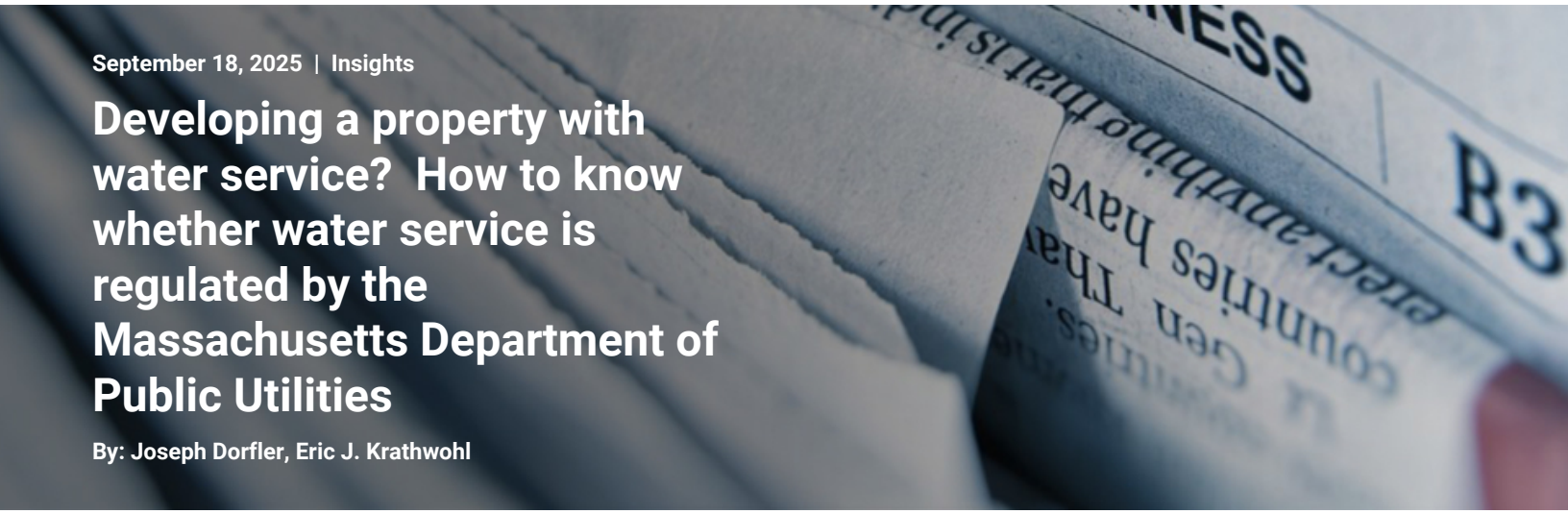

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Developing a property with water service? How to know whether water service is regulated by the Massachusetts Department of Public Utilities

By: Joseph Dorfler, Eric J. Krathwohl

Real estate owners and developers often come to us with questions about providing utility service to their tenants and whether they have any issues with regulation by the Massachusetts Department of Public Utilities (MA DPU). This can be a complex and confusing area of the law and in many cases the answer will depend on very case specific facts, but the following lays out some of the issues that factor into the determination.

At the most basic level, if the owner who provides water service does not sell water, then the water service generally is not subject to MA DPU regulation. Is it a sale, however, where an owner simply charges a share of the costs to operate the water system? Alternatively, is it a sale if the owner charges above-average rent because water service is included, even when there is no separate water fee?

In most situations, the answer to the first question is yes, and to the second question no. The undesirable situation of being subject to regulation can usually be avoided by having no separate charge for water service. For instance, consider an industrial complex owned by a commercial developer where the property lacks access to an independent water supply and relies on a private well. In this scenario, the commercial developer would be the landlord and is responsible for supplying water to the tenants of the industrial complex. Under Massachusetts law, if this landlord provided that water service as part of rent, they would likely not be classified as a water company subject to regulation or rate oversight by the MA DPU, depending on how rent and the water service charges were structured.

A sale of water can also be avoided under certain contractual relationships. For example, associations organized under a trust arrangement to manage the water system may not be regulated by the MA DPU as a water company, provided that all customers are beneficiaries of the trust. This can be found in residential developments with a homeowner's association where the neighborhood water supply is managed through a trust naming each homeowner as a beneficiary. The beneficiaries/homeowners elect the trustee to manage the water system. Rather than a traditional water bill, the beneficiary/homeowner pays into the trust their share of the cost to operate, manage, and

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maintain the water system. In this way, the users of the water system also comprise the beneficiaries of the trust, who operate the water system for their own benefit and assess themselves the costs of operation. Because the beneficiaries/homeowners are also the users of the water system, who also pay the costs to operate the water system, there is no sale of water and the system is not a MA DPU regulated water company. While this scenario uses a residential development as an example, similar situations could be created in other contexts.

One final important note regarding these exceptions to MA DPU regulation is that they do not affect the authority of the Massachusetts Department of Environmental Protection ("MA DEP"). All water companies, regardless of the MA DPU's regulation, still must follow MA DEP's water quality and other standards.

Each situation we encounter is fact-specific. Therefore, it is always advisable to consult with counsel to ensure that you are taking the appropriate steps and making the best decisions possible for you.

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorneys Joseph Dorfler and Eric J. Krathwohl

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