwealth. The ruling noted that the bylaws would have allowed for potential exemptions from the prohibition but concluded that that factor made no difference in the outcome.

Several other municipalities in Massachusetts, including Cambridge and Newton, had been considering similar bylaw amendments. While the attorney general's review authority extends only to Massachusetts town bylaws and not to city ordinances, the same laws apply to cities, so it is most likely that cities will be unsuccessful in defending any similar city initiative through a new city ordinance before a Massachusetts court.

Developers that are thinking about including fossil fuel infrastructure in their projects should take this proceeding as a cautionary note. This attorney general ruling might delay the transition away from the use of fossil fuels in the commonwealth, but that transition is gaining momentum. Given the commonwealth's objectives, largely shared by the legislature, the governor and the attorney general, the most likely next step for restricting any expansion of the commonwealth's fossil fuel infrastructure will take place next in the state legislature and in further regulations promulgated under existing statutory mandates to achieve a clean energy future for Massachusetts.

[1] Petition of the Mass. Att'y Gen. (June 4, 2020).

[2] See Kathleen A. Theoharides, Determination of Statewide Emission Limit for 2050 (Apr. 22, 2020).

[3] Claire Miziolek, et al., 2050 Roadmap: Building Solutions to Address Climate Change in the Commonwealth (Mar. 27, 2020).

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