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NAVIGATING STATE LAW IN LOCAL CLIMATE ACTION
MASSACHUSETTS

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Vincent M. Nolette, Daniel J. Metzger & Olivia N. Guarna

Columbia Law School, Sabin Center for Climate Change Law
Edited by Amy E. Turner

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Sabin Center for Climate Change Law Columbia Law School
435 West 116th Street
New York, NY 10027
Tel: +1 (212) 854-3287
Email: columbiaclimate@gmail.com
Web: https://climate.law.columbia.edu/
Bluesky: @sabincenter.bsky.social
Blog: http://blogs.law.columbia.edu/climatechange

About the Authors: Vincent M. Nolette is the Equitable Cities Climate Law Fellow at Columbia Law School's Sabin Center for Climate Change Law. Daniel J. Metzger is a Senior Fellow for Smart Surfaces at the Sabin Center. Olivia N. Guarna is the Sabin Center's Climate Justice Fellow. Amy E. Turner is the Director of the Cities Climate Law Initiative at the Sabin Center for Climate Change Law. Part of their work supports the Sabin Center's Cities Climate Law Initiative, which provides resources to efficiently and effectively address legal questions confronting the urban climate transition.

About this Document: This is an excerpt of a longer report, *Navigating State Law in Local Climate Action*, which covers nineteen states. The excerpt below contains the report's introduction, along with information and analysis related only to Massachusetts. The full report, as well as other state-specific reports, are available in Columbia Law School's Scholarship Archive.

INTRODUCTION

Local governments are well-positioned to lead the fight against climate change by reducing community-wide greenhouse gas emissions, promoting renewable energy resources, and otherwise advancing climate mitigation and adaptation goals. Many local governments have already taken actions, and there is more they can do. In taking action to mitigate and adapt to the climate crisis, local governments must be aware of and act consistently with preemptive state laws that limit their authority. This report provides state-by-state information, resources, and analysis for nineteen states on key state-local preemption issues.

1. CROSS-CUTTING THEMES

The courts, constitutions, and statutes of each state handle the balance of power between the state and its local governments differently. But broadly, all seek to offer local governments some degree of autonomy, usually expressed as a variety of "home rule," while preserving ultimate authority in the state itself. The specific ways in which the states wield their authority are similarly varied, but they usually include both instances where the state passes laws that withdraw whole fields from local regulatory authority, and ones in which states broadly regulate in an area but allow local governments latitude to regulate so long as there is no conflict between the two. The sections below provide general background on the kinds of considerations that shape the relationship between states and local governments, and the chapters that follow expand on each in the context of particular states.

2. SCOPE

The states covered in this report are ones within which the authors have ongoing research projects and partnerships. They represent several of the "swing" states that are the most closely politically divided, ones where control of the state is split between political parties, and others—like Texas and Florida—where legislatures have taken particularly noteworthy steps to preempt local climate law. For each state covered, the chapters highlight the sources of local authority to regulate and the limits imposed by the state, including: (1) constitutional and statutory delegations of home rule authority and police powers to local governments; (2) state law governing the nature and content of home rule charters, as well as preemption of local law generally; (3) a catalog of current state laws that may preempt local climate action; (4) leading case law on home rule and preemption of local law; (5) where applicable, information on recent and ongoing litigation; (6) a summary of how the state handles building codes; (7) discussion of legal considerations related to public utilities; (8) helpful secondary sources; and (9) additional relevant information.

Many of the issues presented in each state's preemption case law section in this report arise outside the environmental, energy, and climate context. This is intentional, as case law that specifically discusses climate-related preemption measures is too limited to fully illustrate the doctrines through which courts would likely

consider those cases. We would not be able to explain state-specific preemption doctrines by only examining cases that are topically relevant.

These resources are intended to help local governments, policymakers, city attorneys, academics, advocates, and other stakeholders craft resilient climate policies, anticipate and respond to preemption challenges, and mobilize public engagement. The information provided is not exhaustive—it is intended instead as a starting point and a guide to the topics most relevant to state-local preemption. Links to publicly available versions of the constitutional provisions, statutes, and cases cited are provided where those are available.

3. HOME RULE AND THE POLICE POWER

Determining whether a local government may take a particular action involves a two-part inquiry, asking first whether the locality has the authority to legislate on a given issue, and second whether the state has preempted local governments from exercising that authority. The scope of local governments' authority to legislate is significantly shaped by the extent to which their states have allowed for home rule.

Home rule is a constitutional or statutory delegation of authority from a state to its local governments, permitting them to govern within their jurisdictions and adopt laws, regulations, and policies across a broad range of subjects.[1] In the vast majority of states, this "commitment to local lawmaking capacity [is] codified in [state] constitutions and statutes."[2] The core purpose of home rule is to empower local governments to act independently on local matters, so long as their actions are not inconsistent with state law, the state constitution, or their own home rule charters.[3] Today, all but three states provide some level of home rule—forty-one via the state's constitution and six through statute.[4]

Local action in states without a home rule system is cabined by an approach that was first described by Iowa Supreme Court Chief Justice John Dillon, and which has come to be known as Dillon's Rule. Under that approach, courts considering the scope of local governments' authority recognize only those powers that "are essential to municipal government or that the state has explicitly given to them, including any powers that are necessary for or implied by those explicitly given powers."[5] When Dillon's Rule applies, local governments' ability to regulate is more restricted.

[1] *See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124 (2007) (describing home rule as "a system of state and local relations that gives some degree of permanent substantive lawmaking authority to localities beyond that which was provided by the traditional Dillon's Rule regime."); NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY (2020), https://perma.cc/A3VP-NXZZ.
[2] Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2011 (2018), https://perma.cc/3B53-S66J.
[3] *See* NAT'L LEAGUE OF CITIES, *supra* note 1.
[4] *See* Briffault, *supra* note 2.
[5] *See City of Clinton v. Cedar Rapids & Missouri Railroad Co.*, 24 Iowa 455 (1868).

Home rule's "primary purpose and [] principal effect . . . has been to undo Dillon's Rule" and empower local governments to legislate proactively, without prior state approval.[6] However, even in states with expansive home rule systems, local authority is limited by the almost absolute power of state preemption.[7]

4. PREEMPTION

Broadly speaking, preemption is a legal doctrine that allows the federal or a state government to restrict or eliminate the authority of lower levels of government in a specific policy area.[8] There are three ways a state can preempt local action: (1) expressly through clear statutory language (known as "express preemption"); (2) by demonstrating the state's legislative intent to occupy a whole field of regulation (known as "field preemption"); or (3) by enacting state laws that conflict with local ones (known as "conflict preemption").[9] State governments can employ all or a mixture of preemption methods, depending on the state.

While related, home rule and preemption are distinct legal doctrines. Strong home rule increases baseline local authority but it does not limit a state's power to preempt particular laws or fields of regulation. Further, a municipality is generally only affected by preemption to the extent that its actions cross into areas of state concern. Home rule should be viewed as a source of local initiative, while preemption as a legal boundary.

Many state courts liberally construe home rule authority and avoid finding preemption under certain conditions. A few states, like Ohio, have even reined in state power in order to protect local lawmaking.[10] In *City of Canton v. State*, the Supreme Court of Ohio held that "a state law preempting local regulation cannot merely block local action but must include some substantive replacement regulation."[11] Home rule has developed differently in each state, resulting in a patchwork of fifty distinct and nuanced systems of local power.

5. KEY ENVIRONMENTAL, ENERGY, AND CLIMATE CASES

In most states, there is relatively little preemption case law specific to environmental issues. Where there are cases, they are not broadly applicable because of each state's unique home rule and preemption frameworks. As a result, many of the issues discussed in each state's preemption case law section fall outside the environmental, energy, and climate context. That said, some state courts have decided significant preemption disputes in the environmental, energy, and climate sectors. Even though each state's decisions are not binding on other states, courts in states in which there is little applicable case law may find these examples persuasive:

[6] *See* Briffault, *supra* note 2, at 2012.
[7] *Id*.; Diller, *supra* note 1, at 1126–27.
[8] *See* *Arizona v. United States*, 567 U.S. 387, 398–99 (2012) (explaining the principle of supremacy).
[9] *See* *Holt's Cigar Co. v. City of Philadelphia*, 608 Pa. 146, 153 (2011).
[10] *See, e.g.*, *City of Canton v. State*, 95 Ohio St. 3d 149, 151–52 (Ohio 2002).
[11] *See* Briffault, *supra* note 2, at 2013; *City of Canton*, 95 Ohio St. 3d at 152–53.

- **Buildings:** *Glen Oaks Village Owners, Inc. v. City of New York*, No. 42, 2025 WL 1458090 (N.Y. May 22, 2025) (holding that New York State's climate law, the Climate Leadership and Community Protection Act (CLCPA), does not field preempt Local Law 97, New York City's building performance standards);
- **Oil & Gas:** *Wallach v. Town of Dryden*, 23 N.Y.3d 728 (2014) (holding that New York's Oil, Gas and Solution Mining Law does not preempt local zoning laws that ban oil and gas production activities, including hydrofracking);
- **Renewable Energy:** *Town of Copake v. New York State Off. of Renewable Energy Siting*, 191 N.Y.S.3d 181 (N.Y. App. Div. 3d Dept. 2023) (upholding the discretionary authority of New York State's Office of Renewable Energy Siting to override local restrictions on major renewable energy facilities when such a restriction is "unreasonably burdensome in view of the CLCPA targets and the environmental benefits" of the facility); and
- **Utilities:** *StopAquila.Org v. Aquila*, 180 S.W.3d 24 (Mo. Ct. App. 2005) (holding that state public utilities law does not preempt local zoning law); *PPL Electric Utilities v. City of Lancaster*, 214 A.3d 639 (Pa. 2019) (state public service law field preempted a municipal ordinance that imposed additional controls on state-regulated public utilities for the use of the municipality's rights-of-ways); *Boston Edison Co. v. City of Boston*, 459 N.E.2d 1231, 1234 (Mass. 1984) (holding that local ordinances that regulate utilities are broadly preempted by comprehensive state legislation that occupies the field of utility regulation); *Boston Gas Co. v. City of Somerville*, 652 N.E.2d 132 (Mass. 1995) (holding a local ordinance was preempted by state law governing the sale of gas and electricity by public utilities because the ordinance imposed additional requirements on gas companies that were inconsistent with the state law).

6. THE POLITICS OF PREEMPTION

Preemption exists in every state and, as a legal concept, is content neutral. States have used their preemptive powers across diverse subject matters including, for example, laws that restrict local taxation authority,[12] ones that regulate alcohol ordinances,[13] and others that occupy the field of firework regulation.[14] Historically, preemption "consisted of a judicial determination of whether a local law conflicted with preexisting state law."[15] Over the past two decades, though, state legislatures have aggressively and frequently used preemption to enact sweeping statutes barring "local efforts to address a host of local actions."[16] This trend, sometimes referred to as "New Preemption," is characterized deregulatory action against larger, often progressive cities—either to prevent the enactment of certain ordinances or to retaliate against those already passed.[17] A quintessential example of this style of preemption occurred in 2016, when Alabama enacted legislation preempting local

[12] *See, e.g.*, *Mayor of Ocean Springs v. Homebuilders Ass'n of Mississippi*, 932 So. 2d 44 (Miss. 2006).
[13] *See, e.g.*, *State v. Williams*, 283 N.C. 550 (1973).
[14] *See, e.g.*, *People v. Bahnke*, 2024 WL 647931 (Mich. App. Feb. 15, 2024).
[15] *See* Briffault, *supra* note 2, at 1997.
[16] *Id*.
[17] *See generally* Briffault, *supra* note 2.

minimum wage regulation just two weeks after Birmingham passed an increase.[18] On the climate front, one of the most replicated state preemption laws has been the so called "ban on natural gas bans," which swept through conservative states after Berkeley, California enacted an ordinance prohibiting natural gas piping in new construction in 2019.[19] Recent preemption of local climate-related laws fits squarely within the framework of New Preemption, with conservative-led states increasingly targeting climate-related initiatives led by progressive city governments.

* * *

There is an observable trend towards state governments seeking to preempt local climate-related actions, but how and to what extent states will succeed in that effort depends on specific circumstances and varies significantly by state. The following chapters offer a state-by-state primer on state preemption of local action in nineteen states, with particular attention to climate considerations.

[18] *See* Yuki Noguchi, *In Battle Pitting Cities Vs. States Over Minimum Wage, Birmingham Scores A Win*, NAT. PUB. RADIO (July 27, 2018), https://perma.cc/82SY-KUXS.

[19] Berkeley's ordinance was later repealed after losing a federal preemption challenge in federal court. *See Cal. Restaurant Ass'n v. City of Berkeley*, 89 F.4th 1094 (9th Cir. 2024); BERKELEY, CAL., CITY CODE § 12.80 (repealed by Ord. No. 7907-NS (2024)).

MASSACHUSETTS

1. DELEGATION OF HOME RULE AUTHORITY AND POLICE POWER

Massachusetts has granted local governments relatively broad home rule authority by statute and under Massachusetts' constitution, authorizing local governments to exercise the "right of self-government in local matters." Mass. Const. art. LXXXIX, § 1. Municipalities either with or without a "home rule charter" can enact local laws related to "local matters" so long as they are "not inconsistent with the [state] constitution or laws enacted by" the General Court, Massachusetts' state legislature. Mass. Const. art. LXXXIX, §§ 1, 6. To preempt local authority, the General Court's law must be a "general law" that applies to all municipalities rather than a "special law" applicable to only one municipality. Mass. Const. art. LXXXIX, § 8.

The General Court may only pass "special laws" under certain circumstances prescribed by the Massachusetts Constitution, such as in response to a petition for a special law by the local government itself. This is referred to as a Home Rule Petition. A city or town can file a petition for the General Court to pass a special law pertaining only to that municipality.[20] Even if a local government has the authority to pass a local ordinance on the same subject matter, it might choose to seek a special law because of the certainty that comes with having its policy codified in state law.

Although cities and towns are frequently grouped together in the Massachusetts laws describing home rule, their authority differs in at least one significant way: towns are required to submit their local laws to the state Attorney General for approval, whereas cities can enact ordinances without this added review.[21]

1.1 Constitutional Provisions

Mass. Const. art. LXXXIX, § 1, often referred to as the "Home Rule Amendment," delegates home rule authority to cities and towns that have adopted a charter. The delegation of home rule authority in sections 6 and 8 also apply to non-charter cities. Thus, *all* cities and towns in Massachusetts, regardless of whether they have adopted a home rule charter, have some degree of home rule authority subject to certain limitations.

Mass. Const. art. LXXXIX, § 1: "It is the intention of this article . . . to grant and confirm to the people of every city and town the right of self-government in local matters . . ."

Mass. Const. art. LXXXIX, § 2: This section authorizes cities and towns to adopt or revise a charter, so long as the provisions are not "inconsistent" with the state constitution or laws.

Mass. Const. art. LXXXIX, § 6: "Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court . . . and which is not denied, either

[20] Mass. Gen. Laws ch. 3, § 8A.
[21] Mass. Gen. Laws ch. 40, § 32.

expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three."

Mass. Const. art. LXXXIX, § 7: "Nothing in this article shall be deemed to grant to any city or town the power to (1) regulate elections other than those prescribed by sections three and four; (2) to levy, assess and collect taxes; (3) to borrow money or pledge the credit of the city or town; (4) to dispose of park land; (5) to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power; or (6) to define and provide for the punishment of a felony or to impose imprisonment as a punishment for any violation of law . . ."

Mass. Const. art. LXXXIX, § 8: "The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws" only under certain circumstances detailed in section 8. "This section shall apply to every city and town whether or not it has adopted a charter pursuant to section three."

1.2 Statutory Provisions

Mass. Gen. Laws ch. 43B, §§ 1-20: These sections comprise the Home Rule Procedures Act. This Act reiterates municipal authority to adopt, revise, and amend charters and prescribes procedures by which to do so. The Home Rules Procedures Act, along with the constitutional Home Rule Amendment, are cited as the two main sources of home rule authority.

Mass. Gen. Laws ch. 40, § 21: One of the most sweeping grants of power to local governments is with their so-called police powers: "[Cities and] Towns may . . . make such ordinances and by-laws, not repugnant to law, as they may judge most conducive to their welfare." For example, this includes authority "[f]or directing and managing their prudential affairs, preserving peace and good order, and maintaining their internal police" or "[f]or regulating the inspection, materials, construction, installation, alteration or use of pipes, fittings and fixtures through which gas is supplied within buildings and other structures," among other things. *Id.* § 21(1), 21(18).

Mass. Gen. Laws ch. 40, §§ 1-69: In addition to the police powers, chapter 40 generally defines the powers and duties of cities and towns, such as the power to hold and convey property, make contracts, appropriate money, etc. Generally speaking, "[c]ities and towns shall be bodies corporate, and . . . shall have the powers, exercise the privileges and be subject to the duties and liabilities provided in the several acts establishing them and in the acts relating thereto. Except as otherwise expressly provided, cities shall have all the powers of towns and such additional powers as are granted to them by their charters or by general or special law, and all laws relative to towns shall apply to cities." *Id.* § 1.

Mass. Gen. Laws ch. 40, § 32: "[B]efore a [town] by-law takes effect it shall be approved by the attorney general." This provision does not substantively alter towns' authority to enact local laws (i.e., by-laws). If the Attorney

General disapproves a local law, it must provide the town with its reasoning. The Attorney General's decision is also subject to judicial review.[22]

2. HOME RULE CHARTERS

Massachusetts has fifty cities and 301 towns, many of which have adopted charters pursuant to section 2 of the Home Rule Amendment. In addition to the Home Rule Procedures Act, which provides procedures for adopting and amending city and town charters, chapter 43 of the Massachusetts General Laws further regulates city charters. For example, this chapter addresses topics such as voting, possible governmental structures, procedures for passing ordinances, and more.

City charters construe local power broadly under their home rule authority. For example, the City of Lynn's Charter describes its powers with the following language: "Subject only to express limitations on the exercise of any power or function by a city in the constitution or statutes of the commonwealth, it is the intent and the purpose of the voters of Lynn, through the adoption of the charter to secure for the city all powers it is possible to secure under the constitution and statutes of the commonwealth, as fully and as completely as though each such power were specifically and individually enumerated herein."[23]

3. PREEMPTION OF LOCAL LAW

Local laws that are otherwise properly enacted pursuant to a municipality's home rule authority can still be invalid if preempted by state law. Preemption in Massachusetts occurs when a local ordinance is "inconsistent" with a general state law.[24] Inconsistent ordinances are prohibited by the constitutional Home Rule Amendment and statutory home rule provisions. *See, e.g.*, *Bloom v. City of Worcester*, 293 N.E.2d 268, 276 (Mass. 1973) (analyzing "the meaning of the word 'inconsistent' in § 13 of the Home Rule Procedures Act, and § 6 of the Home Rule Amendment").

In determining whether a local law is "inconsistent" with a general state law, courts require that there be a legislative intent to preempt local law. Although this intent can be express or implied from the circumstances, it must be clear. *Town of Wendell v. Att'y Gen.*, 476 N.E.2d 585, 589 (Mass. 1985).

[22] *See, e.g.*, *Town of Amherst v. Attorney General*, 502 N.E.2d 128 (Mass. 1986).
[23] Lynn, Mass. Charter § 1-4, https://perma.cc/SC8J-F82F.
[24] The Massachusetts Supreme Judicial Court has indicated that this applies to general laws that were enacted before the Home Rule Amendment was ratified, in addition to those passed subsequently. *Bloom v. City of Worcester*, 293 N.E.2d 268, 276 (Mass. 1973).

3.1 Express Preemption

Express preemption occurs when the General Court includes explicit preemptive language in a state law. For example, a Massachusetts bill that passed in 2018 regarding the use of tobacco and nicotine includes expressly preemptive language:

> This act shall preempt, supersede or nullify any inconsistent, contrary or conflicting state or local law relating to the minimum sales age to purchase tobacco products . . . This act shall not otherwise preempt the authority of any city or town to enact any ordinance, by-law or any fire, health or safety regulation that limits or prohibits the purchase of tobacco products.

Mass. Session Law ch. 157, § 22 (2018).

3.2 Field Preemption

Field preemption occurs when a state statute impliedly occupies an entire legislative field, leaving no room for local regulation. *See* *Town of Dartmouth v. Greater New Bedford Regional Vocational Technical High School District*, 461 Mass. 366, 375–76 (2012). Courts can "infer that the Legislature intended to preempt the field because legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose." *Boston Gas Co. v. City of Somerville*, 652 N.E.2d 132, 134 (Mass. 1995).

For example, in *Town of Wayland v. Att'y Gen.*, the court held that local pesticide laws are preempted by the Massachusetts Pesticide Control Act because the "clear language [of the law] demonstrates a legislative intent to occupy the field at the state level in the regulation of the use and application of 'pesticides.'" 2014 Mass. Super. LEXIS 35, at *9 (2014).

3.3 Conflict Preemption

Conflict preemption occurs when a local and state law are in direct conflict with each other. A court may find that a local ordinance is preempted if it is "facially inconsistent" with a state law. *Del Duca v. Town Adm'r*, 368 Mass. 1, 9 (1975). Like with field preemption, courts will look at "whether the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject" to "determine whether a local ordinance is inconsistent with a statute." *Boston Gas Co.*, 652 N.E.2d at 134.

For example, in *Boston Gas Co. v. City of Somerville*, the court held a local ordinance related to street excavation by utility companies was preempted by state law governing the sale of gas and electricity by public utilities because it was inconsistent with the state law by imposing requirements that the state law did not. *Boston Gas Co.*, 652 N.E.2d at 132.

3.4 State Laws with Potential for Local Climate Preemption

Building Codes. Mass. Gen. Laws ch. 40A, § 3: Prohibits local requirements relating to "the use of materials, or methods of construction of structures regulated by the state building code" and "the interior area of a single family residential building." The state building code covers energy in addition to construction requirements, which implicates energy use and efficiency.

Fuel. Mass. Gen. Laws ch. 142, § 2: States that the Fuel Gas Code (sections 1-22) "shall apply to all cities and towns." The code has not been held to field preempt local law but, under Massachusetts preemption principles, local law cannot be "inconsistent" with specific provisions of this state-wide code.

Massachusetts has also passed several laws combatting climate change, one significant law of which is listed below. These laws do not have express preemption clauses and courts have not considered the question of whether these laws would preempt local laws.

Emissions Reduction. Mass. Gen. Laws ch. 21N: The Global Warming Solutions Act directs state agencies to "promulgate regulations regarding sources or categories of sources that emit greenhouse gases in order to achieve the greenhouse gas emissions limits and sublimits and implement the roadmap plans required by this chapter." *Id.* § 6.

An Attorney General's opinion issued in 2020 concluded that the state building code, gas code, and public utility laws may preempt local bans on natural gas. In 2019, the Town of Brookline sought to advance a local law prohibiting natural gas connections in new buildings and, as required by state law, the town submitted it to the Attorney General for approval. The Attorney General's opinion concluded that the local law conflicts with portions of the state building code, gas code, and laws that authorize the Department of Public Utilities to regulate natural gas and is thus preempted. Although this opinion is not binding on cities, it may have a chilling effect on cities interested in adopting a similar ban for fear that a Massachusetts court would come to the same conclusion that the Attorney General did.

4. CASE LAW ON HOME RULE AND PREEMPTION OF LOCAL LAW

Courts have described Massachusetts' Home Rule Amendment as "the strongest type of home rule." *Bloom*, 293 N.E.2d at 273 n.4. As a general principle, "municipal action is presumed to be valid" by courts. *Connors v. City of Boston*, 714 N.E.2d 335, 337 (Mass. 1999). Still, local law that is "inconsistent" with state law can be preempted to "preserve[] the Commonwealth's right to legislate with respect to State, regional, and general matters." *Clean Harbors of Braintree, Inc. v. Bd. of Health*, 616 N.E.2d 78, 82–83 (Mass. 1993).

The cases below provide further detail on how Massachusetts courts interpret the scope of municipal home rule authority under the constitutional amendment and state statutes, and the ability of state law to preempt "inconsistent" local laws.

- *Clean Harbors of Braintree, Inc. v. Bd. of Health*, 616 N.E.2d 78 (Mass. 1993): This case addresses the scope of home rule authority by interpreting section 8 of the Home Rule Amendment and suggesting a limitation on municipalities' power. One of the issues in the case was whether a state law that applied only to only one hazardous waste treatment facility in a Massachusetts town violated section 8 of the Home Rule Amendment, which provides that the state legislature "shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities or to all towns, or to all cities and towns, or to a class of not fewer than two." Section 8 limits the state legislature's ability to pass "special laws" that interfere with home rule authority. In *Clean Harbors*, the court wrote, "[t]he Home Rule Amendment preserves the right of municipalities to self-government in 'local matters,' but preserves the Commonwealth's right to legislate with respect to State, regional, and general matters . . . The Legislature may act on matters of State, regional, or general concern, even though the action may have special effect on one or more individual cities or towns." *Id.* at 82–83. In other words, the fact that a law affects only one city or town does not automatically mean that it is a prohibited "special law;" it may be considered a general law if it relates to "state, regional, or general matters." The court held that the state law on hazardous waste treatment "does not violate the Home Rule Amendment, even if the amendment applies only to the hazardous waste treatment facility in [one town]." *Id.* at 83. In effect, this case expands the scope of state laws that can supersede local authority.

- *Bloom v. City of Worcester*, 293 N.E.2d 268 (Mass. 1973): In this case, the Massachusetts Supreme Judicial Court explains the standard for "inconsistency" giving rise to preemption, especially with respect to field preemption. The local ordinance at issue created a local human rights commission and conferred on it the power to hold hearings and issue subpoenas. The ordinance was challenged on the grounds that it was preempted by a state law which also covered human rights and issuing subpoenas. The court offers a standard for "inconsistent" state and local laws, explaining that "the exercise of any local power or function on the same subject" covered by a state law may be preempted "because otherwise the legislative purpose of that statute would be frustrated." *Id*. at 280. However, the court clarifies that state legislation on the same subject does not necessarily preempt local law "[i]f the state legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject," in which case "the local ordinance or by-law is not inconsistent with the State legislation." *Id*. at 280–81. The court upheld the ordinance as valid.

- *Boston Gas Co. v. City of Somerville*, 652 N.E.2d 132 (Mass. 1995): In this case, the Massachusetts Supreme Judicial Court invalidated a local law under both field and conflict preemption principles. The case arose when a gas company challenged a Somerville ordinance on the grounds that it was preempted by state law governing the sale of gas and electricity by public utilities. The court held that the ordinance was field preempted because "[g]iven the comprehensive nature of [the state] statute . . . the Legislature intended to preempt local entities from enacting legislation in this area." *Id*. at 134. The court also held that the ordinance was conflict preempted because "the ordinance is inconsistent with particular provisions of the statute and the regulation of the Department of Public Utilities." *Id*. The court's issue with the ordinance was that it imposed requirements on the gas company that the state law did not. Thus, it found that "the

ordinance conflicts with the statutory scheme for regulating public utilities." *Id*. In particular, the *Boston Gas* court held that ordinances imposing *additional* requirements that a state law can be sufficient for a finding that the ordinance is "inconsistent" with, and therefore preempted by, the state law. *Id*.

- *Roma, III, Ltd. v. Bd. of Appeals of Rockport*, 88 N.E.3d 269 (Mass. 2018): The Massachusetts Supreme Judicial Court considered whether a local zoning ordinance prohibiting use of land for a private heliport was preempted by the state aeronautics laws with "the legislative purpose of 'foster[ing] . . . private flying.'" *Id.* at 278. The court's analysis focuses on whether the state's laws present the requisite intent to preempt. It concluded that they do not for two reasons. First, there is no evidence to suggest that the Legislature considered private landing areas "to be necessary, or even central, to [its] mission of fostering private flying." *Id*. Therefore, local laws that prohibit the use of land for such private landings are "insufficient to warrant a finding of preemption where it would not significantly impair the State's legislative purpose of fostering private flying." *Id*. Second, the fact that land use "has traditionally been a matter of local regulation" is relevant to the intent inquiry. *Id*. Because of this tradition, the court declined to "infer that the enactment of the aeronautics code reflects a clear legislative intent to preempt all local zoning bylaws that might affect [private landings] based on the risk of frustrating the legislative purpose of fostering private flying." *Id*.

- *Six Brothers, Inc. v. Brookline*, 228 N.E.3d 565 (Mass. 2024): The Massachusetts Supreme Judicial Court considered whether a local bylaw, which partially bans the sale of tobacco based on birth year, is preempted by a Massachusetts law that set a minimum age requirement for the sale of tobacco products. The state law "expressly preempts any 'inconsistent, contrary or conflicting' local law related to the Statewide minimum age provision, but otherwise affirms the authority of local communities to limit and to ban the sale of tobacco products within their municipalities." *Id*. at 569. The bylaw separates citizens into two groups based on birth year and prohibits the sale of tobacco products to one of the groups (regardless of how old the members of that group become). The court held that the local law is not preempted by the state law because it does not conflict with the state minimum age requirement and falls within the type of local regulation that is expressly permitted by the state law. *Id*.

4.1 Other Relevant Cases

Opinion of the Massachusetts Attorney General (July 21, 2020): Although not case law, this opinion of the state Attorney General is a significant decision related to preemption in the climate context. In 2019, the Town of Brookline sought to advance a local law prohibiting natural gas connections in new buildings and, as required by state law, the town submitted it to the Attorney General for approval. The Attorney General concluded that the local law was conflict preempted by three sources of state law: (1) "the State Building Code, which establishes comprehensive statewide standards for building construction and 'is intended to occupy the field of building regulation;'" (2) "the Gas Code and G.L. c. 142, § 13 in that it creates a new reason to deny a gas permit;" and (3) "G.L. c. 164 through which the Massachusetts Department of Public Utilities [] comprehensively regulates the sale and distribution of natural gas in the Commonwealth." Because cities are not required to

submit local laws to the Attorney General for approval, as towns are, they are not technically bound by this decision. However, the opinion has thus far been respected by cities.

5. BUILDING CODES

Massachusetts has a statewide building code, which was adopted by the state Board of Building Regulations and Standards (BBRS) pursuant to state law, Mass. Gen. Laws ch. 143, § 93. Local governments have only limited means by which to customize the building code in their jurisdictions. The statewide building code follows the 2021 edition of the International Code Council model codes.[25] It includes codes related to energy (e.g., energy use and energy efficiency) in addition to construction requirements. It applies to "all towns, cities, state agencies or authorities" in the state and covers privately-owned and most state-owned buildings. *Id.* § 2A; 780 C.M.R. 102. The code is comprised of two main parts: the base code for larger buildings and the residential code for smaller residences.

Massachusetts state laws preempt some local activity that interferes with the statewide building code through an express limitation on the subject of zoning ordinances. Mass. Gen. Laws ch. 40A, § 3. Specifically, state law preempts local zoning regulation relating to "the use of materials, or methods of construction of structures regulated by the state building code [and] the interior area of a single family residential building." *Id*. State courts have held that the State Building Code field preempts local laws on the "same subject" as the state code. *See, e.g.*, *St. George Greek Orthodox Cathedral of W. Mass. v. Fire Dep't*, 967 N.E.2d 127, 133–34 (Mass. 2012). To avoid being preempted, municipalities in the past have sought to implement climate policy through zoning incentives rather than regulations. For example, the Town of Hull offers a $500 rebate on permit fees for new buildings in certain districts "that are adapted to and resilient to the impacts of climate change." Zoning By-law, Town of Hull art. III § 39B(12.2) (2018). Additionally, the statewide code does not contain building performance standards,[26] so local law on that subject may not be preempted as the "same subject" of the state building code. For example, Boston has adopted the Building Emissions Reduction and Disclosure Ordinance (BERDO), which sets certain emissions reduction requirements for large existing buildings.

Massachusetts state law provides three exceptions to the application of the statewide building code. First, municipalities have the option to adopt the "Stretch Code," which is a more stringent version of the state energy code. 225 C.M.R. 22.00 (stretch code for low-rise residential construction); 225 C.M.R. 23.00 (stretch code for all other construction). More than 250 cities have adopted the stretch code.[27] Second, municipalities can recommend local amendments to the state code with "more restrictive standards" for approval by the state Board by demonstrating that "special conditions prevailing" in the city justify such standards. Mass. Gen. Laws ch. 143, § 98. The state Board may then choose to promulgate the amendment if the local change would conform

[25] Mass. Bd. of Building Regs. & Standards, *Massachusetts State Building Code – 780 CMR*, MASS.GOV https://www.mass.gov/massachusetts-state-building-code-780-cmr.
[26] The state does, however, have building energy performance standards that apply to state-owned buildings.
[27] MASS. BUILDING ENERGY CODE ADOPTION BY MUNICIPALITY (2024), https://www.mass.gov/doc/building-energy-code-adoption-by-municipality/download.

with both "accepted national and local engineering and fire prevention practices" and "the general purposes of a statewide building code." *Id*. Third, in addition to the Stretch Code, municipalities also have the option to adopt the "Specialized Code," more recently created by Mass. Gen. Laws ch. 25A, § 6. The Specialized Code is "designed to ensure new construction that is consistent with a net-zero Massachusetts economy in 2050, primarily through a combination of energy efficiency, that it in turn enables reduced heating loads, and efficient electrification."[28] The Stretch and Specialized Codes are similar in purpose but have some distinctions in application and requirements.[29]

As noted above, an Attorney General's opinion issued in 2020 suggests that the state building code, along with portions of the case code and public utility laws, may preempt local bans on natural gas. Although that issue has not been specifically addressed by a court, the Attorney General's opinion has been largely respected. However, local bans on natural gas in new buildings have not been entirely abandoned in the state because they are specifically authorized by state law on a limited basis. In 2022, Massachusetts passed a law requiring the state Department of Energy Resources to "establish a demonstration project in which not more than ten cities and towns may adopt and amend general or zoning ordinances or by-laws that require new building construction or major renovation projects to be fossil fuel-free."[30]

6. ELECTRIC UTILITY CONSIDERATIONS

What is the relevant utility regulatory body of public utilities in the state? Who and what does it regulate? Chapter 164 of the Massachusetts General Laws covers the manufacture and sale of gas and electricity. The Massachusetts Department of Public Utilities (DPU) has the general authority to regulate "all gas and electric companies" and the "authority to regulate and control distribution of gas." Mass. Gen. Laws ch. 164, §§ 76, 105A.

What authority, if any, do municipalities have over utilities? The Massachusetts Supreme Judicial Court has held that "local laws are superseded by statutes that deal comprehensively with a Statewide problem, and . . . utility regulation is one type of comprehensive legislation that preempts local ordinances." *Boston Edison Co. v. City of Boston*, 459 N.E.2d 1231, 1234 (Mass. 1984). However, there are a number of sections of Chapter 164 that expressly provide for certain municipal authority. For example, section 62 authorizes municipalities operating a power plant to pass local laws imposing penalties "to protect the plant, control its use and prevent accidents from gas or electricity supplied by it, and to govern consumers in their use thereof." Mass. Gen. Laws ch. 164, § 62.

[28] MASS. DEP'T OF ENERGY RES., STRETCH ENERGY AND MUNICIPAL OPT-IN SPECIALIZED BUILDING CODE FREQUENTLY ASKED QUESTIONS 1, https://www.mass.gov/doc/stretch-energy-and-municipal-opt-in-specialized-building-code-faq/download.
[29] For more details, *see id.* at 2.
[30] *Municipal Fossil Fuel Free Building Demonstration Program*, MASS.GOV, https://www.mass.gov/info-details/municipal-fossil-fuel-free-building-demonstration-program.

Municipalities in Massachusetts are authorized to own and operate electric utilities, called municipal light plants, to provide electricity and gas to their residents. *See, e.g.*, Mass. Gen. Laws ch. 164, § 47A. The DPU has limited oversight of these plants. There are over forty municipal light plants in the state.[31]

Can cities enter into franchise agreements with utilities? Under Mass. Gen. Laws ch. 164, § 72, utilities must petition the state Department of Public Utilities for authority to provide service within municipalities, which the Department may grant.[32] However, utilities must still obtain authorization from local authorities before occupying municipal rights-of-way. Mass. Gen. Laws ch. 164, § 72; *Sudbury v. Dep't of Pub. Util.*, 179 N.E.2d 263 (Mass. 1962).

How can cities intervene in Department of Public Utilities proceedings? Cities can intervene in DPU proceedings to represent the interests of their residents. Mass. Gen. Laws ch. 30A, § 10; *see Town of Sudbury v. Dep't of Pub. Utilities*, 218 N.E.2d 415, 419–20 (Mass. 1966).

Does the state have an obligation to serve statute? Yes, Massachusetts state law contains a "duty to serve" provision requiring utilities to provide service to customers who request it: "On written petition of any person, having a residence or place of business in a town where a corporation is engaged in the manufacture, transmission or sale of gas or the distribution of electricity, aggrieved by its refusal or neglect to supply the petitioner with gas or electricity, the department may . . . issue an order directing and requiring it to supply the petitioner with gas or electricity." Mass. Gen. Laws ch. 164, § 92.

However, whether this obligation still applies is currently in controversy because of a recently passed climate law, Bill S.2967. Section 77 of that law states that when reviewing a petition for gas service, the DPU shall consider: (i) whether the grant of the petition is in the public interest, including the public interest in reducing greenhouse gas emissions and complying with the limits and sublimits established pursuant to chapter 21N; and (ii) whether, in the totality of the circumstances, the petitioner can secure adequate substitutes for gas-fired services . . . [t]he department may, in order to advance the public interest in reducing greenhouse gas emissions . . . order actions that may vary the uniformity of the availability of natural gas service.

The DPU is currently considering whether this amendment alters the obligation to provide customers with gas.

Has the state passed enabling legislation for community choice aggregation (CCA)? Yes, Massachusetts was the first state in the nation to pass CCA legislation in 1997.[33] Massachusetts' CCA enabling legislation authorizes "any municipality or any group of municipalities acting together within the commonwealth . . . to aggregate the

[31] *Massachusetts Municipally-Owned Electric Companies*, MASS.GOV, https://www.mass.gov/info-details/massachusetts-municipally-owned-electric-companies.
[32] For a list of authorized utility franchise areas across Massachusetts, *see* PAUL E. OSBORNE, MASS. DEP'T OF PUB. UTIL. GAS UTILITY FRANCHISE AREAS IN COMMONWEALTH OF MASSACHUSETTS (2021), https://www.mass.gov/doc/gas-franchises-2021/download.
[33] *CCA by State: Massachusetts*, LEAN ENERGY, https://perma.cc/B4XS-D249.

electrical load of interested electricity consumers within its boundaries." Mass. Gen. Laws ch. 164, § 134. The state has 176 communities with local CCA authorization.[34]

7. SECONDARY SOURCES

David J. Barron et al., *Dispelling the Myth of Home Rule: Local Power in Greater Boston* (2018), https://perma.cc/MS32-46BA.

Mass. Dep't of Revenue, *What is Home Rule?* https://www.mass.gov/doc/home-rule/download.

8. MISCELLANEOUS

As noted above, section 7 of the Home Rule Amendment expressly withholds certain significant powers from local governments. Therefore, although courts have described Massachusetts' local authority as "the strongest type of home rule," *Bloom*, 293 N.E.2d at 273 n.4, commentators have noted that section 7 narrows home rule authority in Massachusetts compared to home rule in other states.[35]

[34] *Id*.

[35] *See, e.g.*, GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 65 (2008) ("Because the exceptions for regulating city elections, taxing, borrowing, and regulating most private or civil affairs cover such a wide range of issues that are of concern to cities, Section 7 makes home rule in Massachusetts something of an illusion.").