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Docket Number 2282CV00400

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COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT

NORFOLK, ss C.A. No. 2282CV00400

The TOWN OF BROOKLINE & OTHERS ,

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,

Intervenors.

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

Plaintiffs respectfully submit the following Reply Memorandum.[1]

I. The Articles Do Not Conflict with G.L. c. 164.

The Attorney General and National Grid discuss *Boston Gas Co. v. City of Somerville*, 420 Mass. 702 (1995) (*Boston Gas I*) and *Boston Gas Co. v. City of Newton*, 425 Mass. 697 (1997) (*Boston Gas II*), as though each sets a bright line to determine preemption under Chapter 164. That line is not nearly so clear. Yes, a municipality cannot "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, but what this means in the context of each of the

[1] All terms previously defined in Plaintiffs' initial Memorandum shall have the same meanings.

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Boston Gas cases is not as clear as the defendants would suggest.[2]

In *Boston Gas I*, Somerville required, by ordinance, that companies repair street openings differently and more burdensomely than G.L. c. 164, §70's standard for repair, which requires only that a utility "shall put all such streets, lanes and highways in as good repair as they were in when opened." In *Boston Gas II*, Newton attempted to impose fee requirements on utilities in connection with street excavation permits. In both cases the ordinances in question presented a crystalline example of a fee or obligation imposed on a natural gas utility which differed from the minimum requirements imposed by Chapter 164. Both were therefore preempted. The Attorney General alone also refers to a third case, *Boston Gas Co. v. City of Boston*, Super. Ct. No 1784CV02241, 2018 WL 4198962 (July 16, 2018) (*Boston Gas III*), in which Boston regulated the inspection, maintenance, and repair of natural gas leaks in the city. The court held the ordinance invalid for imposing obligations on utilities that were inconsistent with Chapter 164.

Those cases' common thread prohibits municipal regulation that imposes ***obligations*** on ***natural gas utilities*** that exceed or conflict with Chapter 164's requirements. The Brookline Articles do not place obligations on those utilities. Those cases are inapposite.

The Attorney General and National Grid also repeatedly misapprehend the Articles by saying that they prevent or prohibit the use of fossil-fuels, the delivery of natural gas to consumers, or the installation of infrastructure necessary to receive natural gas. Not so. Article 25 applies to a zoning overlay district but does not affect or regulate any permissible uses in the underlying zoning district. The proponent of a by-right use allowed in the underlying zoning district is at complete liberty to install fossil fuel infrastructure and burn natural gas. Similarly, Article 26, for a limited set of special permits, establishes three possible avenues for permit issuance, each requiring design decisions to be made by the applicant (not a gas utility), and only one of which choices would result in the ***voluntary*** construction of a fossil-fuel free structure.

[2] Neither the Attorney General nor National Grid have responded to the Plaintiff's position that the "practical effects" of any regulation can only be discerned through fact finding, are not properly within the scope of the Attorney General's review.

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It is not hyperbole to say that, even with these Articles approved, all of Brookline could be redeveloped, compliant with zoning, to include new natural gas infrastructure. The Articles seek to incentivize voluntary choice; they do not prohibit or ban that infrastructure.

II. The Articles Do Not Conflict with the Zoning Act or Building Code.

Potential conflict with the Building Code, regulation of materials or methods of construction under G.L. c. 40A, §3, or G.L. c. 40A, §4's uniformity requirements, reduces to a single question: do the Home Rule Amendment and the Zoning Act permit regulation of deleterious uses of land even if regulations necessary to address such ills overlap with subjects which are also addressed in the State Building Code? The answer is, of course, that they do.

Defendants' argument asserts that either express or implicit regulation of the use of certain construction materials is a *per se* violation of G.L. c. 40A, §§3 and 4. That cannot be so. Zoning regulates the locations of uses of land to protect the health and general welfare. Any zoning bylaw that limits the uses of land in a zoning district implicitly prohibits certain materials or methods of construction within that district. Take some examples: (1) prohibiting the indoor cultivation of marijuana in a district implicitly means prohibiting electrical equipment, lighting, ventilation, and other materials that are unique to that industry; (2) prohibiting electrical generation equipment over a certain capacity size (*e.g.*, a 5-megwatt generator for residential property) implicitly prohibits something against which the Building Code would have no qualms; or (3) establishing a maximum floor area ratio with reference to the finished or unfinished space in a residential building, implicitly prohibiting the inclusion of certain building materials in unfinished spaces. Each is a fair subject for zoning but would otherwise be permissible under the Building Code.

Such extreme results cannot be so. Yet, because the standard proffered by the Attorney General and National Grid would allow those extreme results, and others, the court must reject it. Here, the Articles do not prescribe any size, shape, material composition, or other specification that would or would not be acceptable. Such parameters relating to the safety and structural integrity of materials used in the construction of structures is the exclusive province of the Building

Code. The Articles therefore do not conflict with the Building Code or G.L. c. 40A, §§3 or 4.

III. Recent Legislation Does Not Moot This Appeal or Preempt the Articles.

National Grid and the Attorney General have argued that recently enacted legislation further evidences preemption of the Town of Brookline's adoption of the Articles, and National Grid argues at length that such legislation in fact moots this appeal. *See* St. 2021, c.8 ("Climate Act"); St. 2022, c.179 ("Drive Act"). These arguments are flawed for similar reasons.

The Climate Act provided for the promulgation of a municipal opt-in Specialized Code supplement, which may require some buildings to meet enhanced energy efficiency requirements. The Drive Act includes the authorization of a "demonstration project," administered by the Department of Energy Resources ("DOER"), which may, subject to how DOER implements it, allow up to ten municipalities to adopt regulations that outright prohibit the use of fossil fuels in new buildings and major renovation projects. Both are different from the Articles. As described in Plaintiffs' initial Memorandum and this one, the Articles focus on the use of land and do not prohibit fossil fuel infrastructure. Rather, the Articles seek a different path, using elective zoning incentives, to achieve their goals. Moreover, in the case of the demonstration project, while Brookline anticipates participating, that may change in the future and the "demonstration project" itself will not begin unless and until DOER moves forward with a program. It is not unheard of for Massachusetts agencies to ignore or fail to timely implement these types of statutory directives. *See*, *e.g.*, *Kain* v. *Dept. of Env. Prot.*, 474 Mass. 278 (2016).

These special acts do not support either preemption or mootness arguments. First, neither special act contains any statement by the General Court that their enactment reflects a Legislative view that Brookline's and other towns' attempts, using different pathways to combat climate change, were preempted. Merely because the General Court has also acted on a subject matter that is of great consequence is hardly reason to infer municipalities' attempts to address that subject matter using different legal means are somehow preempted. Nor do these two special acts – not codified in the General Laws and unaccompanied by any statements reflecting an intended

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comprehensiveness or intent to occupy the field for this subject matter – have any preemptive effect themselves. Preemption is strong medicine in a Home Rule State. It should not be administered on a whim, using a blunt apples-to-oranges analogy, bereft of any explicit statements by the General Court to back up that conjecture.

The new legislation also does not moot this case. The question presented by this lawsuit is narrow and is limited to whether the Attorney General erred in disapproving the Articles on the basis that they conflict with preemptive state law. As already discussed, the new legislation and Articles, while they share some common purposes, use very different pathways to go about those purposes. So, put another way, this argument is materially flawed simply because the plaintiffs' appeal cannot, practically speaking, be moot unless the Articles also conflict with – making them preempted by – State law. For that reason, addressing mootness as an issue makes little sense here. One way or another, the court must address the substance of this case.

Respectfully Submitted:

The TOWN OF BROOKLINE, MASSACHUSETTS

/s/ Jonathan Simpson (BFB)

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