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Superior Court - Norfolk
Docket Number 2282CV00400

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT

NORFOLK, ss C.A. No. 2282CV00400

The TOWN OF BROOKLINE, MASSACHUSETTS, ELISABETH CUNNINGHAM, GEORGE WARNER, DANIELA RAMIREZ, ANNE LE BRUN, JESSE GRAY, KATHRYN GRAY, CHARLOTTE GAEHDE, STEPHAN GAEHDE, STEPHANIE GAEHDE, LILLY GAEHDE, SUSHMA BOPPANA, KATHLEEN MCSWEENEY SCANLON, MARY DEWART, BARBARA STEIN, JIN SUK, MICHAEL MOSBROOKER, LISA VIOLA, DONNA VIOLA, JAMES VIOLA, AND MARSHA JONES,	)
Plaintiffs,	)
v.	)
MAURA HEALEY, ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS	)
Defendant.	)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

The climate crisis is real and immediate. Most of the Commonwealth is in drought, with a significant area in severe drought.[1] The years 2020 and 2021 were the second and third hottest years on record in Massachusetts in over a century[2] and, in 2022, the Boston area saw both its warmest recorded 30-day stretch and the first time two heat waves have lasted as long as six days.[3] Elsewhere, wildfires threaten groves of ancient sequoia trees in California,[4] the United Kingdom just recorded its hottest temperature on record,[5] an extreme heatwave is attributed to have caused deaths in southern Europe,[6] and rising temperatures and flooding are wreaking havoc on food supplies, threatening lives, and forcing migration across South Asia.[7] Alarmingly, that is just a snapshot of a constellation of woes now afflicting the world. It is beyond reasonable dispute: We are living through a global climate crisis. Fossil fuel use must be immediately and dramatically reduced to keep global warming below the crucial threshold of 1.5°C before even worse damage occurs.[8] The time to act is now; tomorrow will be too late.

For years, the Town of Brookline has sought to act. Brookline's Annual Town Meeting voted overwhelmingly in May and June 2021 to adopt two amendments to the Town's Zoning By-Laws to drive change. Both amendments, adopted under Town Meeting Articles 25 and 26 (the "Articles"), would incentivize new construction and major renovation projects that avoid

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[1] https://droughtmonitor.unl.edu/CurrentMap/StateDroughtMonitor.aspx?MA

[2] https://www.ncei.noaa.gov/access/monitoring/climate-at-a-glance/statewide/haywood

[3] https://www.bostonglobe.com/2022/08/11/metro/after-all-heat-more-comfortable-weather-is-finally-here/

[4] https://www.npr.org/2022/07/19/1111807299/yosemite-national-park-mariposa-grove-sequoia-trees-wildfire-california

[5] https://www.bbc.com/news/live/uk-62184978

[6] https://www.bbc.com/news/world-europe-62196045

[7] https://www.nytimes.com/2022/06/14/world/asia/india-south-asia-climate-change.html?searchResultPosition=4

[8] https://www.ipcc.ch/2022/04/04/ipcc-ar6-wgiii-pressrelease/

incorporating new fossil fuel infrastructure, in favor of climate-friendly alternatives. Those Articles use traditional municipal regulation to encourage—*i.e.,* incentivize—but not compel construction using fossil fuel alternatives. They are neither extraordinary nor beyond Brookline's traditional authorities, both as part of local zoning and Constitutional Home Rule powers.

Under our law, the Attorney General must approve a Town's zoning by-law amendments before they take permanent effect. Here, the Attorney General mistakenly disapproved both Articles (the "Decision," appended to this Memorandum as Attachment A). In the Decision, she pointed to purported conflict and preemption issues with respect to four legal authorities: (1) the *Zoning Act*, G.L. c.40A, §3, as that section distinguishes the zoning power from the regulation of materials and methods of building construction; (2) the Massachusetts State Building Code (the "Building Code"), 780 CMR 101.00 *et seq.*, including as it incorporates other specialized codes; (3) G.L. c.164 as it relates to State regulation of natural gas utilities; and (4) again to the *Zoning Act*, insofar as that act regulates special permits in §§4, and 9. Each decision was wrong.

(1) **Zoning Act Materials and Methods of Construction:** The Articles do not regulate the "use of materials, or methods of construction" as that term is used in G.L. c.40A, §3. The Attorney General's interpretation of that language is overly broad and inconsistent with traditional local powers and the limited judicial interpretations of §3.

(2) **Building Code:** The Articles do not supplant or modify the Building Code in any way, including in a manner that injures its uniformity or second guesses the wisdom of the issuing authority. Rather, the Articles are traditional regulations of the "use" of land.

(3) **Natural Gas Utility Regulation:** The Articles create incentives to avoid natural gas voluntarily, but do not prohibit the purchase and consumption of natural gas. They, therefore, do not run contrary to Statewide regulation of the natural gas industry.

(4) **Zoning Act Special Permits and Uniformity:** The Articles regulate only uses of land irrespective of the identity of its owner, and therefore conform to the requirements for special permits under G.L. c.40A, §§4, and 9.

Moreover, while each of the four has its specific infirmities, all reflect a deeper misunderstanding of Brookline's Articles and the authority under which they were approved. Both Articles represent little more than Brookline's exercise of traditional municipal zoning power over land use, bolstered by Massachusetts' Home Rule Amendment.

As explained in this Memorandum, the Court should therefore reverse the disapproval. The Attorney General has erred about more than an esoteric debate over State-versus-municipal authority. The State has enacted climate legislation with lofty goals but remains far behind where it must be to avert climate catastrophe. Municipalities like Brookline want to help. Articles 25 and 26 do exactly this by way of conventional zoning regulations, based on long-established principles of local zoning and Constitutional Home Rule authorities. Brookline should not be denied its authority to help ensure a safer climate future for its residents and others.

FACTUAL BACKGROUND[9]

The Members of Brookline's 2021 Annual Town Meeting approved two warrant articles, Article 25 and Article 26, adopting local zoning regulations that incentivize the construction of "fossil-fuel-free" buildings. Those buildings are generally defined as those without new heating, cooling, and hot water systems that rely on the combustion of natural gas or fuel oil. (R-8-9, 19-21[10]). This case is about those Articles and the Attorney General's error in disapproving them.

A. Article 25 – Emerald Island Special District

Article 25 applies to Brookline's "Emerald Island Special District" ("EISD"). (R-8-9) The EISD is a zoning overlay district,[11] comprised of a narrow strip of land that overlays a portion of

[9] The following facts are taken from the Amended Administrative Record ("Record").

[10] Citations in the form "R-__" refer to the relevant page number of the Amended Administrative Record.

[11] The Appeals Court has characterized such Special Districts as "a technique in which new, more restrictive zoning is 'laid over' an existing zone in order to further regulate or restrict

the Town's Industrial Services Zoning District. (1st Supp. R-113, 239)[12] The EISD does not supplant the underlying zoning of the district it overlays. (1st Supp. R-92, 113) Instead, in the EISD, a project proponent may be allowed additional uses of a property, not otherwise authorized, or may obtain relief from certain dimensional requirements by obtaining a special permit. (R-10-17; Section 5.06.4.j). Development criteria to obtain special permits in the EISD are set forth in Section 5.06.4.j.

Article 25 would amend the development criteria for projects in the EISD by adding a new criterion for an EISD special permit. (R-8-9). That criterion, subject to certain exceptions and exclusions, would be that "all new buildings shall...be free of on-site fossil fuel infrastructure." (R-8-9). Article 25 defines "on-site fossil fuel infrastructure" as "fossil fuel piping that is in a building, in connection with a building, or otherwise within the property lines of premises, including piping that extends from a supply source." (R-8-9). This definition captures gas or fuel-oil piping that is inside a building, on the consumer side of a gas meter or connection—in other words, infrastructure that is not owned or operated by a local gas distribution company. Notably, and notwithstanding Article 25's additional criterion for a ***discretionary*** special permit, all land within the boundaries of the EISD can still be used for the as-of-right purposes allowed in the underlying district.

The 2021 Brookline Annual Town Meeting voted to adopt Article 25 by a margin of 208 to 3 (R-8-9), and the Brookline Town Clerk submitted Article 25 to the Municipal Law Unit of the Office of the Attorney General (the "MLU") for review. (R-80).

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certain permitted uses.... The typical overlay district is not an independent zoning district but simply a layer that supplements the underlying zoning district regulations." *KCI Mgmt., Inc. v. Bd. of Appeal of Bos.*, 54 Mass. App. Ct. 254, 259 (2002), citing *Salsich & Tryniecki*, Land Use Regulation 167 (1998).

[12] Distinguishing the First Supplement to the Amended administrative Record, from the Amended Administrative Record.

B. Article 26 – Limited Conditions on Certain Other Special Permits

Article 26 applies to certain other types of special permits, outside the EISD. It would insert a new Section 9.13 into the Town's Zoning By-laws, placing additional but limited conditions on the issuance of such permits. (R-18-21) Those additional conditions would apply to projects that install new "on-site fossil fuel infrastructure" in certain circumstances. (R-18-21). "On-site fossil fuel infrastructure" is defined the same way as in Article 25, with a handful of differing exceptions immaterial to this case. A project that includes new on-site fossil fuel infrastructure would be subject to one of two conditions: Either the special permit would (1) require renewal after an initial term of five years (or in 2030, whichever comes later); or (2) be personal to a specific applicant, transferrable to another in only limited circumstances. (R-18-21).

No project proponent would be compelled to accept those conditions. Rather, each applicant would still be allowed to build whatever is allowed as of right and, in addition, would have three special permitting options: (1) design a project that does not include new on-site fossil fuel infrastructure; (2) accept a special permit subject to the condition that it expires and must be renewed; or (3) accept a special permit subject to the condition that it is personal and transferrable only in limited circumstances. Applicants could receive exemptions for certain uses or waivers in circumstances of hardship or impracticality. Like Article 25, Article 26 incentivizes climate-conscious action through discretionary authority but does not compel it.

The 2021 Brookline Annual Town Meeting voted to adopt Article 26 by a vote of 206 to 6, (R-18-21), and the Town Clerk submitted Article 26 to the MLU for review. (R-80).

C. The Attorney General's Review and Disapproval

The Attorney General issued the Decision on February 25, 2022 (R-174-185), citing four grounds for her disapproval: (1) By regulating On-Site Fossil Fuel Infrastructure, the by-laws unlawfully regulate "the use of materials, or methods of construction of structures regulated by the state building code" in violation of G.L. c.40A, §3; (2) The by-laws are preempted by the Building Code, including the incorporated Gas Code and Fire Code; (3) The by-laws are

preempted by G.L. c.164 through which the Massachusetts Department of Public Utilities ("DPU") regulates the sale and distribution of natural gas in the Commonwealth; and (4) Article 26 conflicts with the special permit and uniformity provisions in the *Zoning Act,* G.L. c.40A, §9 and §4, by requiring the special permit granting authority to act on an application in a certain way depending upon whether the proposal includes On-Site Fossil Fuel Infrastructure, not on how the building is used. (R-175-176).

STANDARD OF REVIEW

A town may challenge the Attorney General's disapproval of a by-law in a *certiorari* action. See *Town of Amherst v. Att'y Gen.*, 398 Mass. 793, 794, n.2 (1986). The "Attorney General's power to disapprove Town by-laws is limited. The Attorney General only may disapprove a by-law if it violates State substantive or procedural law." *Amherst*, 398 Mass. at 795. "The Attorney General is guided in the exercise of [her] limited power of disapproval by the same principles that guide [the Courts]. It is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." *Id.*, 398 Mass. at 795–96, (1986) (internal citation omitted). "A local regulation will not be invalidated unless the court finds a sharp conflict between the local and state provisions." *Roma, III, Ltd. v. Board of Appeals of Rockport*, 478 Mass. 580, 588-589 (2018), citing *Doe v. Lynn*, 472 Mass. 521, 526 (2015). As described below, the Attorney General has identified no "sharp" conflicts with preemptive authority that can overcome the fundamental presumption of validity for municipal by-laws.[13]

[13] Under Standing Order No. 1-96, the administrative record constitutes the Attorney General's answer to Plaintiffs' Complaint and this Court resolves Plaintiffs' challenges pursuant to a motion for judgment on the pleadings.

ARGUMENT

I. The Brookline By-laws Are Traditional Exercises of Core Municipal Zoning Power That Should Be Approved.

The Attorney General's error in disapproving the Articles is rooted in an overarching flaw. She failed to properly acknowledge and apply Brookline's long-held, traditional authority under both Home Rule and municipal zoning powers.

Under Home Rule, municipalities have broad latitude to adopt by-laws for the general welfare. The Home Rule Amendment gives municipalities explicit power to "adopt[ ], amend[ ], or repeal" local ordinances or by-laws, and authorizes the "exercise [of] any power or function which the general court has the power to confer upon it." Article II, §6 of the Amendments to the Constitution of Massachusetts. That authority's limits are narrow, constrained only when doing so would be "inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight" and not "denied, either expressly or by clear implication, to the city or town by its charter." The *Home Rule Procedures Act*, G.L. c.43B, §13, reiterates that broad authority.

For even longer than municipalities have had Home Rule authority, and since then, consistent with it, municipalities have adopted zoning by-laws and ordinances to protect the health, safety, and welfare of their citizens. The *Zoning Act*, G.L. c.40A, explicitly codifies this authority, among other purposes, to "conserve the value of land and buildings, including the ***conservation of natural resources*** and the ***prevention of blight and pollution*** of the environment," St. 1975, c.808 §2A, with municipalities relying on zoning "as a permissible regulatory tool for controlling the...environmental impacts of land use" for decades, *see Dufault v. Millennium Power Partners, L.P.*, 49 Mass. App. Ct. 137, 139 (2000). Municipalities, moreover, may do so even when a resulting bylaw or decision would have some impact on architectural design without being unlawful. See *Britton v. Zoning Bd. of Appeals. of Gloucester*, 59 Mass. App. Ct. 68, 76 (2003). And municipalities may achieve these objectives using special

permits, a power that existed even in the prior *Zoning Enabling Act* before its replacement in 1975. See St. 1975, c.808. Indeed, the SJC has noted that "the use of special permits as a means of controlling and accomplishing the purposes of zoning...by-laws [is] a common practice...." MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 637 (1970).

Both Articles at issue in the case are routine exercises of these longstanding, traditional municipal powers and authority.

Article 25. Article 25 is lawful and not preempted because it would only expand already existing and available criteria for a discretionary, voluntary special permit in the EISD. It would not foreclose by-right uses of the underlying property and not stop anyone from using land in the EISD as otherwise allowed in the underlying Zoning District. Article 25's reach is thus narrowly applicable only when a landowner seeks discretionary permission to use property in ways not authorized by right in that district or to exceed otherwise applicable dimensional restrictions. This is a routine exercise of the discretionary special permitting authority entrusted to municipalities in the Zoning Act, through a single additional criterion that allows for a voluntary choice to propose a fossil-fuel-free development. It, therefore, exists comfortably within the Town's G.L. c.40A, §3 zoning power over special permits related to conservation of natural resources and the prevention of blight and pollution, and within Home Rule authority.

Article 26. Article 26 is lawful and not preempted under similar logic. Article 26 imposes no new special permit requirement for any project. Rather, as explicitly authorized by G.L. c.40A, §9, and under the limited circumstances it describes, Section 9.13 places certain "conditions...and limitations on time or use" on certain projects that already require a special permit, if those projects involve new "On-Site Fossil Fuel Infrastructure." Once again, these are voluntary, not compelled, choices in pursuit of a lawful zoning objective. Nothing more.

Zoning practitioners are well familiar with each of these types of conditions—an expiration after a period of years, subject to renewal, or a permit that is personal rather than running with

the land—and each has routinely been upheld by the Commonwealth's appellate courts.[14] Conditions of these types are lawful ways to balance concerns over public health and welfare against detrimental uses. As just one example, special permits for wireless communication facilities are often issued with an expiration date. The Town of Bolton's Zoning Bylaw provides that special permits for wireless communication facilities expire after five years. Bolton Zoning Bylaw at §250-25(E). The Town of Billerica provides that special permits for wireless communication facilities shall expire after a maximum of 20 years. Billerica Zoning By-Laws at §5.G.XVIII.1. Billerica also employs this strategy in issuing special permits for marijuana facilities that expire within five years and are personal to the applicant. *Id.* at §§5.E.8.6.e-f, 5.E.9.6.e-f. Notably, these requirements were approved by the Attorney General without comment (*See* MLU-9190 (approving Article 34 of Billerica's October 2, 2018 Town Meeting)), evidencing their routine nature.

* * *

In sum, both Articles fall within traditional powers and subjects regulated by zoning and both Articles regulate in traditional ways. The fact that they may overlap subjects regulated by other laws does not determine their validity. Under Home Rule, only a "sharp" conflict with preemptive authority revokes such a traditional exercise of municipal power.

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[14] *See, e.g. Lobisser Bldg. Corp. v. Planning Bd. of* Bellingham, 454 Mass. 123, 132 (2009) (stating that time limitations may be appropriate special permit conditions and G.L. c.40A, §9 contemplates the same); *Solar v. Zoning Bd. of Appeals of Lincoln*, 33 Mass. App. Ct. 398, 400-401 (1992) (stating that conditions limiting duration and transferability of a special permit are not prohibited by G.L. c.40A, §9); *also Hopengarten v. Board of Appeals of Lincoln*, 17 Mass. App. Ct. 1006 (1984) (affirming a special permit that required renewal every three years and was personal to the applicant); *Shuman v. Board of Aldermen of Newton*, 361 Mass. 758, 766-767 (1972) (finding a special permit personal to the holder valid); *Maki v. Yarmouth*, 340 Mass. 207, 213 (1960) (a master construing a special permit as personal to the holder correctly applied precedent); *Todd v. Board of Appeals of Yarmouth*, 337 Mass. 162, 168-169 (1958) (stating that "[t]he power to give permits for exceptions is so worded as to suggest that personal use may be contemplated.").

As explained next, no such sharp conflict exists here.

II. The Attorney General's Bases for Denial Are Legally Untenable, Are Not Supported by Evidence in the Administrative Record, and Should be Reversed.

The Attorney General stated four grounds for disapproving the Articles. Each mistakenly relied on the claim that the Articles touch on subjects regulated by state law, and none identified the sharp conflict sufficient to override Brookline's Home Rule and traditional zoning powers.

A. Brookline's Articles Are Not in Conflict with the *Zoning Act,* G.L. c.40A, § 3.

The *Zoning Act* says that "[n]o zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code." G.L. c.40A, §3, ¶1. The Attorney General disapproved Brookline's Articles saying that they regulate the "use of materials, or methods of construction of structures" in a way prohibited by §3. But the Attorney General supplied no useful definition of "materials, or methods" against which to judge her decision and that phrase is, in fact, an enigma. The statute does not define it and the Attorney General's Decision correctly acknowledges the paucity of decisions on its meaning. (R-178-179). The analysis must therefore begin by determining what the phrase means.

Building codes establish consistent and cost-effective standards for safe building construction and therefore specify standards for how to build a structure or install equipment to achieve that goal. *See* G.L. c.143, §95. Indeed, the State's regulation of building materials and methods in pursuit of safety saw its genesis after Boston's catastrophic Cocoanut Grove nightclub fire in 1942 claimed 492 lives,[15] when the General Court first started exploring the issue and later created a Board of Standards and Appeals.[16] Over time, the entity responsible for

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[15] Thomas, Jack, *The Cocoanut Grove Inferno*, The Boston Globe (Nov. 22, 1992).

[16] *Report of the Committee on Building Codes and Policies Bearing Upon 'The Safety of our Citizens in Places of Assembly,'"* Senate No. 399 (Mar. 9, 1943); *Report of the Recess Commission on Safety of Persons in Buildings, authorized by Chapter 67, Resolves of 1943*, Senate No. 520 (Dec. 1944).

construction safety was moved around State government and its composition was changed, eventually resulting in the General Court's creation of the Board of Building Regulation and Standards and the codification of a requirement for the Massachusetts State Building Code.[17] At bottom, however, the Building Code's roots—and its proper interpretation—lie in its historical purpose to regulate "materials" and "methods" for constructing buildings and using equipment to make them safe. Understood through that lens, the Building Code does not ***compel*** what buildings must be built or—at a high level—what equipment must be used; it regulates those voluntary choices to ensure that the materials and methods for doing so are safe and consistent.

Zoning, meanwhile, regulates those voluntary choices about how land will be used and where individuals may voluntarily choose to put buildings or equipment. Zoning is a broad grant of power, rooted in a traditional and long history of municipal regulation over land use. *See, e.g., Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (explaining the historical genesis and tradition of zoning regulations). Thus, when §3 carves out from the *Zoning Act* the regulation of "materials" or "methods," the General Court meant for that text to exclude from the broad local authority over land use only a limited subset of regulation over ***how*** one builds or installs structures or equipment that are otherwise authorized on land or as part of a use.

This important distinction between zoning and the Building Code favors Brookline. Brookline has not voted to tell anyone how to install fossil fuel infrastructure or prohibited them from doing so. Instead, Brookline confined the Articles solely to incentivizing voluntary choices, for special permits, about how certain land uses are to be effectuated. Where, as explained below, no caselaw or other statutory text counsels to the contrary, the Town's traditional authority over such matters should be respected. The Articles should have been approved.

Enos v. City of Brockton, 354 Mass. 278 (1968), mistakenly relied upon by the Attorney General, actually confirms this distinction. In *Enos*, the SJC examined a city's zoning ordinance

[17] *See, e.g.*, 1943 Acts c.544; 1945 Acts c.645; 1984 Acts c.348.

requiring that "[a]ll multiple dwellings shall be of second class construction." 354 Mass. at 278. The Building Code also defined second-class construction and required it, with differing requirements for its use. *Id.* at 278-279. In explaining why the Building Code preempted the municipal ordinance, the SJC elaborated on the distinction between zoning and building codes:

> It should be borne in mind that the purposes and operation of zoning laws and building codes are somewhat divergent. Whereas the main purpose of zoning is to stabilize the use of property and to protect an area from deleterious uses, a building code relates to the safety and structure of buildings

Id. at 280-281 (internal quotations and citations omitted)). *Enos* is sometimes cited as having motivated the insertion of the phrase "materials, and methods" at issue in this case and therefore illustrates that the phrase should be interpreted as suggested by Brookline.

In addition to *Enos*, support for Brookline's position is also to be found in the unpublished Appeals Court decision in *Wildstar Farm, LLC v. Planning Bd of Westwood*, 81 Mass. App. Ct. 1114 (Feb. 15, 2012) (unpublished). In that decision, the Appeals Court panel addressed a local zoning by-law applicable to sprinkler and fire protection systems. The panel concluded that such systems are not "methods of construction of structures" within the meaning of G.L. c.40A, §3. If equipment as integral to building safety as fire suppression systems are not "materials, or methods of construction" as used in G.L. c.40A, §3, it cannot be that the limiting language in the *Zoning Act* reaches fossil fuel piping. Indeed, and as the *Wildstar Farm* panel's application of the plain meaning of "materials, or methods of construction" affirms, the Articles do not attempt, either overtly or implicitly, to regulate the types of materials that are used, or the methods employed in building construction.

The Articles adhere to the reasoning in *Enos* and are consistent with the conclusions in *Wildstar Farm*. Specifically, the Articles do not regulate the size, shape, strength, or composition of oil or gas piping, where it is to be located, or how it is to be installed, tested, or inspected for safety. Accordingly, what caselaw is to be found on the subject supports the conclusion that the Articles do not violate G.L. c.40A, §3. Moreover, where there is such sparse guidance, it strays

outside the limited jurisdiction of the Attorney General's review to adopt a novel and restrictive interpretation of the statute where "every presumption is to be made in favor of the validity of municipal by-laws." *Town of Amherst*, 398 Mass. at 795–796.

B. Brookline's Articles Are Not in Conflict with the State Building Code or its Incorporated Specialized Codes.

The Attorney General also found that the Articles are preempted by the State Building Code:

> The broad preemptive effect of the Building Code (and the incorporated Gas Code and Fire Code) is such that the Code preempts all municipal ordinances and by-laws that--even when as well- intentioned as the by-law here--would restrict, expand, or in any way vary what is otherwise permitted or prohibited by the Code. ***If the Building Code (and the incorporated Gas Code and Fire Code) regulates a topic, a local by-law cannot second guess the Board's determination by adopting a local regulation of that topic.***

(R-181) (emphasis added). But this sentence overstates the Building Code's preemptive reach to the point of absurdity. Contrary to the Attorney General's statement, the Building Code does not exist to ensure that certain building elements are available for unfettered use, but to ensure that, when buildings are constructed with such elements, appropriate methods and materials are employed to ensure a structure's safety. Zoning by-laws and ordinances are replete with examples of provisions that restrict or prohibit certain building elements; even if the Building Code regulates how such elements can be constructed, and the Attorney General has, until now, routinely approved such provisions. A few examples follow:

- MLU-10379 (approving, without substantive comment, Article 22 of Auburn's October 2021 Town Meeting amending the Town's Zoning to limit building heights to35 feet in some districts, and 80 feet (or up to 110 feet with a special permit) in others, even though the Building Code establishes standards for higher construction (780 CMR 5.00));
- MLU-7947 (also approving, without comment, Article 41 of Concord's April 2016 Town Meeting to increase the maximum permitted building height in a certain district from 25 to 27.5 feet);

- MLU-10086 (approving, without comment, Article 21 of Medway's May 2021 Town Meeting, providing that no building permit may issue for façade improvements without review for compliance with Medway's Design Review Guidelines, which, in turn, requires certain aesthetic standards impacting methods and materials of construction.); *See also Big Block Development Group v. Holder*, Mass. Land Ct., 27 LCR 177, 2019 WL 1645626 (Apr. 16, 2019) (upholding mandatory design guidelines in connection with "form-based zoning").

The Attorney General correctly approved these lawful zoning regulations. The fact that there is such scant caselaw examining whether restrictions of this type are preempted by the Building Code is a testament to how unremarkable they are.

Indeed, the Attorney General has accepted the harmonious coexistence of zoning and the Building Code even in the context of energy regulation. Recent by-law amendments in Lexington and Brookline required a certain percentage of new parking spaces to be built to accommodate the future installation of electric vehicle charging stations. The Stretch Energy Code[18] has its own "EV Ready" requirements (780 CMR 13.001, C405.1), which require certain commercial buildings to supply one EV Ready space per 15 parking spaces. The Lexington and Brookline articles required more, yet the MLU approved these by-law amendments without comment. MLU-9752 (approving Article 14 of Brookline's November 2019 Town Meeting), MLU-10066 (approving Article 44 of Lexington's March 2021 Town Meeting). Similarly, in 2021 the MLU approved an amendment to Arlington's Zoning Bylaw that provided frontage and lot area exemptions for homes constructed to a certain Home Energy Rating System (HERS) score, even though the requisite HERS standard is more stringent than required by the Stretch Code. See MLU-10245. Each of these regulations necessarily impacts how something may be

[18] The "Stretch Code" is codified in chapters 11 and 13 of the Building Code and has been adopted by Town Meeting in Lexington and Brookline. https://www.mass.gov/doc/stretch-code-adoption-by-community-map/download.

built, beyond what the Building Code requires, but do not run afoul of the Building Code because these impacts flow from towns' authority to regulate uses. And the fact that the Attorney General approved these by-laws undercuts the sweeping language she used to reject the Articles.

Like the above examples, this case does not present a novel use of zoning power to dictate building standards. Brookline's Articles, as land-use regulations, are just like these other by-laws, each of which the Attorney General approved. The Articles address only ***whether and where*** something can be built—a legitimate purpose of zoning—rather than ***how*** something can be built—the purpose of the Building Code. *See Enos*, 354 Mass. at 280-281 (1968). That difference—between whether and where a land use can be sited and how it should be constructed if allowed—is the fundamental distinction between zoning by-laws and the Building Code.

By observing (and not ignoring) that distinction, Brookline acted properly when adopting the Articles. As the SJC has recognized, the legislative goal of the Building Code and its preemptive reach is to ensure uniform standards for construction and construction materials. *St. George Greek Orthodox Cathedral of W. Massachusetts, Inc. v. Fire Dep't of Springfield*, 462 Mass. 120, 126 (2012). Brookline's Articles do not overlap with the purpose or intent of the Building Code and are therefore not preempted by it.[19] Nothing about Brookline's Articles would interfere with the Building Code's standards or force action in contravention of those standards. Rather, the Articles merely provide a choice to install one type of infrastructure or another, with

[19] *See also Town of Milton v. Attorney General*, 372 Mass. 694, 696 (1977) (finding that Town regulation prohibiting self-service gas stations was not inconsistent with State regulations that allow the existence of such facilities, because the latter were fire safety regulations, the purpose of which was to ensure the safety rather than the existence of such gas stations). Where a zoning by-law does not charge a special permit granting authority with a review of structural safety concerns, it can exist in harmony with the Building Code. *See generally Trustees of Boston College v. Board of Aldermen of Newton*, 58 Mass. App. Ct. 794, 804 (2003) (in a Dover Amendment case, accepting the value of a proposed structure's Gothic architectural style, and the benefits of permitting a height limitation exceedance, where the "unsightly exposure of the building's mechanical equipment...for aesthetic reasons, [Boston College] proposed to hide under a false pitched roof of Gothic style.").

each form of installation having to comply fully with the Building Code standards.

C. Brookline's Articles Are Not in Conflict with the Department of Public Utilities' Regulation of the Gas Industry Under G.L. c.164.

The Attorney General also found that Brookline's Articles conflict with G.L. c.164, through which the Massachusetts Department of Public Utilities regulates the sale and distribution of natural gas. The Decision quotes *Boston Gas Co. v. City of Somerville*, 420 Mass. 702, 706 (1995), implying that the Articles conflict with Chapter 164 because the Town "cannot use its limited authority to enact an ordinance which has the practical effect of frustrating the fundamental State policy of ensuring uniform and efficient utility services to the public." The Decision then equates a regulation that may affect the gross sales of natural gas as a regulation of the sale of natural gas itself.

Again, the Attorney General was wrong. To start, the Attorney General's citation of the "practical effects" of the Articles was outside the permitted scope of her review under G.L. c. 40, §32, which is limited to ruling on questions of law. *Town of Concord v. Attorney General*, 336 Mass. 17, 24 (1957). Moreover, assessing the practical effect of a municipal by-law requires evidence and findings outside of a ***legal review*** of a by-law, and is instead contingent on the examination of facts and policy. *See, e.g., Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 334 (4th Cir. 2001) ("Here, the parties are in agreement that the statutory provisions at issue are not facially discriminatory.... Thus, we must determine whether the statutory provisions at issue would discriminate...in their practical effect or were enacted for the purpose of discriminating.... Quite obviously, both inquiries present questions of fact." (emphasis added)).

Next, even if the Attorney General could permissibly undertake a "practical effects" review, that never actually happened. While the Record reflects that many interested parties submitted comment letters, the Attorney General did not purport to engage in a fact-finding process to support a conclusion that the Articles would have any effect on the ability of the natural gas industry to provide uniform and efficient utility services to the public. Such a determination for

so complicated an industry would have required a far more robust process, with technical and expert evidence that the Attorney General never solicited and certainly never considered.

Putting aside those procedural flaws, the Attorney General's determination was also substantively wrong. To start, the Articles ask nothing of regulated utility companies whatsoever; they apply only to those seeking to use land in Brookline. The Articles also do not prohibit gas companies' operation in a way that could disrupt the uniformity of their service—for example, by failing to serve some customers in a locality in which they provide service. Nothing in the Articles prevents a customer from requesting, or a utility from providing, gas or electric service in Brookline.[20] All they do is incentivize choices potential customers may make about whether to use gas or not. If Chapter 164 is to be understood to prohibit local regulations that will indirectly affect the natural gas industry, it must also be understood to demand high-quality economic analysis that demonstrates that such effects will occur. The record reflects none of that here.

The Decision is also substantively and radically out of step with the Commonwealth's current "fundamental state policy" and laws—enacted after G.L. c.164—to combat climate change and restrict the expansion of fossil fuel infrastructure. Starting in 2008 with the Green Communities Act, G.L. c.25A, §10 and Global Warming Solutions Act ("GWSA"), G.L. c.21N, now bolstered by this Legislative session's An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy (the "Climate Act"), St. 2021, c.8 (in 2021), and An Act Driving Clean Energy and Offshore Wind (the "Drive Act"), St. 2022, c.178 (in 2022), the Commonwealth's clear and overriding policy is to avert climate change, including through reductions to fossil fuel use. Perhaps most tellingly, the Green Communities Act and GWSA legally required the Secretary of Energy and Environmental Affairs to adopt greenhouse gas

[20] G.L. c.164, §92 affords a resident or business owner the right to petition the Department of Public Utilities to order a gas or electric company operating in the resident or business owner's town to supply the resident or business with gas or electricity unless the utility is solely engaged in the transmission of gas in the town and compliance would result in permanent financial loss to the corporation. The Articles do not affect this statutory right.

emissions limits to achieve net zero emissions in 2050, G.L. c. 21N, §§ 3, 3A, with the SJC explaining those limits' attainment is paramount over other historical policies: "the Commonwealth must reduce emissions and, in doing so, may, in some instances, elevate environmental goals over other considerations." *Kain v. Dep't of Env't Prot.*, 474 Mass. 278, 295 (2016). The more recent Drive Act only reaffirms these new goals' primacy by directing funding towards achieving these limits and mandating consideration of these limits in new contexts. Additionally, that Legislative enactment also authorizes a "demonstration project" under which up to ten cities or towns may adopt general or zoning bylaws doing exactly what Brookline attempted through these Articles.[21]

All this Legislation, enacted after Chapter 164 shows that the Commonwealth's policies have dramatically and unambiguously shifted to address the immediate climate crisis now at hand. Massachusetts' State policy is to reduce greenhouse gas emissions. And this is true even if doing so may incentivize consumers to choose alternative energy sources over the fossil fuels offered by the natural gas utilities. Indeed, dealing with climate change is simply incompatible with the Commonwealth's present level of natural gas consumption and directly in opposition to the notion that continued natural gas utility services to the public must be ensured.

D. Brookline's Article 26 Is Not in Conflict with G.L. c.40A, §§4 & 9.

The Attorney General finally found that Article 26 (but not Article 25) conflicts with G.L.

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[21] This "demonstration project," while evidencing a state policy that has shifted towards combating climate change by reducing emissions, does not resolve the issues in this case. Brookline, by virtue of its Home Rule Petition on the subject (Bill S.2473), is *likely* to be one of the ten municipalities approved to participate in the project. However, the demonstration project falls far short of the relief Plaintiffs seek in this case. The Act requires that participating cities and towns meet thresholds for housing affordability or multifamily housing; establishes data collection and reporting requirements; and requires the Department of Energy Resources to compile a report in 2025 and every two years thereafter which includes "recommendations for the continuation or termination of the demonstration project." DRIVE Act §83(d). Further, participation in the demonstration project will not rectify the Attorney General's exceedance of her authority or the resulting invasion of Brookline's Home Rule authority. The Attorney General's decision sets an erroneous precedent for future lawful uses of zoning authority.

c.40A, §9, because its special permit conditions improperly regulate something other than the use of land, and violate the uniformity requirement of G.L. c. 40A, §4. As with all her other grounds for disapproval, she was again wrong.

The conditions contemplated by Article 26 are directly related to the use of land for fossil fuel combustion. As noted in Section I, *supra*, zoning is the regulation of uses of land by a local authority, to protect the health, safety, and welfare of its citizens. Each regulated use of land involves a great many physical structures and objects—many of which are also materials used in construction that, when employed in certain uses, result in effects experienced on surrounding properties or the community at large. Care must therefore be taken to distinguish between a regulation that targets a use—which necessarily implicates physical materials, structures, and objects—and one that targets such materials, structures, and objects themselves.

Here, Article 26 targets the former. The Article's new special permit conditions are directly responsive to the use of land that includes fossil fuels for heating, cooling and hot water, and the environmental consequences of such use for the Brookline community. The conditions contemplated by Article 26 provide a reasonable safeguard against the long-term use of land for fossil fuel combustion by incentivizing present development to avoid the installation of new combustion-related infrastructure that will last for generations. As noted in Section II.C, *supra*, the limits required by *G.L.* c.21N, §§3, 3A are mandatory and intended to "attain actual, measurable, and permanent emissions reductions in the Commonwealth." *Kain*, 474 Mass. at 300. Article 26 reflects a recognition that this use of land for fossil fuel combustion in the coming years will increasingly conflict with the achievement of these limits. Where applied, the Article 26 conditions address the existing use of land for the combustion of fossil fuels by creating future decision points for property owners to reconsider that use.

G.L. c.40A, §4 provides, in part, that "[a]ny zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted." G.L. c.40A, §4, requires that all land in similar circumstances be treated alike

without regard for such factors as the identity of the owner or proponent of a particular use. See *SCIT, Inc. v. Planning Bd. of Braintree*, 19 Mass. App. Ct. 101, 107-108 (1984); *Cumberland Farms, Inc. v. Jacob*, 23 LCR 620, 623 (Oct. 6, 2015). As described, Article 26 addresses the effects of land used for the combustion of fossil fuels, which is unrelated to the identity of a given property owner.

CONCLUSION

For all the reasons articulated herein, the Plaintiffs' Motion should be ALLOWED, and the Court should enter a final judgment in the Plaintiffs' favor.

Respectfully submitted:

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