



City of Lowell - Law Department

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June 5, 2018

City Manager Eileen Donoghue
Mayor William J. Samaras
Members of the City Council

Re: Motion Response – Downed Wires Ordinance

Dear Manager Donoghue, Mayor Samaras and Members of the City Council:

I write in response to Councilor Leahy's motion, made May 22, 2018, seeking to have the Law Department draft an ordinance ("proposed ordinance") that would allow the City to impose a fine upon utility companies who permit downed wires or power lines to remain in place after they are notified that such lines are illegally hanging from their utility pole. The fine levied by the proposed ordinance would be in an amount of \$100 per downed wire or power line.

In regards to the proposed ordinance, the initial inquiry must be whether the City has the authority or jurisdiction to impose a fine upon a utility company for allowing downed wires to remain on or adjacent to public ways. Pursuant to the Home Rule Procedures Act, "[a]ny 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...*" See G.L. c. 43B, § 6 (emphasis added). In Massachusetts, there need not be a specific state statute which acts to override the local ordinance for preemption to apply. Instead it is enough if the state is found to have dealt with the general subject matter in a manner that, by implication, denies local power to act. Accordingly, the City must first consider whether the state legislature has enacted legislation that would be viewed as being in conflict with or overruling local action. If so, the proposed ordinance would be preempted.

With respect to the subject matter of the proposed ordinance, in 1997 the state legislature passed G.L. c. 164, § 34B, which addresses the installation of utility poles, wires, and repairs by utility and telecommunication companies within the Commonwealth. In 2005, the Massachusetts Supreme Judicial Court concluded that this statute preempted a bylaw passed by the town of Bedford which imposed a fine on utility companies for delays in removing or repairing utility poles and wires. See *Boston Edison Co. v. Town of Bedford* 444 Mass. 775 (2005). The Court concluded that the bylaw frustrated the legislative purpose of ensuring uniformity in the regulation of utility service all over Massachusetts. *Id.*

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In light of the existing statewide regulatory scheme under G.L. c. 164, §34B and the Supreme Judicial Court's decision, any attempt to impose a fine on utility companies for these types of violations via a local ordinance would likely be found to be preempted by state legislation. Further, it can be inferred that if the City were to pass an ordinance such as that which has been proposed, there would be a high degree of likelihood that one or more utility companies who operate within the City of Lowell may pursue a lawsuit challenging the ordinance on similar grounds to the case against Bedford, MA. Therefore, in order to proceed with the proposed ordinance, the City would be required to first file a home rule petition pursuant to Section 8 of the Home Rule Procedures Act seeking special authorization for the proposed ordinance from the state legislature. *See* G.L. c. 43B, § 8.

In recent years, there have been efforts from multiple fronts to get the legislature to address the statutory impediment to municipalities being able to pass ordinances or bylaws which impose fines such as those contemplated in the proposed ordinance. For example, Governor Baker previously proposed amendments that would allow for municipalities to establish ordinances allowing for the issuance of fines against utility companies for their failure to replace or repair utility poles and wires as part of his "municipal modernization" bill. Ultimately, the final version of this bill that was passed by the legislature and signed by Governor Baker on August 9, 2016, removed this particular provision. Instead the state established a study to further consider the topic, essentially maintaining the status quo on this issue. *See* 2016 Mass. Acts Chapter 218. Other legislators have also filed more narrowly tailored bills which simply seek to amend G.L. c. 164, § 34B in order to provide authority for municipalities to pass local ordinances or bylaws permitting the imposition of fines for violations of the statute. These include H. 1749 filed by Rep. Jonathan Hecht of Watertown, H. 1758 filed by Rep. Marc Lombardo of Billerica, and H. 1730 filed by Rep. Tackey Chan of Quincy, which were all filed in 2017. All of these bills were referred to the committee on Telecommunications, Utilities, and Energy, where no action has taken place.

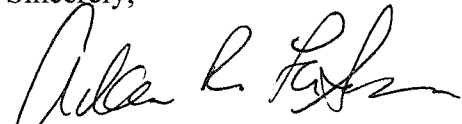
Additionally, other municipalities in the Commonwealth have filed home rule petitions seeking special legislation specific to their city or town that would allow them to impose fines on utility companies who are dilatory in replacing or repairing utility poles and related overhead wires and power lines. In late 2015, the towns of Natick and Framingham both filed home rule petitions for special legislation seeking authorization to impose fines against utility companies due to concerns about the difficulties these communities were having with getting utility companies to replace double-poles which caused delays to public infrastructure projects. These communities also presented general concerns related to public safety and aesthetics. Both of these bills were referred to the Joint Committee on Telecommunications, Utilities and Energy and were given a study order on May 23, 2016. No further action has been taken on these bills and they appear to have stalled at this stage. The city of Haverhill has followed suit and filed its own home rule

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petition at the beginning of this year which was also referred to the Joint Committee on Telecommunications, Utilities and Energy where it remains pending.

In sum, if the City Council intends to pursue the proposed ordinance, it will need to do so through a home rule petition for special legislation authorizing the City to pass the ordinance and impose the fines. Based on the legislature's apparent lack of interest in passing legislation to that effect and its lack of action upon the home rule petitions filed by other municipalities on this same issue, there appears to be a high degree of likelihood that any home rule petition from the City of Lowell would receive similar treatment.

Sincerely,



Adam R. LaGrassa
Assistant City Solicitor

citycouncil-motionresponse2018/downedwires

cc: Christine P. O'Connor, City Solicitor