COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS **SUPERIOR COURT NO. 2282CV00400**

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.

MEMORANDUM OF PENDING INTERVENER-DEFENDANT BOSTON GAS COMPANY d/b/a NATIONAL GRID IN OPPOSITION TO THE PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS (And in Support of its Deemed Cross-Motion for Judgment on the Pleadings per Standing Order 1-96, ¶ 4)

I. INTRODUCTION

This case concerns a petition brought by the Town of Brookline ("Town" or "Brookline") and 20 Brookline residents (together with the Town, the "Plaintiffs") seeking certiorari review pursuant to G.L. c. 249, § 4 of the decision of the Office of the Attorney General ("AGO") dated February 25, 2022, which was rendered pursuant to G.L. c. 40, § 32 and G.L. c. 40A § 5, disapproving Town Meeting Warrant Articles 25 and 26 ("Bylaw Amendments") as adopted by Brookline's Town Meeting (the "AG Decision"). The very purpose of the Bylaw Amendments is to restrict and prohibit the use of fossil fuel, including natural gas, for new buildings and major

renovations by requiring special permit applicants to commit to construction without onsite fossil-fuel infrastructure to obtain favorable zoning relief under the Zoning Bylaw. After a thorough review of the Bylaw Amendments and existing state law, the AGO found that the Bylaw Amendments conflict with the plain language of G.L. c. 40A and are preempted by both the State Building Code and G.L. c. 164.

This case is governed by Massachusetts Superior Court Rule 1-96, pursuant to which the Plaintiffs served a *Motion for Judgment on the Pleadings* and accompanying memorandum of law (together, "Motion") on September 19, 2022, in accordance with Massachusetts Superior Court Rule 9A. Boston Gas Company d/b/a National Grid ("National Grid" or the "Company") hereby provides this Memorandum in support of its opposition (and deemed cross-motion) to the Plaintiffs' Motion as an Intervener-Defendant ("Opposition").[1]

As demonstrated below, the Plaintiffs' case is moot because the Legislature has clearly and unequivocally established the governing legal framework that is now applicable to cities and towns in the Commonwealth to achieve the objectives proposed in the Bylaw Amendments. Moreover, separate and apart from the new statutory framework that is now in effect, the Bylaw Amendments are inconsistent with the legal authority exclusively vested by statute in applicable state agencies regarding the use of fossil fuels; accordingly, the AGO's disapproval of the Bylaw Amendments was properly within her statutory role under G.L. c. 40, § 32 and G.L. c. 40A § 5 and should be affirmed.

[1] On September 14, 2022, National Grid filed a *Motion for Leave to Intervene in the Above-Captioned Proceeding,* which sets for the grounds for its intervention pursuant to Mass. R. Civ. P. 24(a) and (b) and which is pending before the Court.

II. STATEMENT OF FACTS

A. The Bylaw Amendments

The Brookline Annual Town Meeting adopted the Bylaw Amendments in May and June 2021 (R:8, 18).[2] With these Bylaw Amendments, the Town is attempting to restrict and prohibit fossil-fuel use in new construction under the guise of zoning incentives.[3]

Article 26 applies to all special permit applications for "New Buildings" and "Significant Rehabilitations" in all zoning districts in the Town (except for two overlay districts) (R:18-21). Special permit applicants must commit to construction without "On-Site Fossil Fuel Infrastructure" to be granted a special permit without restrictions (R:18-21).[4] If the application includes new or a continuation of existing "On-Site Fossil Fuel Infrastructure," the special permit granting authority must issue either a special permit that is time restricted (i.e., not to exceed five years, which may, for good cause, be renewed one or more times, for a term not to exceed one year) or one that is personal to the applicant and non-transferrable except in certain circumstances (i.e., does not run with the land) (R:18-21).

Article 25 similarly restricts the use of fossil fuel but is broader in scope even though its provisions are limited to one zoning district (R:8-10). In the Emerald Island Special District, a special permit is required for all applications for new structures that exceed floor area ratio and height thresholds and/or seek alternative parking and loading zone requirements and special

---

2 Citations in the form "R:_" refer to the relevant page number of the Amended Administrative Record.

3 This is the second time in recent years that the AGO has rejected an attempt by the Town to evade state law and impose local regulations to restrict and prohibit the use of fossil fuels in the Town for new buildings and major renovations (R:197).

4 "On-Site Fossil Fuel Infrastructure" is defined in the Zoning Amendments 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; provided, however that 'On-Site Fossil Fuel Infrastructure' shall not include a. Fuel gas piping connecting a gas source to a meter or to the meter itself; or b. Fossil fuel piping related to backup electrical generators, cooking appliances, or portable propane appliances for outdoor cooking and heating" (R:8-10, 18-21).

permits will be granted under Article 25 only where all such new buildings are constructed without "On-Site Fossil Fuel Infrastructure" (R:8-10).

The direct effect of Articles 25 and 26 is an attempt to circumvent well-established case law that currently vests in the state, not in cities or towns, the authority to regulate the use of fossil fuels for buildings and homes in the Town.

B. The AG Decision

The AG Decision disapproved the Bylaw Amendments, finding the following:

1. By regulating "On-Site Fossil Fuel Infrastructure," the Bylaw Amendments unlawfully regulate "the use of materials, or methods of construction of structures regulated by the state building code" in violation of the first sentence in G.L. c. 40A, § 3 (R:198). See also R:202-203.

2. The Bylaw Amendments are preempted by the Building Code (including the Gas Code and Fire Code), which establish comprehensive statewide standards for building construction and are "intended to occupy the field of building regulation." St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Dep't of Springfield, 462 Mass. 120, 130, n.14 (2012) (R:198). See also R:203-205.

3. The Bylaw Amendments are preempted by G.L. c. 164, through which the Massachusetts Department of Public Utilities ("DPU") comprehensively regulates the sale and distribution of natural gas on a uniform basis throughout the Commonwealth. Boston Gas Co. v. City of Somerville, 420 Mass. 702, 706 (1995) (R:198-199). See also R:205.

4. Article 26 conflicts with the special permit and uniformity provisions of G.L. c. 40A, §§ 4 and 9 by requiring the special permit granting authority to act on a special permit

application in a certain way depending upon whether the application includes "On-Site Fossil Fuel Infrastructure" rather than how the building is *used* (R:199). See also R:205-206.

As further described below, National Grid supports and agrees with the AG Decision as properly rejecting the Town's Bylaw Amendments because they are inconsistent with state law. In addition, National Grid adds that recent legislation has rendered Plaintiffs' case moot.

C. Recent Legislation

1. The 2021 Climate Act Established Municipal Opt-in Specialized Code

As referenced in the AG Decision (R:206), in March 2021, prior to the Town's adoption of the Bylaw Amendments in May and June of 2021, the Legislature adopted *An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy* (the "Climate Act"). The Climate Act is a comprehensive set of landmark legislative provisions designed, *inter alia*, to advance the Commonwealth's imperatives to combat climate change and to achieve greater equity in the distribution of energy and environmental benefits to environmental justice populations. In pertinent part to the matter at hand, the Climate Act empowers the Department of Energy Resources ("DOER") to develop and promulgate, in consultation with the Board of Building Regulations and Standards ("BBRS"),[5] a municipal opt-in specialized energy code ("Municipal Opt-in Specialized Code") that will become part of the State Building Code. The specialized code will include, but not be limited to, net-zero building performance standards and a definition of net-zero building, to achieve compliance with the Commonwealth's statewide greenhouse gas emission targets. St. 2021, c. 8, § 31.[6] DOER must develop and promulgate the Municipal Opt-in Specialized Code by December 2022. Id. Once promulgated, a municipality may adopt it

[5] Pursuant to G.L. c. 143, § 93, the BBRS has exclusive authority over the State Building Code. St. George Greek Orthodox Cathedral, 462 Mass. at 133-134.

[6] https://malegislature.gov/Laws/SessionLaws/Acts/2021/Chapter8

notwithstanding any special or general law, rule, or regulation to the contrary. Id. The Climate Act, therefore, establishes for the first time the prerequisites, sequence, and pathway for cities and towns to have the opportunity to regulate the use of fossil fuels within their communities.

In furtherance of the statutory deadline of December 2022, DOER released final draft regulations on September 23, 2022, that provide a set of net-zero building performance standards that combine highly energy efficient design, onsite renewable energy generation, and electrification to comply with state emission limits and goals.[7] The regulations will be submitted to the General Court for review pursuant to G.L. c. 25A, § 12, after which they will be promulgated as final regulations by DOER. Thereafter, cities and towns may adopt the Municipal Opt-in Specialized Code by vote of City council or Town meeting, as applicable, to address emission reduction and climate change goals within their communities.

2. The 2022 Drive Act Established a Pilot Program for Fossil-Fuel Bans

In 2021, five communicates (Arlington, Acton, Brookline, Concord, and Lexington) filed home rule petitions with the General Court seeking authorization to adopt and enforce local regulations restricting new fossil-fuel infrastructure in certain construction "notwithstanding chapter 40A, section 13 of chapter 142, and chapter 164 of the General Laws, the State Building Code, the Fuel and Gas Code, or any other general or special law or regulation to the contrary" (R:207). Five communities followed suit before August of 2022 (Aquinnah, Cambridge, Lincoln, Newton, and West Tisbury).

Against this backdrop, in August 2022, the Legislature enacted *An Act Driving Clean Energy and Offshore Wind* (the "Drive Act"), a significant body of legislation aimed at moving Massachusetts further toward its goal of net-zero greenhouse gas emissions by 2050 through the

[7] https://www.mass.gov/info-details/stretch-energy-code-development-2022

promotion of offshore wind and solar power, battery storage, and the electrification of the transportation and building sectors.[8] St. 2022, c. 179.[9] With respect to the issues pending in this appeal, the Drive Act supplements the Climate Act by requiring DOER to establish a demonstration project (the "Pilot Program") in which up to ten cities and towns in the Commonwealth may: (1) adopt and amend general or zoning ordinances or by-laws that require new building construction or major renovation projects to be fossil-fuel free; and (2) enforce restrictions and prohibitions on new building construction and major renovation projects that are not fossil fuel-free. St. 2022, c. 179, § 84(c).

A city or town may apply to participate in the Pilot Program after it has received local approval (i.e., the vote of the City council or Town meeting, as applicable) and has submitted a home rule petition[10] to the General Court. Id. In addition, a city or town either must: (1) meet a 10 percent housing affordability threshold set under G.L. c. 40B; or (2) have been granted safe harbor status through an approved Housing Production Plan ("HPP") by the Department of Housing and Community Development ("DHCD"); or (3) have approved a zoning ordinance or by-law that provides for at least one district of reasonable size in which multi-family housing is permitted as of right that does not include age restrictions and is suitable for families with children. Id. A city or town that met the 10 per cent affordability threshold as of December 21, 2020, will

---

8 Because "the deferred operation of the [Drive Act] would tend to defeat its intended purpose to authorize forthwith the advancement of offshore wind and clean energy in the commonwealth," it was declared to be an emergency law, necessary for the immediate preservation of the public convenience, and took immediate effect on August 11, 2022. St. 2022, c. 179.

9 https://malegislature.gov/Laws/SessionLaws/Acts/2022/Chapter179

10 The Plaintiffs essentially argue that the Town's home rule authority has been usurped by the AGO's disapproval. See Motion at 7-9. However, the very point of the Pilot Program is the adoption of local zoning enactments via the participating municipalities' home rule power. As discussed above, the Town's application for the Pilot Program is pending and once approved, the Town will be poised to adopt zoning bylaws (or implement the Bylaw Amendments), but with the critical oversight of DOER, as contemplated by the Legislature in the Drive Act.

have satisfied the requirements of the Drive Act. Id. Communities seeking to attain the 10 percent threshold or qualify for the Pilot Program based on safe harbor status have until February 2024 to do so. Id. Assuming the affordability criteria are met, DOER shall issue up to 10 approvals in the order in which the cities and towns have submitted their home rule petitions to the General Court. Id.

Thus far, including the 10 municipalities identified above, a total of 12 cities and towns have filed home rule petitions with the General Court.[11] Brookline's home rule petition was filed on June 1, 2021 (the third municipality to file).[12] Moreover, according to DHCD's Chapter 40B Subsidized Housing Inventory, the Town has met the 10 percent housing affordability threshold as of December 21, 2020.[13] Thus, the Town has met the criteria for participation in the Pilot Program.

III. ARGUMENT

A. Standard of Review

1. Mootness

Litigation ordinarily is considered moot when the party claiming to be aggrieved ceases to have a personal stake in its outcome. Attorney Gen. v. Commissioner of Ins., 442 Mass. 793, 810 (2004); Taylor v. Board of Appeals of Lexington, 451 Mass. 270, 274 (2008). Where, as here, plaintiffs have secured the objective they sought by alternative means, the substantive issue in the appeal is no longer in controversy and the appeal is moot. Ott v. Boston Edison Co., 413 Mass. 680, 680 (1992) ("The substantive issue in this appeal is no longer in controversy and is moot

---

11 Not surprisingly, the Legislature has not yet enacted any of the home rule petitions.

12 https://malegislature.gov/Bills/192/S2473

13 https://www.mass.gov/doc/subsidized-housing-inventory/download

because the plaintiff appellants have attained by another process the objective that they sought by the commencement of this action…There is no current actual controversy warranting declaratory relief as to the [Plaintiffs'] rights concerning earlier stockholders' meetings"). Courts decline to hear moot cases because: (a) only factually concrete disputes are capable of resolution through the adversary process; (b) it is feared that the parties will not adequately represent positions in which they no longer have a personal stake; (c) the adjudication of hypothetical disputes would encroach on the legislative domain; and (d) judicial economy requires that insubstantial controversies not be litigated. Wolf v. Commissioner of Public Welfare, 367 Mass. 293, 298 (1975). As discussed below, the Legislature has enacted governing state law through the Climate Act and Drive Act that establishes the prerequisites, steps, and procedures that must be followed by the Town and other communities in the Commonwealth to achieve the fossil-fuel free objectives the Town seeks by bringing this suit, thereby making the Plaintiffs' challenge of the AGO's disapproval of the Bylaw Amendments moot. The adjudication of the Plaintiffs' hypothetical dispute would encroach on, and be inconsistent with, the Legislature's actions and no other facts exist that would support the Court's exercise of discretion in reviewing a moot appeal.

2. Certiorari Review of the AG Decision

In situations in which mootness does not apply, a person aggrieved by the AGO's disapproval of a bylaw can obtain a judicial determination of whether the bylaw was properly disapproved through certiorari review. Town of Reading v. Attorney General, 362 Mass. 266, 269 (1972). In certiorari cases, "the standard of review may vary according to the nature of the action for which review is sought." Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 217 (1989). Where the action being reviewed is not a decision made in an adjudicatory proceeding and where the action entails matters committed to or implicating the

exercise of administrative discretion, the court applies the "arbitrary and capricious" standard. Garrity v. Conservation Comm'n of Hingham, 462 Mass. 779, 792 (2012). Neither G.L. c. 40, § 32 nor G.L. c. 40A § 5 provides standards for the Attorney General's review of bylaws for inconsistency with existing state law and, accordingly, she uses her discretion is approving or disapproving bylaws and the Court will review her decision using the "arbitrary and capricious" standard. See, e.g., Frawley v. Police Comm'r of Cambridge, 473 Mass. 716, 728 (2016). A decision is arbitrary or capricious such that it constitutes an abuse of discretion where it "lacks any rational explanation that reasonable persons might support." Doe v. Superintendent of Schs. of Stoughton, 437 Mass. 1, 6 (2002). The appealing party bears the burden of demonstrating the invalidity of the administrative decision. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989). "It is not the place of a reviewing court to substitute its own opinion" for that of the AGO. Doe, 437 Mass. at 6.

The AGO may disapprove a bylaw if it violates State substantive or procedural law. Concord v. Attorney General, 336 Mass. 17, 24 (1957). "[T]he touchstone of the analysis [of whether a local bylaw is inconsistent with State law] is whether the State Legislature intended to preempt the [town's] authority to act." Connors v. Boston, 430 Mass. 31, 35 (1999), citing Bloom v. Worcester, 363 Mass. 136, 155 (1973). The "question is not whether the Legislature intended to grant authority to municipalities to act ..., but rather whether the Legislature intended to deny [a municipality] the right to legislate on the subject [in question]." Wendell v. Attorney General, 394 Mass. 518, 524 (1985). A local regulation will be invalidated if there is a "sharp conflict" between the local and State provisions, which appears when either "the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the legislation cannot be achieved in the face of the local by-law." Easthampton Sav. Bank v. Springfield, 470 Mass. 284,

289 (2014). As demonstrated below, the AG Decision presents several instances of sharp conflict between the Bylaw Amendments and existing state law, and thus, should be affirmed.

B. Given the Extensive New Legislation Enacted Under the Climate Act and Drive Act, the Plaintiffs' Action Is Now Moot.

The Plaintiffs' Motion ignores the sweeping legislation enacted in 2021 and 2022, through the Climate Act and the Drive Act, respectively, that prescribe the specific processes by which municipalities may potentially restrict and prohibit the use of fossil fuel for new buildings and major renovations, thereby mooting this appeal.[14] See Ott v. Boston Edison Co., 413 Mass. at 680. These enactments are clear and indisputable evidence of the Legislature's intent for a measured and limited process to govern how cities and towns may act to regulate the use of fossil fuels in their communities. However, outside of that process, state law dictates that the use of fossil fuels in homes and businesses in Massachusetts is exclusively regulated and overseen by state agencies rather than on an *ad hoc* basis by the 351 cities and towns in the Commonwealth. To that end, it is well established that the purpose of G.L. c. 164 is to "ensure uniform and efficient utility services to the public" (see, e.g., Boston Gas Co. v. City of Newton, 425 Mass. 697, 699 (1997); Boston Gas Co. v. City of Somerville, 420 Mass 702, 703 (1995)) and the Supreme Judicial Court (the "SJC") has consistently ruled against municipal overreach based on the "the desirability of uniformity of standards applicable to utilities regulated by the [DPU]." Boston Gas Co. v. City of Newton, 425 Mass. at 699; Boston Edison Co. v. Town of Sudbury, 356 Mass. 406, 420 (1969). See also Pereira v. New England LNG Co., 364 Mass. 109, 121 (1973) ("To hold otherwise would impute to the Legislature an intent to Balkanize the Commonwealth and to permit any single municipality to deny access to such vital services to any and all other municipalities"). There are

[14] Although the Plaintiffs' Motion acknowledges these statutory changes, it fails to analyze the significance of these enactments relative to its underlying claims. Motion at 17-18.

no circumstances that would support the discretionary review of this moot appeal. Importantly, reversal of the AG Decision would "encroach on the legislative domain" (Wolf v. Commissioner of Public Welfare, 367 Mass. at 298) and would, in fact, thwart the Legislature's clear intent to have state agency oversight and control of any fossil-fuel bans via the Climate Act's Municipal Opt-In Specialized Code and the Drive Act's Pilot Program.

The Climate Act's Municipal Opt-In Specialized Code will be available for municipal adoption in December 2022. The specialized code goes beyond the base and stretch codes embodied in the existing State Building Code by providing a set of net-zero building performance standards that combine highly energy efficient design, onsite renewable energy generation, and electrification to comply with state emission limits and goals and by requiring all new buildings to be designed for electric service and wiring appropriate for future electrification.[15] Notably, the Legislature explicitly vested the authority to establish energy design standards for buildings with DOER and BBRS, charging these state agencies to develop and promulgate a uniform specialized state code that furthers the Commonwealth's statewide climate change objectives. St. 2021, c. 8, § 31. If the Legislature had wanted to provide individual communities the immediate power to unilaterally adopt their own limitations or prohibitions on the use of fossil fuels in advance of this process and outside of the statewide oversight by DOER and BBRS, it would have done so. See New England Power Co. v. Amesbury, 389 Mass. 69, 74-75 (1983) ("We do not imply language in a statute if the Legislature has not provided it"). Rather, as it did with Chapter 164 and the State Building Code (as discussed below), the Legislature created a statewide framework in the Climate

[15] The specialized opt-in code language includes the following definition of a net zero building: "a building which is consistent with achievement of MA 2050 net-zero emissions, through a combination of highly energy efficient design together with being an all-electric or Zero Energy Building, or, where fossil fuels are utilized, a building fully pre-wired for future electrification and that generates solar power on-site from the available Potential Solar Zone Area." St. 2021, c. 8, § 31.

Act, thereby continuing to ensure consistency and uniformity throughout the state and avoiding balkanization and inefficiency in the development of local regulation on the use of fossil fuels and related climate change initiatives within the Commonwealth. See St. George Greek Orthodox Cathedral, 462 Mass. at 133-134; Boston Gas Co. v. City of Newton, 425 Mass. 697, 702 (1997).

The Legislature's intent to achieve these objectives carefully and through statewide oversight is manifest. At the time of the Climate Act's enactment, members of the Legislature were keenly aware of Brookline's previous attempts to legislate in this policy area. Context surrounding the passage of the Climate Act is illuminating. In the House and Senate Session Summaries of the conference committee held on Monday, January 4, 2021, there were extensive discussions on Brookline's effort to pass local bylaws restricting the use of fossil fuels and the purpose of the stretch energy code to be developed by BBRS and DOER. State Representative Tommy Vitolo (who represents Brookline) stated:

> Some communities want to push forward on initiatives faster than others. One such community is Brookline, whose certain article calling for restrictions on fossil fuels pipelines passed. July 2020 was too soon but January 2021 is not. This bill contains language to allow communities to opt-in to a net zero stretch code just as they have been able to opt into the stretch energy code for a decade.

Tr. of House of Representatives Session, January 4, 2021, State House News Service, (www.statehousenews.com). State Senator Michael Barrett also acknowledged that "Brookline took a path breaking approach which also lacked in supporting state law, such that it could be enabled. We're providing that state law support today, creating a local option net zero stretch energy code." Id. Thus, legislators from both houses of the General Court acknowledged that Brookline's prohibition had failed previously, and they indicated that this provision of the Climate Act was intended to provide municipalities more stringent but uniform tools under the law once DOER and BBRS establish appropriate parameters applicable statewide through the State Building Code.

Thereafter, building on the directives of the Climate Act, the Drive Act established a Pilot Program to be administered by DOER that would allow up to ten municipalities the opportunity to adopt and amend general or zoning ordinances or by-laws that require new building construction or major renovation projects to be fossil fuel-free, "notwithstanding chapter 40A of the General Laws, section 13 of chapter 142 of the General Laws and chapter 164 of the General Laws or any other general or special law to the contrary." St. 2022, c. 179, §§ 84(b). Having complied with the prerequisites (i.e., being one of the first ten communities to file a home rule petition with the General Court and meeting the affordability threshold), the Town has now provisionally secured a spot in the Pilot Program.

Significantly, the Pilot Program requires DOER to monitor the benefits of municipal natural gas bans adopted pursuant to it and to evaluate potential negative impacts of natural gas bans in other sectors. St. 2022, c. 179, § 84(e). The statute mandates that DOER collect data from the pilot communities to monitor impacts of the ordinances and by-laws adopted pursuant to the Pilot Program on: (1) emissions; (2) building costs; (3) operating costs; (4) the number of building permits issued; and (5) other criteria as set by DOER. Id. For example, the Drive Act requires electric and gas distribution companies to collect and annually report to DOER the anonymized monthly totals of electricity and natural gas consumed, and corresponding electricity and natural gas bill amount, for each consumer: (1) residing in a newly constructed building or major renovation project subject to the demonstration in each municipality participating in the demonstration; and (ii) residing in a newly constructed building or major renovation project in a number of comparable municipalities, as selected by the department, not participating in the demonstration. Id. By September 30, 2025, DOER is required to file a report summarizing this data with the Senate and House committees on Ways and Means, the joint committee on Housing

and the joint committee on Telecommunications, Utilities and Energy, and including an analysis of the net reduction in emissions: (1) for each newly constructed building or major renovation project subject to the Pilot Program; and (2) for each comparable newly constructed building or major renovation project in a number of comparable municipalities, as selected by DOER, not participating in the Pilot Program. Id. The DOER report shall also analyze impacts on: (1) housing production, if any; (2) housing affordability, if any, including electric bills, heating bills and other operating costs; (3) housing affordability for persons of low and moderate income, if any, including electric bills, heating bills and other operating costs; and (4) any other matters set forth by DOER. Id.

The fact that so much data is required to be complied and filed with the General Court underscores the Legislature's intent to fully evaluate the benefits and detriments of fossil-fuel bans within the confines of the Pilot Program. The Legislature could hardly have been clearer that municipal adoption of fossil-fuel bans may occur *only* in the limited circumstances specified in the Climate Act and Drive Act, under the direct control and oversight of DOER and the BBRS, and not independent thereof. Absent the Drive Act, municipalities simply do not have the power to enact local legislation to prohibit the use of fossil fuels in new construction and major renovations.

For these reasons, the substantive issue in this appeal is no longer in controversy and the appeal is moot because the Legislature has decidedly established the procedures for cities or towns to impose municipal fossil-fuel bans through the Climate and Drive Acts. Ott v. Boston Edison Co., 413 Mass. at 680. The circumstances here do not justify the Court's review of the AG Decision. Given the enactment of the Municipal Op-In Specialized Code and the Pilot Program, and the deliberate action on the part of the Legislature in not enacting any of the 12 home rule petitions that have been filed with the General Court outside of the parameters of the Pilot Program,

the Legislature has unequivocally set forth the limited process that cities and towns must follow if they desire to restrict or prohibit fossil-fuel use in their communities. Thus, the substantive issue in this appeal is not likely to recur between the Town or other municipalities and, even if it did, timely judicial resolution of it would be possible via certiorari review. Accordingly, this appeal should be dismissed as moot.

C. The Bylaw Amendments Are Inconsistent with State Law.

If this case is not dismissed as moot, the Court should nonetheless find that the AG Decision is not arbitrary or capricious and that the AGO properly disapproved the Bylaw Amendments as inconsistent with state law.

1. The Bylaw Amendments Are Inconsistent with the Climate and Drive Acts

As demonstrated above, the Bylaw Amendments directly conflict with both the Climate and Drive Acts. The Climate Act directs DOER (and not individual municipalities) with the authority to develop and promulgate, in consultation with the BBRS, the Municipal Opt-In Specialized Code, which includes net-zero building performance standards and a definition of net-zero building that are designed to achieve compliance with the Commonwealth's statewide greenhouse gas emission limits. St. 2021, c. 8, § 31. The Drive Act similarly evidences the Legislature's intent to occupy the field of regulation of fossil-fuel use by establishing the Pilot Program where DOER will oversee local attempts to adopt bylaws that restrict or prohibit fossil fuel use. St. 2022, c. 179, § 84(c). As an integral part thereof, DOER will carefully evaluate and

monitor the benefits and impacts of municipal bylaws adopted under the Pilot Program.[16] The adoption of natural gas bans outside of the Pilot Program sharply conflicts with, and defeats, the Legislature's deliberate and measured approach to meeting the Commonwealth's climate change goals. The purposes of Sections 84(c) and (e) of the Drive Act simply cannot be achieved in the face of the *ad hoc* adoption of the Bylaw Amendments. Easthampton Sav. Bank v. Springfield, 470 Mass. at 289.

As such, the AG Decision correctly disapproved the Bylaw Amendments.

2. The Bylaw Amendments Are Inconsistent with G.L. c. 164

The Bylaw Amendments also are preempted by G.L. c. 164, through which the DPU comprehensively regulates the sale and distribution of natural gas in the Commonwealth (R:198-199, 205). Perhaps no area of statewide preemption is more firmly settled by case law of the SJC than energy regulation. It is squarely established that G.L. c. 164 is "comprehensive in nature" and, therefore, intended by the Legislature to preempt local entities from enacting legislation in this area. Boston Gas Co. v. City of Somerville, 420 Mass. 702, 704 (1995) (the "sale of gas … by public utilities is governed by G.L. c. 164" not by municipalities). The very purpose of G.L. c. 164 is to ensure uniform and efficient utility services to the public. Boston Gas Co. v. City of Newton, 425 Mass. 697, 702 (1997). The Legislature granted the DPU the "paramount power" to regulate and control the distribution of natural gas and, in fact, intended to make that grant in

[16] This oversight is critical because natural gas bans, like the one embodied in the Bylaw Amendments, will significantly increase the cost to heat homes and businesses, which will have serious negative impacts on the public and the state economy (R:136-137). Moreover, where one community or large group of customers are effectively opted out of using natural gas, the costs of providing utility service become higher over time for the remaining customers (id.). Because of this cost-sharing dynamic, the Bylaw Amendments will inevitably cause detrimental cost impacts to customers *outside* of Brookline, which is one of the reasons that state law makes sure that there is uniform regulation of utility services across municipal boundaries and throughout the state (id.).

furtherance of regulated gas service. Pereira v. New England LNG Co., 364 Mass. 109, 120 (1973); Boston Gas Co. v. City of Somerville, 420 Mass. at 704.

To that end, it is the DPU, and the DPU alone, that has the statewide authority to establish whether, how and under what conditions natural gas may be used in the Commonwealth. Referencing G.L. c. 164, § 105A, the SJC has found that the Legislature recognized "the absolute interdependence of all parts of the Commonwealth and of all of its inhabitants in the matter of availability of public utility services, and [gave] to the DPU the power to take action necessary to insure that *all* may obtain a reasonable measure of such vital services." Pereira v. New England LNG Co., 364 Mass. at 121 (emphasis added). The SJC also has held that the Legislature did not intend to "Balkanize the Commonwealth" (id.), which is exactly what would happen if the Bylaw Amendments are deemed valid as that would allow the Town to control and ultimately restrict to whom National Grid is able to sell and distribute natural gas in the Town and even whether the service could be sold at all.[17] Only the DPU is granted authority under G.L. c. 164 to regulate sales by natural gas companies and the right to use natural gas by the public. In short, the Bylaw Amendments are inconsistent with the fundamental statutory framework, confirmed on numerous occasions by the SJC, that the DPU is entrusted with the exclusive authority to ensure the provision of uniform and efficient natural gas service to consumers throughout the state.

3. The Bylaw Amendments Are Inconsistent with Chapter 40A and the State Building Code

National Grid likewise fully supports the AGO's findings that the Bylaw Amendments are inconsistent with G.L. c. 40A and the State Building Code. G.L. c. 40A, § 3, unequivocally states

[17] Local enactments prohibiting the use of fossil-fuel have a *per se* effect on limiting customer choices on how they obtain critical energy services for their homes and businesses and the rates at which these services are provided to customers across the Commonwealth – a result that is within the exclusive province of the DPU's authority to protect and regulate the public interest under Chapter 164 of the General Laws. Boston Gas Co. v. City of Newton, 425 Mass. at 699; Boston Edison Co. v. Sudbury, 356 Mass. 406, 420 (1969).

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." The Bylaw Amendments would clearly restrict the "material" or "methods" of construction of infrastructure regulated by the State Building Code. Although there are no reported appellate decisions interpreting this provision, the SJC has found that zoning bylaws cannot require the use of certain types of walls and floors, which are regulated by the State Building Code. See Enos v. City of Brockton, 354 Mass. 278, 279 (1968). In making this finding, the SJC noted that "the Legislature did not intend to authorize the combining of building codes with zoning ordinances or by-laws." Id. The Bylaw Amendments limit or prohibit the use of necessary fossil fuel infrastructure, such as piping needed for homes and businesses, which is an impermissible use of zoning because these materials and methods of construction are governed by the State Building Code.

To that very end, the General Court authorized the development of a State Building Code with the "intention" of having "uniform standards and requirements for construction" including for energy conservation. St. George Greek Orthodox Cathedral, 462 Mass. at 126; G.L. c. 143, § 95(a). As the AG Decision concludes, and consistent with Chapter 164, the SJC has found that the Legislature authorized the State Building Code to ensure "uniform standards" and that it "intended to occupy a field by promulgating comprehensive legislation and delegating further regulation to a State board." St. George, 462 Mass. at 126, 128-130 (if all municipalities were allowed to enact similarly restrictive ordinances and bylaws, a "patchwork" of building regulations would cause a "narrowing of options" through development of different applicable building codes in each of the Commonwealth's 351 cities and towns, which was "precisely the result that the promulgation of the code was meant to foreclose"). If the Bylaw Amendments aimed at regulating gas piping in buildings, the use of which is clearly allowed under the State Building Code, are

deemed a valid exercise of local zoning authority, then where is the line demarcating the lawful regulation of land use and the unlawful regulation of "materials" and "methods"? Allowing the Bylaw Amendments to stand would sanction the Town and other municipalities to adopt their own by-laws inconsistent with the State Building Code, which has consistently been prohibited under state law.

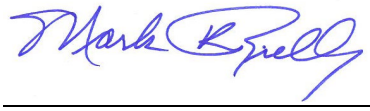
IV. CONCLUSION

For the reasons set forth above, the Court should deny the Plaintiff's Motion for Judgment on the Pleadings, grant the Company's Cross-Motion for Judgment on the Pleadings, enter final judgment in favor of the Company and grant such other relief as it deems just and proper.

Respectfully submitted,

BOSTON GAS COMPANY d/b/a NATIONAL GRID

By its attorneys:



Mark R. Rielly, Esq.
National Grid USA Service Company, Inc. d/b/a National Grid
40 Sylvan Road
Waltham, MA 02451
BBO #651908
Mark.Rielly@nationalgrid.com

David S. Rosenzweig, Esq.
Keegan Werlin LLP
99 High Street, Suite 2900
Boston, MA 02110
BBO #552495
drosen@keeganwerlin.com

Dated: October 19, 2022

CERTIFICATE OF SERVICE

I, David S. Rosenzweig, hereby certify that on October 19, 2022, I caused a copy of the foregoing document to be served on counsel for all parties to this case by electronic mail by agreement of the parties.

David S. Rosenzweig, Esq.