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, and

BOSTON GAS COMPANY, d/b/a NATIONAL GRID, and MASSACHUSETTS ENERGY MARKETERS ASSOCIATION,[1]

Interested Parties.

OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS WITH CROSS-MOTION FOR JUDGMENT AND MEMORANDUM OF LAW INCORPORATED

INTRODUCTION

In a laudable effort to curtail the use of fossil fuels to heat buildings and water, the Town of Brookline passed two amendments to its Zoning By-Law, which have the effect of denying or limiting a special permit for certain building projects if the proposed construction will include

[1] The interested parties were added by Order of the Court during a motion hearing session held on October 19, 2022.

installation of "on-site fossil fuel infrastructure." While the Attorney General agrees with the goals underlying the Town's By-Law amendments, she was obligated under G.L. c. 40, § 32, to review the amendments without regard to the Town's policy objectives in adopting them. The Attorney General's singular focus was, as it must be, on whether the amendments conflict with the State Constitution or pre-existing Massachusetts statutes. After the Attorney General disapproved the amendments on the basis that they conflict with several Massachusetts statutes, the Town and the individually named Plaintiffs brought this action seeking judicial review of her decision, and they now move for judgment on the pleadings pursuant to Mass. Civ. P. R. 12(c) and Superior Court Standing Order 1-96. Because the Attorney General correctly concluded that the By-Law amendments conflict with Massachusetts law, the Plaintiffs' motion should be denied. Further, the Attorney General's cross-motion for judgment on the pleadings, incorporated herein under Superior Court Standing Order 1-96, § 4, should be allowed, and the Court should enter judgment for the Attorney General.

FACTS AND PROCEDURAL HISTORY

The By-Law's General Provisions

The Town of Brookline has adopted a Zoning By-Law pursuant to the Massachusetts Zoning Act, G.L. c. 40A. *See* Supplemental Appendix ("SA"). The By-Law's purposes are enumerated in its first section, Art. I, § 1.00. SA at 7. The By-Law's Article III divides the Town into various districts, as shown on a map kept in the office of the Town Clerk. SA at 24-29, §§ 3.00-3.03. The By-Law also provides for "overlay districts" within various of the Town's zoning districts, where "both the requirements of the base zoning district and those of the overlay district shall apply." SA 24, § 3.00.4. A table of uses permitted in each zoning district is set forth in Article IV of the By-Law. SA at 33-55, § 4.07. In addition, Article V of the By-Law sets forth dimensional requirements for each district and type of use. SA at 84-165.

Within Article V, the By-Law includes specific requirements for each of numerous special zoning districts. SA at 92-120, § 5.06. Among those special districts is the Emerald Island Special District ("EISD"), which encompasses an area bounded by River Road, Brookline Avenue, and Washington Street. SA at 113,§ 5.06(4)(j)(1). Within the EISD, a special permit is required for all new structures, outdoor uses, and exterior alterations that "exceed a floor area ratio of 1.0,[2] a height greater than 40' and/or seek alternative parking and loading zone requirements." *Id.* at 113, § 5.06(4)(j)(2). Moreover, a special permit is available for such projects only on lots "greater than 13,600 square feet in contiguous area" and only for certain uses described in § 5.06(4)(j)(3).[3] *Id.* An application for a special permit within the EISD must meet certain requirements related to matters such as setbacks and sidewalk widths, street trees, and sidewalk lighting, as set forth in the By-Law at § 5.06(4)(j)(2).a-j. *Id.* at 114-16.

Article IX of the By-Law provides for a Board of Appeals (the "Board") to be appointed by the Selectmen. SA at 198, § 9.01. The Board is Brookline's "special permit granting authority," as defined in G.L. c. 40A, § 1A, and it may grant special permits, subject to requirements in By-Law Article IX ,§§ 9.04, 9.05, 9.08, and 9.10. SA 198, § 9.03.

The By-Law Amendments

Brookline's Town Meeting representatives passed two amendments to the By-Law during their annual meeting held in May and June 2021, both of which amendments sought to limit or

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[2] "Floor area ratio" is described in the By-Law as the "ratio of gross floor area to lot area." SA at 139, § 5.20.

[3] Section 5.06(2)(j)(3)(a) of the By-Law lists the uses for which a special permit for additional height up to 85 feet may be granted in the EISD. SA at 116-17. Section § 5.06(2)(j)(3)(b) of the By-Law lists the uses for which a special permit for additional height up to 110 feet may be granted in the EISD. SA at 117.

discourage the use of what the Town has called "fossil fuel infrastructure" in certain building projects requiring a special permit.

1. Article 25

The first of the amendments, set forth in Article 25 of Brookline's annual Town Meeting Warrant ("Article 25"), would insert new language into § 5.06(4)(j)(2).d of the By-Law, which is among the provisions setting forth requirements for the issuance of a special permit in the EISD. *See* Amended Administrative Record ("AR") at 8. That amendment would require that "All new buildings shall . . . be free of on-site fossil fuel infrastructure." AR at 8.

Article 25 defines "On-Site Fossil Fuel Infrastructure" as follows: "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; [excluding,] however[:] a. Fuel gas piping connecting a supply 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." AR at 008.

Article 25 also excludes, generally, from its provisions "piping, in buildings with floor areas of at least 10,000 square feet, required to produce potable or domestic hot water from centralized hot water systems if the Engineer of Record certifies that no commercially available electric hot water heater can meet the building's hot water demand for less than 150% of installation or operational costs, compared to a conventional fossil fuel hot water system." AR at 009. And, Article 25 also excludes from its provisions, "[r]esearch laboratories for scientific or medical research" and "[h]ealth care uses that require licensure or certification as a health care facility by the Massachusetts Department of Public Health." AR 9.

2. Article 26

Article 26 of the Town Meeting Warrant ("Article 26") would add an entirely new section to the By-Law at the end of Article IX, designated as Section 9.13. AR at 18-21. The new § 9.13 would add three alternative conditions for "all special permit applications for New Buildings or Significant Rehabilitations proposed to be located in whole or in part within the Town or for uses to be located within such New Buildings or Significant Rehabilitations,"[4] with certain limitations, including the same language described above related to hot water heating systems, research laboratories, and health care uses. AR at 19-20.

Under the proposed new § 9.13, except as otherwise noted therein, the Board would be prohibited from issuing special permits unless: (1) the Board finds that the proposal "does not involve the installation of any new On-Site Fossil Fuel Infrastructure or the continuation of any On-Site Fossil Fuel Infrastructure installed pursuant to a special permit previously issued subject to this section;" or (2) the special permit includes a condition limiting it to a term not to exceed five years from the date of its first exercise or January 1, 2030 (whichever is later)," with renewals available in one-year increments for "good cause;" or (3) the special permit is made "personal to the applicant and . . . non-transferrable." AR 20. Under the proposed new § 9.13, where a special permit is made time-limited or personal to the applicant, the Board "may modify the special permit to run with the land in perpetuity, upon a finding that the applicant has removed, disconnected or otherwise permanently disabled any On-Site Fossil Fuel Infrastructure that was subject to this section at the time the special permit was first granted." AR at 20.

[4] The By-Law gives the term "Significant Rehabilitations" a complex definition. AR 18-19. In summary, it refers to renovations to existing residential buildings involving reconfiguration of more than 75% of gross floor area or renovations to existing commercial buildings involving reconfiguration of more than 50% of gross floor area. AR at 19.

The Attorney General's Decision

In August 2021, the Town submitted to the Office of the Attorney General requests for approval of Articles 25 and 26 (among other By-Law changes) pursuant to G.L. c. 40, § 32 (requiring attorney general approval of town by-laws). AR at 5-94. After receiving comment on the articles from numerous sources, AR 95-196, the Attorney General issued her decision on Articles 25 and 26 by letter dated February 25, 2022, signed by the Director of the Attorney General's Municipal Law Unit. AR 197-208. The Attorney General noted that she is "resolutely committed to reducing greenhouse gas emissions and other dangerous pollutants from the burning of fossil fuels." AR 197. However, the Attorney General explained that she was constrained to disapprove the By-Law amendments set forth in Articles 25 and 26 for the following four reasons: (1) rather than regulating land use, the amendments unlawfully regulate the "use of material, or methods of construction of structures regulated by the state building code" in violation of G.L. c. 40A, § 3; (2) the amendments are preempted by provisions of the State Building Code and the legislation enabling its adoption; (3) the amendments are preempted by G.L. c. 164, through which the State's Department of Public Utilities ("DPU") comprehensively regulates the sale and distribution of natural gas; and (4) the provisions of Article 26 conflict with the special permit and uniformity provisions set forth in the Zoning Act at G.L. c. 40A, §§ 4 and 9. AR at 198-99.

The Instant Litigation

On or about April 26, 2022, the Town of Brookline and the above-listed individual plaintiffs (collectively, the Plaintiffs) filed their Complaint in the Supreme Judicial Court for Suffolk County (the "Single Justice Session"), seeking judicial review of the Attorney General's

decision (the "Decision") pursuant to the certiorari statute, G.L. c. 249, § 4.[5] On or about April 29, 2022, a Single Justice ordered the case transferred to the Superior Court.

ARGUMENT

I. Neither the Attorney General Nor the Court May Consider Policy in Reviewing Proposed By-Laws or By-Law Amendments.

As the Attorney General noted in the Decision, her views as to the soundness of policies seeking to reduce greenhouse gas emissions and other forms of air pollution resulting from the burning of fossil fuels play no part in her statutorily-required review of the By-Law amendments set forth in Articles 25 and 26 (collectively, the "Amendments"). This Court is similarly constrained. *See Town of Amherst v. Att'y Gen.*, 398 Mass. 793, 799 (1986) ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law."); *Beard v. Town of Salisbury*, 378 Mass. 435, 439-440 (1979) ("We emphasize . . . that it is not this court's province to evaluate the wisdom of a matter of municipal policy").

As explained in *Beard*: "Because due regard must be accorded to the wishes of local residents, the only questions which this court or other courts may address, apart from those involving the constitutionality of a challenged regulation or the procedural prescriptions precedent to the law's adoption, are whether a local enactment extends beyond the authority conferred by its enabling statute or whether it exceeds the implied powers which are granted municipalities by the Home Rule Amendment." *Beard*, 378 Mass. at 440.

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[5] The certiorari statute is the correct mechanism for seeking judicial review of an Attorney General's decision disapproving a town by-law under G.L. c. 40, § 32. *See Town of Reading v. Attorney General*, 362 Mass. 266, 269-70 (1972).

II. The Home Rule Amendment Allows Only for Adoption of By-Laws That Are Not "Inconsistent" With Existing Legislation.

The Home Rule Amendment allows cities and towns to "exercise any power or function" the Legislature has power to confer on it, so long as such exercise is not inconsistent with the Commonwealth's constitution or statutes. "Municipal regulations not directly authorized by statute but permissible under the Home Rule Amendment will be deemed void if they are inconsistent with any portion of the General Laws." *Beard*, 378 Mass. at 440. This is clear from the plain text of the "Home Rule Amendment," set forth in the Massachusetts Constitution in its Amended Art. II, § 6, stating:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, *which is not inconsistent with the constitution or laws enacted by the general court* in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter.

Mass. Const. Amend. Art. II, § 6 (emphasis supplied); *see also Boston Gas Co. v. City of Newton*, 425 Mass. 697, 699 (1997) ("*Boston Gas II*") ("Municipalities may not adopt by-laws or ordinances that are inconsistent with State law."). Similar language is included in the Home Rule Procedures Act. *See* G.L. c. 43B, § 13; *see also St. George Greek Orthodox Cathedral of W. Massachusetts, Inc. v. Fire Dep't of Springfield*, 462 Mass. 120, 125 (2012).

"The zoning power was one of the 'independent municipal powers' granted to cities and towns by the Home Rule Amendment, enabling them to enact zoning ordinances or bylaws as an exercise of their 'independent police powers' to control 'land usages in an orderly, efficient, and safe manner to promote the public welfare' . . . as long as their enactments were 'not inconsistent with the Constitution or laws enacted by the Legislature.'" *Durand v. IDC Bellingham, LLC*, 440 Mass. 45, 50 (2003) (quoting *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 356-57 (1973)). Zoning amendments are only authorized under

the Home Rule Amendment,[6] however, if they are not inconsistent with the statutes of the Commonwealth, including the plain language of the Zoning Act. *See id.* at 52-53 (reviewing compliance with procedural requirements of G.L. c. 40A to determine whether zoning by-law amendment violated state law).

III. Legislative Intent to Forbid Local Regulation May Be Express or Implied.

"To determine whether a local ordinance is inconsistent with a statute," the Attorney General and courts "look[] to see whether there was either an express legislative intent to forbid local activity on the same subject or whether the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject." *Boston Gas II*, 425 Mass. at 699 (quoting *Boston Gas Co. v. Somerville*, 420 Mass. 702, 704 (1995) ("*Boston Gas I*")). In some circumstances, legislative intent to preempt local regulation can be inferred because "legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose." *Id.* (quoting *Boston Gas I*, 420 Mass. at 704). *See also Town of Amherst*, 398 Mass. at 797 (if legislative intent to preempt a field is not clear, "that intent may be inferred if legislation deals with a subject comprehensively"); *Wendell v. Attorney General*, 394 Mass. 518, 524 (1985).

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[6] *See* Mark Bobrowksi, Handbook of Massachusetts Land Use and Planning Law, Fifth Ed. (2022) at §2.02, pp. 2-5, 2-6, 2-7 (explaining difference between pre-1975 "Zoning Enabling Act" and post-1975 "Zoning Act," in relation to the municipal power available under the Home Rule Amendment); *see also id.* at p. 2-6 ("In essence a valid zoning regulation is any ordinance or bylaw adopted pursuant to the procedures set forth in [G.L. c. 40A, § 5] and not inconsistent with the constitution or laws of the Commonwealth.").

IV. The Brookline Amendments Conflict With Express Legislative Intent.

A. The Zoning Act Prohibits Enactment of Zoning By-Laws Governing Subject Matter Covered By the State Building Code.

Whatever the Attorney General's own policy views may be on the goals underlying the By-Law Amendments at issue, the Attorney General correctly disapproved of the Amendments because they conflict directly with legislative intent as expressed the Commonwealth's Zoning Act, set forth in G.L. c. 40A, which states plainly: "No 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.

Importantly, the definition of "zoning" set forth in Section 1A of the Zoning Act is: "to regulate the use of land, buildings and structures." G.L. c. 40A, § 1A. Thus, the Zoning Act's plain language establishes a distinction between, on the one hand, "land use" – which is a proper subject of local zoning ordinances — and, on the other hand, "materials[] or methods of construction . . . regulated by the state building code" — which are *not* a proper subject of local zoning by-laws. *Compare* G.L. c. 40A, § 1A, *with* G.L. c. 40A, § 3; *see also SCIT, Inc. v. Planning Bd. of Braintree*, 19 Mass. App. Ct. 101, 106 (1984) ("The Zoning Act, G.L. c. 40A, has, with precision, set out limits on the exercise of zoning power by the municipality."). Massachusetts law has long recognized this distinction — even before the 1978 adoption of the language set forth in § 3 of the Zoning Act that specifically prohibits enactment of by-laws concerning "materials[] or methods of construction" regulated by the building code.[7] Specifically, in *Enos v. City of Brockton*, 354 Mass. 278 (1968), the Supreme Judicial Court held that the Commonwealth's zoning statute, as then-enacted, was "not intended to authorize the

[7] *See* 1978 Mass. Acts 808; *see also*, Bobrowski, § 4.02.

regulation of the constituent materials of walls and floors by means of a zoning ordinance" and that "[t]hese matters are properly the subject of building codes rather than zoning regulations." *Enos*, 354 Mass. at 280.

The Court recognized in *Enos* that a zoning by-law is "intended to have a certain degree of permanency" and is "more difficult to amend than most other by-laws and ordinances,"[8] while a building code "is much more flexible." *Id.*, 354 Mass. at 281. Thus, if zoning by-laws served as building codes, "outmoded methods of construction would become difficult to change because of the more cumbersome methods prescribed for zoning amendments." *Id.* Accordingly, the Court concluded, "the Legislature did not intend to authorize the combining of building codes with zoning ordinances or by-laws." *Id.*; *see also Peters v. Town of Yarmouth*, 5 LCR 126, 128 (1997) (striking down zoning by-law as unauthorized where its purpose and effect were "to regulate the use of materials or methods of construction of structures regulated by the state building code").[9]

The Plaintiffs claim that the Zoning Act's prohibition of by-laws governing "materials[] or methods" of construction is meant to exclude from the concept of "land use" only "***how***" one "builds or installs structures or equipment that are otherwise authorized." Plaintiffs' Memorandum in Support of Their Motion for Judgment on the Pleadings ("Pl. Mem.") at p. 11 (emphasis in original). But this interpretation of the Zoning Act is doubly flawed. First, the Plaintiffs ignore that "fossil fuel infrastructure" is one available "method" of installing a system in a building for heating air and water, and it is a "method" that is regulated in the State's

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[8] *See* G.L. c. 40A, § 5 (setting forth procedure for adoption or amendment of zoning by-laws).

[9] A copy of *Peters* is attached hereto as Exhibit A.

comprehensive building code, set forth at 780 CMR 101.00, *et seq*. (the "Building Code").[10] Thus it is not a permissible subject for a by-law under G.L. c. 40A, § 3. Second, the Plaintiffs' interpretation would render superfluous the word "materials" as used in in that same section of the Zoning Act. The Amendments refer specifically to "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." AR at 008. It is difficult to fathom how "piping" is not a "material" within the meaning of the Building Code. *See Enos*, 354 Mass. at 278 (striking down zoning by-law requiring "masonry walls twelve inches thick"); *see also* citations set forth in n.10, *supra*; G.L. c. 40A, § 3 (providing no zoning by-law may "regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code").[11]

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[10] The Building Code incorporates by reference the provisions of the Massachusetts Fuel Gas Code ("Gas Code") (248 CMR 4.000 through 8.00), and the Massachusetts Comprehensive Fire Safety Code ("Fire Code") (527 CMR 1.00), both of which govern fuel piping and infrastructure. The Building Code, and the incorporated Gas Code and Fire Code, have broad application regarding building materials and methods of construction, including fuel piping systems. *See* G.L. c. 142, § 1 (defining "gas fittings" as "any work which includes the installation, alteration, and replacement of a piping system beyond the gas meter outlet or regulator through which is conveyed or intended to be conveyed fuel gas of any kind for power, refrigeration, heating or illuminating purposes"); G.L. c. 142, § 13 (which charges the Board of State Examiners of Plumbers and Gas Fitters with implementing regulations regarding gas fittings in buildings throughout the Commonwealth); 527 CMR 1.05, § 11.5 (regulating the installation of "fuel oil burners and all equipment in connection therewith"); 527 CMR 1.05, § 11.5.1.10.8 (regulating "fill and vent piping"); and 527 CMR 1.05, § 11.5.10.10.1 (regulating oil supply and return lines). Notably, Article 26 includes an exemption for "repairs or replacement of any existing portions of a fuel piping system deemed unsafe by the Plumbing and Gas Fitting Inspector." *See* AR at 20. The inclusion of this exemption acknowledges explicitly that fuel piping is already governed by a comprehensive set of regulations. *See, e.g.*, G.L. c. 142, § 11B (requiring plumbing and gas fitting inspectors to "complete a minimum of 12 hours per year of continuing education which shall include the review and interpretation of plumbing and fuel gas codes and related codes, rules and regulations").

[11] The Plaintiffs suggest that the Amendments do not violate § 3 of the Zoning Act because they merely incentivize a choice to decline to use on-site fossil fuel infrastructure, rather than enacting an outright ban on such infrastructure. *See* Pl. Mem. at pp. 4, 5, 8, 11, 17. But the incentive offered by both Amendments is a special permit. In the case of Article 25, that special

(footnote continued)

B. The Legislation Requiring Development of a State Building Code Expressly Prohibited Development of Local Codes Governing the Same Subject Matter.

The Town's attempt to regulate "fossil fuel infrastructure" also is directly contrary to the Legislature's express directives set forth in its adoption of the statutes that led to development of the Building Code. By adopting G.L. c. 143, the Legislature established the state Board of Building Regulations and Standards ("BBRS"), and charged the BBRS with adopting and regularly updating the Building Code. *See* G.L. c. 143, §§ 93, 94(a), (c), (d), and (h). The Legislature's objectives in establishing the BBRS and requiring it to adopt a building code are described in G.L. c. 143, § 95, and include: (1) "Uniform standards and requirements for construction and construction materials, compatible with accepted standards of engineering and fire prevention practices, energy conservation and public safety;" and (2) "Elimination of restrictive, obsolete, conflicting and unnecessary building regulations and requirements which may increase the cost of construction and maintenance over the life of the building or retard unnecessarily the use of new materials, or which may provide unwarranted preferential treatment of types of classes of materials, products or methods of construction without affecting the health, safety, and security of the occupants or users of buildings." G.L. c. 143, § 95(a) & (c).

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permit would be unavailable for buildings and structures that include installation of "on-site fossil fuel infrastructure." And in the case of Article 26, any special permit that is issued would be limited by a temporal restriction or a provision that it is non-transferable if "on-site fossil fuel infrastructure" is used. Special permits are a form of regulation governed by the Zoning Act. *See* G.L. c. 40A, §§ 6, 9, 9A, 11, 16, & 17. The Plaintiffs cite no authority for the proposition that the restriction set forth in G.L. c. 40A, § 3, against regulations pertaining to materials or methods of construction regulated by the Building Code does not apply where the means of regulation is a special permit. Moreover, the Plaintiffs have stated that the purpose of the Amendments is to "*ensure* that progress toward achieving the Commonwealth's statutorily mandated target of net-zero statewide greenhouse gas emissions by the year 2050 will not be obstructed by the contemporaneous installation of new fossil fuel infrastructure that has the potential to operate long past 2050." Complaint at ¶ 6 (emphasis added). Stated simply, where Brookline cannot restrict "methods or materials of construction" through defining "as-of-right" uses in a district, it cannot accomplish the same goal using the mechanism of a special permit requirement.

As explained in 2012 in *St. George Greek Orthodox Cathedral of W. Massachusetts, Inc. v. Fire Dep't of Springfield*, *supra*, the above-quoted legislative statements demonstrate an express intent to preempt the adoption of local building codes, or any other local regulation with the potential to create inconsistency in building standards throughout the Commonwealth. In *St. George*, the City of Springfield had enacted an ordinance that required installation of just one of four types of "fire protective signaling systems and automatic fire detection systems" that were otherwise deemed permissible throughout the Commonwealth under the statewide Building Code. *St. George*, 462 Mass. at 129. Springfield's arguments for upholding its regulation included that a "narrowing of options" otherwise available under the Building Code did not make the ordinance inconsistent with the Code. *Id.* at 125. But the Court found the ordinance was expressly preempted anyway.

Specifically, in *St. George* the Court noted the above-quoted language regarding "[u]niform standards and requirements for construction and construction materials" set forth in G.L. c. 143, § 95(a). *St. George*, 462 Mass. at 126. The Court also noted that the Legislature had required the BBRS to "recommend or require tests and approvals and specify criteria and conditions, of materials, devices, and methods of construction," and stated that "[t]he board shall issue certification of such acceptability, which certification *shall be binding on all cities and towns*." *Id.* (quoting G.L. c. 143, § 94(d)) (emphasis in original). Further, the act adopting the statute establishing the BBRS stated that the state building code "shall be binding and have the full force and effect of law on January [1, 1975], in all cities and towns notwithstanding any special or general law to the contrary." *Id.* (quoting St.1972, c. 802, § 67). And, finally, that same legislation stated that "'[a]ll by-laws and ordinances of cities and towns or regulations promulgated by any state boards, commissions, agencies or departments or any special acts . . . in conflict with the state building code shall cease to be effective on January [1, 1975]." *Id.*

(quoting St.1972, c. 802, § 75, as appearing in St.1975, c. 144, § 1). As explained by the Court, "'[t]he above quoted sections, together with the whole of [St.1972,] c. 802 [,] and its subsequent amendments, evince a clear legislative intent . . . to create uniform standards throughout the Commonwealth for the construction of buildings and materials used therein. . . .'" *St. George*, 462 Mass. at 126-127 (quoting *Shriners' Hosp. for Crippled Children v. Boston Redevelopment Auth.*, 4 Mass. App. Ct. 551, 560 (1976)). And, "[w]here the Legislature demonstrates its express intention to preempt local action, inconsistent local regulations are invalid under the Home Rule Amendment." *St. George*, 462 Mass. at 129. In short, because the Legislature expressly preempted local action inconsistent with the Building Code, the Attorney General properly disapproved Brookline's Amendments, which are inconsistent with the Building Code. *St. George*, 462 Mass. at 129;[12] *Town of Amherst*, 398 Mass. at 795 (Attorney General may disapprove a bylaw if it violates State substantive or procedural law); *see also American Motorcyclist Ass'n v. Park Comm'n of Brockton*, 412 Mass. 753, 756 (1952) (sharp conflict with State law exists where local regulation is "facially inconsistent" with State law) (quoting *Del Luca v. Town Adm'r of Methuen*, 368 Mass. 1, 9 (1975)).

V. The Building Code Also Impliedly Preempts Contrary Local Zoning Ordinances.

The Legislature's intent that the Building Code preempt contrary local zoning ordinances can also easily be inferred from the comprehensiveness of that regulation. *See Boston Gas I*, 420 Mass. at 704 (preemption may be inferred where "legislation on the subject is so comprehensive

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[12] As stated in *St. George*: "If all municipalities in the Commonwealth were allowed to enact similarly restrictive ordinances and bylaws, a patchwork of building regulations would ensue . . . . Allowing the city's ordinance to stand would . . . . sanction[ ] the development of different applicable building codes in each of the Commonwealth's 351 cities and towns, precisely the result that promulgation of the [Building C]ode was meant to foreclose." *St. George*, 462 Mass. at 135.

that any local enactment would frustrate the statute's purpose"); *see also Bloom v. City of Worcester*, 363 Mass. 136, 155 (1973) ("Legislation which deals with a subject comprehensively, describing . . . what municipalities can and cannot do, may reasonably be inferred as intended to preclude the exercise of any local power or function on the same subject because otherwise the legislative purpose of that statute would be frustrated.") In *St. George*, the Court held this explicitly, stating: "The sheer comprehensiveness of the code itself demonstrates the Legislature's intention to foreclose inconsistent local enactments." *St. George*, 462 Mass. at 128, n.13. The Land Court has acted similarly in striking down zoning a local requirement as to basement floor elevations because "matters relating to the integrity of a structure and its waterproofing are more properly addressed in the state [Building C]ode." *Meadowoods Dev. Corp. v. Town of Medway*, 6 LCR 110, 112 (1998).[13] Similarly, the Building Code preempts local regulations on matters pertaining to "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," AR 008 (text of Art. 25); *see also* n.10, *supra*.

VI. The Amendments Are Also Preempted by G.L. c. 164, Governing the Manufacture and Sale of Gas and Electricity.

In addition to the Building Code, another statute preempts the Amendments. Specifically, "[t]he manufacture and sale of gas and electricity by public utilities is governed by G.L. c. 164." *Boston Gas I*, 420 Mass. at 704. That statute's purpose "is to ensure uniform and efficient utility services to the public." *Boston Gas II*, 425 Mass. at 699. Given Chapter 164's

[13] A copy of *Meadowoods* is attached hereto as Exhibit B. There, the Land Court judge described the language in § 3 of the Zoning Act discussed *supra* as also providing evidence that "the General Court intended the state [Building C]ode to preempt the area of building construction." *Meadowoods*, 6 LCR at 113.

"comprehensive nature," the Supreme Judicial Court has concluded that it was "intended to preempt local entities from enacting legislation in this area." *Boston Gas I*, 420 Mass. at 704.

Thus, a Somerville city ordinance regulating repair of street openings by utilities was struck down because a municipality "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." *Boston Gas I*, 420 Mass. at 706. Similarly, that portion of a Newton ordinance requiring payment of an "inspection and maintenance" fee in connection with street openings by utilities was invalid because "by demanding that the plaintiff, through an upfront fee, in effect pay for the long-term maintenance of the street, the ordinance mandates something not required by the statute and is, therefore, inconsistent with, and preempted by, G.L. c. 164." *Boston Gas II*, 425 Mass. at 700-701. In the *Newton* case, the Court commented that allowing the City to assess fees that were inconsistent with chapter 164 "would impose an additional burden on the plaintiff, a burden which undermines the 'fundamental State policy of ensuring uniform and efficient utility services to the public.'" *Boston Gas II*, 425 Mass. at 703 (quoting *Boston Gas I*); *see also Boston Gas Co. v. City of Boston*, 35 Mass. L. Rptr. 141, 2018 WL 4198962, *1 (Mass. Super. 2018) ("non-incidental local rules and ordinances affecting the manufacture and sale of gas and electricity are preempted by Chapter 164").

Here, as in the *Boston Gas* cases discussed *supra*, the Amendments would prevent the installation of the infrastructure necessary to receive that natural gas. Notably, "fossil fuel infrastructure" as defined in the Amendments includes not only piping that is within a building but also piping that is "within the property lines of premises, including piping that extends from a supply source." AR 0008 (text of Art. 25). Because the Amendments prevent the delivery of gas to consumers in a non-incidental way, they "conflict[] with the statutory scheme for

regulating public utilities" and are "inconsistent with G.L. c. 164 and therefore invalid." *Boston Gas I*, 420 Mass. at 705.[14]

VII. Article 25 is in Violation of the Zoning Act's Uniformity and Special Permit Provisions.

In addition to being in direct conflict with the Zoning Code's limitations set forth in § 3, Article 25 also violates the uniformity provision described in § 4 of the Zoning Act, which states: "[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. The uniformity principal means that "[a] zoning ordinance is intended to apply uniformly to all property located in a particular district . . . and the properties of all the owners in that district [must be] subjected to the same restrictions for the common benefit of all." *SCIT, Inc.*, 19 Mass.

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[14] Further evidence of the Legislature's intent to preempt individual zoning by-laws concerning "fossil fuel infrastructure" can be found in the recent passage of an Act Driving Clean Energy and Offshore Wind (the "DRIVE Act"). *See* St. 2022, c. 179. The DRIVE Act provides for a "demonstration project" to be established by the Department of Energy Resources ("DOER"), through which municipalities may, "notwithstanding [the Zoning Act, G.L. c. 142, § 13, or G.L. c. 164] or any other general or special law to the contrary," adopt and amend general zoning ordinances or by-laws that: "require new building construction or major renovation projects to be fossil fuel-free, and enforce restrictions and prohibitions on new building construction and major renovation projects that are not fossil fuel-free, including through the withholding or conditioning of building permits; provided, that said restrictions and prohibitions shall not apply to research laboratories for scientific or medical research, or to hospitals or medical offices regulated by the department of public health as a health care facility." St. 2022, c. 179, § 84(b). In specifically referencing pre-existing legislation including the Zoning Code and G.L. c. 164, the above-quoted language acknowledges explicitly that passage or amendment of local zoning by-laws requiring "fossil fuel-free" building is unavailable under the Home Rule Amendment, because such local action would conflict with those above-referenced statutes. Similarly, legislation passed in 2021 and entitled An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy requires the development of a: "municipal opt-in specialized stretch energy code that includes, but is not limited to, net-zero building performance standards and a definition of net-zero building, designed to achieve compliance with the commonwealth's statewide greenhouse gas emission limits and sublimits established pursuant to [G.L. c.] 21N." St. 2021, c.8, § 31 (inserting new clause (14) to G.L. c. 25A, § 6). These recent legislative enactments demonstrate an awareness of the limitations of municipal power under the Home Rule Amendment, and that legislation was required to enable such efforts.

App. Ct. at 107-108 (quoting *Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence*, 324 Mass. 433, 439 (1949)). While "[s]ome exceptions to uniformity are sanctioned by the Zoning Act," the law does not "contemplate, once a district is established and uses within it authorized as of right, conferral on local zoning boards of a roving and virtually unlimited power to discriminate as to uses between landowners similarly situated." *Id.* at 108. By granting special permits only to landowners within the EISD who can or will forego the installation of on-site fossil fuel infrastructure, however, the Amendments do just that.

Similarly, because, for reasons already discussed in Part I.A, installation of fossil fuel infrastructure is not a form of "land use," but is, instead, the "use of materials, or methods of construction of structures regulated by the state building code," Article 25 also violates the Zoning Act's special permit provision, which authorizes special permits only for "specific types of *uses*." G.L. c. 40A, § 9 (emphasis added); *see also SCIT*, 19 Mass. App. Ct. at 109.

CONCLUSION

For all of the foregoing reasons, the Court should deny Plaintiffs' Motion for Judgment on the Pleadings and allow the Attorney General's cross-motion for judgment on the pleadings.

Respectfully submitted,

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