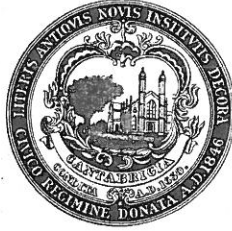


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CITY OF CAMBRIDGE

Office of the City Solicitor
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December 10, 2019

Louis A. DePasquale
City Manager
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: ***Response to Policy Order No. 8 of 10/21/19 Re: Legal opinion on the proposed zoning amendments to Articles 2.000 and 4.32 of the Cambridge Zoning Ordinance re Mobile Fueling***

Dear Mr. DePasquale:

We have prepared this legal opinion in response to Policy Order No. 8 of 10/21/19, which requests that the Law Department review the proposed zoning amendments to Articles 2.000 and 4.32 of the Cambridge Zoning Ordinance (the "Zoning Ordinance") and provide a legal opinion or response. Specifically, the proposed zoning amendments to Articles 2.000 and 4.32 of the Zoning Ordinance concern a concept referred to as on-demand mobile fueling. As set forth in the Policy Order, on-demand mobile fueling involves commercial services that offer mobile fueling through mobile apps for vehicle owners to get their gas tanks filled at home or at their office instead of at service stations. As many vehicle owners in the City do not have off-street parking, the Policy Order expresses concern that the mobile fueling could take place while vehicles are parked on the street or in public garages. Due to health and safety concerns expressed in the Policy Order, the proposed zoning amendments to Articles 2.000 and 4.32 of the Zoning Ordinance seek to define a Mobile On-Demand Fueling Service and prohibit it in all zoning districts.

As an initial matter, as will be discussed further below, to the extent the proposed zoning amendments concerning on-demand mobile fueling would apply to on-demand mobile fueling in the public way, zoning cannot regulate public ways. Harrison v. Textron, Inc., 367 Mass. 540, 549 (1975); Chaput v. Kane, 17 MISC 000062, 2018 WL 5622263 (Land Ct. 2018); Pitkin v. City of Cambridge, 19 MISC 000240, 2019 WL 5495858 (Land Ct. 2019). Additionally, deliveries, ranging from food delivery to heating oil delivery, are generally considered as

providing a service to the principal use and not constituting a separate use of the property. Therefore, on-demand mobile fueling is not properly regulated through zoning, but may be regulated by a general ordinance, and is regulated by the Massachusetts Comprehensive Fire Safety Code.

As set forth in the Policy Order, the Council expressed concern with the possibility that mobile fueling would take place while vehicles are parked in the public way. However, zoning ordinances cannot regulate the laying out or use of public ways. *Id.* Accordingly, to the extent the Council intends to have the proposed zoning amendments apply to activity within the public way, the proposed zoning amendments would not have that effect. Additionally, the Zoning Ordinance and the Zoning Act, G.L. c.40A, do not treat the delivery of goods as a use of property. Deliveries of goods ranging from restaurant and grocery deliveries to heating oil and propane deliveries, for example, constitute providing a service to the principal use. If challenged, a Court would likely not find that a service that provides mobile fueling is distinguishable from these other types of deliveries. Accordingly, we do not recommend that it be regulated through zoning.

However, mobile fueling is already regulated by the Massachusetts Comprehensive Fire Safety Code (the "Fire Safety Code"), 527 CMR 1.00, *et seq.*, and those regulations address some of the concerns expressed in Policy Order No. 8 of 10/21/19. The Fire Safety Code comprises the state regulations promulgated by the Board of Fire Prevention, which are enforced by both the Fire Department and the Inspectional Services Department, depending on which section of the Fire Safety Code is at issue.

Pursuant to the Fire Safety Code, mobile fueling services are required to obtain approval from the State Fire Marshal's Office and the Fire Department and are required to comply with all requirements set forth in the Fire Safety Code; 527 CMR 1.00: 42.16. The Fire Safety Code provides that "**mobile fueling operations and delivery vehicle parking shall be prohibited in buildings, in covered parking structures, on public streets and in public ways.**" It also provides that mobile fueling shall not take place within twenty-five (25') feet of buildings, property lines, combustible storage, and when mobile fueling occurs within twenty-five (25') feet of a storm drain, a storm drain cover approved by the Fire Department shall be used to protect the storm drain. The Fire Safety Code also provides that the Fire Department can require "a site specific safety and emergency response plan for locations where mobile fueling is authorized" for purposes of "ensur[ing] that fueling operations are conducted in a safe manner that is acceptable to the [Fire Department]."

Therefore, pursuant to the Fire Safety Code, mobile fueling is prohibited from taking place on public ways and in parking garages, City owned or otherwise. The City can prohibit mobile fueling from occurring on any other City owned property, as the Fire Safety Code requires that "mobile fueling operations shall not be conducted unless approved by the [Fire Department] and the owner of the property on which the fueling will occur. Mobile fueling operations shall occur only at approved locations." In regard to private property, mobile fueling can only occur with the approval of the property owner, approval of the Fire Department and in compliance with all requirements of the Fire Safety Code.

Additionally, mobile fueling could be further regulated through a general ordinance. The City can adopt a general ordinance that regulates or prohibits mobile fueling under the City's Home Rule Powers, as long as the ordinance is not inconsistent with the Constitution or any general law. In determining whether an ordinance is inconsistent with state law, the legislative intent for a state law to preempt local regulation must be clear. Here, mobile fueling is regulated in the Fire Safety Code, which comprise regulations promulgated by the Board of Fire Prevention under their statutory authority. The Fire Safety Code explicitly provides that its section regulating on-demand mobile fueling "addresses mobile refueling activities governed by [National Fire Prevention Association Code] 30A. **Other local, state, and federal requirements might be applicable.**" 527 CMR 1.05: A.42.16.1. (emphasis added). Accordingly, the Fire Safety Code explicitly allows local regulation of mobile fueling. While the Fire Safety Code explicitly provides that local regulations might be applicable, it is possible an ordinance could be challenged as preempted by state law. However, in our opinion, an ordinance that prohibits mobile fueling is likely to withstand challenge.

We have taken the proposed zoning amendments to Articles 2.000 and 4.32 of the Zoning Ordinance and the language of Policy Order No. 8 of 10/21/19, and prepared the following proposed amendment to the Cambridge Municipal Code for the Council's consideration. Presently, Chapter 8.12 of the Municipal Code regulates Gasoline Service Stations. Chapter 8.12 could be amended by adding a new section as follows:

8.12.020 – Mobile On-Demand Fueling Service.

A. Statement of Purpose.

The purpose and intent of this section is to protect the public and the City's first responders from the health and fire hazards posed by Mobile On-Demand Fueling Services. Mobile On-Demand Fueling Services invite trucks carrying flammables into residential and other areas, where fuel could spill, posing a health and fire hazard. There is no compelling public interest in allowing such a service to operate in a City whose climate action goals are to decarbonize the transportation sector by encouraging the use of sustainable mobility options and electric vehicle technology.

B. Definition.

Mobile On-Demand Fueling. The practice of delivering motor vehicle fuel to a motor vehicle while the motor vehicle is parked in a location other than a gasoline service station.

Mobile On-Demand Fueling Service. A commercial entity that provides Mobile On-Demand Fueling.

C. Requirements.

Mobile On-Demand Fueling Services are prohibited from conducting Mobile On-Demand Fueling anywhere within the City of Cambridge.

D. *Enforcement.*

1. *Fine. Any Mobile On-Demand Fueling Service which shall violate any provision of this section shall be liable for a fine of not more than three hundred dollars and each violation shall constitute a separate offense.*
2. *Whoever violates any provision of this chapter may be penalized by a noncriminal disposition as provided in G.L. c. 40, §21D. For purposes of this section, the Chief of the Fire Department or their designees shall be enforcing persons.*

E. *Severability.*

It is the intention of the City Council that each separate provision of this chapter shall be deemed independent of all other provisions herein, and it is further the intention of the City Council that if any provision of this chapter be declared to be invalid by a court of competent jurisdiction, the remaining provisions of this chapter shall remain valid and enforceable.

We welcome further discussion at the meeting and look forward to getting additional guidance on whether the Council would want such a general ordinance, and if so, if the proposed language above addresses the Council's concerns.

Very truly yours,



Nancy E. Glowa
City Solicitor