



# COMMERCIAL REAL ESTATE INSIGHT & NEWS

The Bowditch & Dewey Real Estate Blog

## Massachusetts' Demonstration Project Takes Flight

BY JOSEPH R. DUQUETTE • DECEMBER 11, 2023

An Act Driving Clean Energy and Offshore Wind (St. 2022, c. 179, § 84) required the Massachusetts Department of Energy Resources (DOER) to establish a demonstration project in which 10 municipalities were selected to adopt and amend general or zoning ordinances or by-laws that require new building construction or major renovation projects to be fossil fuel-free. These municipalities include:

- Arlington
- Lexington
- Brookline
- Acton
- Concord
- Cambridge
- Lincoln
- Newton
- West Tisbury
- Aquinnah

DOER has subsequently promulgated regulations, set forth in 225 CMR 24.00, which recommend that these communities adopt the new Specialized Energy Code as established in 225 CMR 22.00 and 225 CMR 23.00 and also the Model Rule that can be found there. The regulations set forth specific reporting requirements for both participating communities as well as electric and gas utilities to monitor the efficacy of the demonstration project moving forward. To become eligible for the demonstration project in the future, a community must have achieved one of the following

housing eligibility thresholds:

1. The municipality has met the 10% housing affordability threshold set under chapter 40B of the General Laws as of December 21, 2020; or
2. The municipality has been granted safe harbor status; or
3. The municipality has approved a zoning ordinance or by-law that provides for at least one district of reasonable size in which multi-family housing is permitted as of right pursuant to the Executive Office of Housing and Living Communities' guidelines implementing section 3A of chapter 40A of the General Laws.

While the regulations clearly try to strike the appropriate balance between the Commonwealth's housing production goals and its climate initiatives, it remains to be seen whether an effort will be made to bring a case asserting that the federal Energy Policy and Conservation Act (EPCA) preempts the Massachusetts demonstration program.

The 9<sup>th</sup> Circuit concluded earlier this year that the City of Berkeley's ordinance banning natural gas piping within newly constructed buildings was so preempted in *California Restaurant Association v. City of Berkeley*, No. 21-16278. In June, there was a petition for en banc review of the 9<sup>th</sup> Circuit's decision and more than 20 amicus briefs have been filed in support of the petition. Of note, [the Biden Administration submitted an amicus brief](#) stating the following:

“Nothing in EPCA, properly understood, disables a State or locality from exercising its police power to prohibit the use of items that, in its judgment, are dangerous or unsafe... the key point here is that the nation benefits from States and localities experimenting with different approaches to matters within their historical police powers. And the preemption provision in a federal statute about energy conservation standards for covered products does not stand in the way of different localities deciding for themselves whether and how to tackle any number of health and safety concerns identified by local leaders in ways that may have an indirect effect on a consumer's ability to use a covered product in certain circumstances.”

Stay tuned.