COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2282-00400

THE TOWN OF BROOKLINE, MASSACHUSETTS & others[1]
Plaintiffs

vs.

MAURA HEALY, as Attorney General[2]
Defendant

and

BOSTON GAS COMPANY d/b/a NATIONAL GRID & another[3]
Intervenors

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

This case concerns the legality of two amendments to zoning by-laws passed by the Town of Brookline (the "Town") to prevent or limit the use of fossil fuel infrastructure in new construction. Pursuant to G. L. c. 40, § 32, the Town submitted the amended by-laws to the Attorney General for the Commonwealth of Massachusetts ("Attorney General"), who issued a decision disapproving the amendments. Concluding the Attorney General had erred, the Town and several of its residents filed this action seeking judicial review of the decision under G. L. c. 249, § 4. The matter is now before the Court on the parties' cross motions for judgment on the pleadings.[4] For the following reasons, the plaintiffs' motion is **DENIED**, and the Attorney General's cross motion is **ALLOWED**.

---

[1] Elisabeth Cunningham, George Warner, Daniela Ramirez, Anne LeBrun, 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

[2] For the Commonwealth of Massachusetts

[3] Massachusetts Energy Marketers Association

[4] Both Intervenors filed memoranda opposing the plaintiffs' motion.

BACKGROUND

The following facts are taken from the Administrative Record ("A.R.").

On April 21, 2021, the Brookline Planning Board held a duly noticed public hearing on two proposed amendments to the Town's Zoning By-Laws: Article 25 and Article 26 (together, the "Articles"). The Articles proposed the adoption of local zoning regulations that would incentivize the construction of fossil-fuel-free buildings.[5]

Article 25 proposed amending Section 5.06.4(j) of the Town's Zoning By-Law, which applies to the Town's Emerald Island Special District. In its existing form, Section 5.06.4(j) requires a special permit for all applications for new structures that exceed a floor area ratio of 1.0, a height greater than 40 feet and/or seek alternative parking and loading zone requirements. The proposed by-law amendment in Article 25 requires that "[a]ll new buildings shall be free of on-site fossil fuel infrastructure."[6] A.R. at 8.

Article 26 proposed the adoption of a new Zoning By-Law: Section 9.13, the "On-Site Fossil Fuel Infrastructure." Section 9.13 applies to all special permit applications for "New Buildings" or "Significant Rehabilitations." A.R. at 19. It requires that the special permit granting authority ("SPGA") base its decision to grant a special permit on whether the building includes "the installation of new On-Site Fossil Fuel Infrastructure or the continuation of any On-Site Fossil Fuel Infrastructure installed pursuant to a special permit previously issued." A.R. at 20. If the application includes new, or a continuation of existing, On-Site Fossil Fuel Infrastructure, the SPGA must either issue a special permit that is time restricted or issue a

[5] The Town defines "fossil-fuel-free buildings" as "those without new heating systems and appliances that rely on the combustion of natural gas or fuel oil." Complaint at par. 4.

[6] The by-law defines "On-Site Fossil Fuel Infrastructure" as: "[F]ossil 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 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." A.R. at 8.

special permit that is personal to the applicant and non-transferrable except in certain circumstances. If the application does not include On-Site Fossil Fuel Infrastructure, there is no restriction on the decision of the SPGA.

The Planning Board voted to support favorable action on the Articles, and in June 2021, Members of Brookline's 2021 Annual Town Meeting voted to adopt the Articles. The Town thereafter submitted the Articles to the Municipal Law Unit of the Office of the Attorney General for review pursuant to G. L. c. 40, § 32.

On February 25, 2022, the Attorney General issued a decision disapproving the Articles ("AG Decision"). The Attorney General found that the Articles conflicted with the laws of the Commonwealth in four ways:

> 1. By regulating On-Site Fossil Fuel Infrastructure, defined in the by-laws as "fossil fuel piping that is in a building," 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 (sentence one).
>
> 2. The by-laws are preempted by the Building Code, including the incorporated Gas Code and Fire Code, which establishes comprehensive statewide standards for building construction and is "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).
>
> 3. The by-laws 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 in the Commonwealth. . .
>
> 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 SPGA to act on a special permit application in a certain way depending upon whether the application includes On-Site Fossil Fuel Infrastructure, not on how the building is *used*.

A.R. 198-199 (emphasis in original).

On April 26, 2022, the plaintiffs filed their Complaint seeking judicial review of the AG Decision pursuant to the certiorari statute, G. L. c. 249, § 4. A Single Justice ordered the case transferred to the Superior Court.

DISCUSSION

A. Standard of Review

A certiorari action is the proper means to seek review of the Attorney General's disapproval of a bylaw. *Reading* v. *Attorney General*, 362 Mass. 266, 269–270 (1972). "Certiorari allows a court to correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the plaintiff. In its review, the court may rectify only those errors of law which have resulted in manifest injustice to the plaintiff or which have adversely affected the real interests of the general public." *Sheriff of Plymouth County* v. *Plymouth County Personnel Bd.*, 440 Mass. 708, 710 (2004) (internal quotations and alterations omitted).

B. Analysis

Pursuant to the Home Rule Amendment, "[a]ny 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." G. L. c. 43B, § 13. A local ordinance or bylaw will be considered "inconsistent" with a general law only when "[t]he legislative intent to preclude local action [is] clear." *Bloom* v. *Worcester*, 363 Mass. 136, 155 (1973). "This intent can be either express or inferred. In other words, local action is precluded either where the 'Legislature has made an explicit indication of its intention in this respect,' or 'the purpose of State legislation would be frustrated [by a local enactment] so as to warrant an inference that the Legislature intended to

preempt the field.'" *St. George Greek Orthodox Cathedral of W. Massachusetts, Inc.* v. *Fire Dep't of Springfield*, 462 Mass. 120, 126 (2012) ("*St. George*"), quoting *Wendell* v. *Attorney Gen.*, 394 Mass. 518, 524, (1985). "If the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject, the local ordinance or by-law is not inconsistent with the State legislation, unless the Legislature has expressly forbidden the adoption of local ordinances and by-laws on that subject." *Bloom*, 363 Mass. at 156.

In furtherance of the purposes of the Home Rule Amendment, the Attorney General may only disapprove a by-law that "violates State substantive or procedural law." *Amherst* v. *Attorney Gen.*, 398 Mass. 793, 795 (1986). The Attorney General's power of disapproval is, therefore, "limited" and "it is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." *Id.* at 795-796.

As noted, the Attorney General disapproved the Articles because she found them either inconsistent with or preempted by other Massachusetts laws. For the reasons explained below, the Court concludes that she did not err in that determination.

1. Whether the Articles Conflict with G. L. c. 40A, § 3

The Attorney General first concluded that the Articles could not be approved because by regulating "On-Site Fossil Fuel Infrastructure," they "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 (sentence one)." A.R. at 198. The plaintiffs argue that this conclusion was in error because the Articles only regulate how certain land uses are to be effectuated, which is properly the subject of zoning by-laws. The Court does not agree.

Although § 1A of the Zoning Act, G. L. c. 40A, permits cities and towns to use zoning "to regulate the use of land, buildings and structures to the full extent of [their] independent

constitutional powers . . . to protect the health, safety and general welfare of their present and future inhabitants," this power is limited by G. L. c. 40A, § 3. That section provides 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." Section 3 was enacted to separate matters properly the subject of zoning and those regulated by the Building Code. While "the main purpose of zoning is to stabilize the use of property and to protect an area from deleterious uses," the Building Code "relates to the safety and structure of buildings." *Enos* v. *Brockton*, 354 Mass. 278, 280-281 (1968). Thus, the Building Code sets the "[u]niform standards and requirements for construction and construction materials" with the explicit intent to "eliminat[e] 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. "[I]f zoning ordinances or 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." *Enos*, 354 Mass. at 281.

What is meant by "materials, or methods of construction" is not defined in the Zoning Act and there are very few cases considering the issue, none of which concern fossil fuel infrastructure. The Attorney General asserts that the Articles regulate an available "method" for installing a system in a building for heating air and water or a "material" used in such a system. The plaintiffs contend that the Articles do not dictate how to install fossil fuel infrastructure or

prohibit anyone from doing so and therefore, they do not regulate materials or methods of construction. The Attorney General has the better argument.

The Articles define "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." See A.R. at 8. They therefore seek to prohibit or severely limit the use of "fossil fuel piping" as a "method" for installing a heating system in a building or a "material" used in construction. Indeed, fuel piping and infrastructure are regulated by the Building Code which incorporates by reference the provisions of the Massachusetts Fuel Gas Code (248 Code Mass. Reg. §§ 4.00 through 8.00) and Comprehensive Fire Safety Code (527 Code Mass. Regs. § 1.00). Thus, by regulating "On-Site Fossil Fuel Infrastructure" the Articles are inconsistent with G. L. c. 40A, § 3.[7] Cf. *Meadowoods Dev. Corp.* v. *Medway*, 6 LCR 110, 112 (Mass. Land Ct. 1998) (Lombardi, J.) (concluding that a by-law amendment regulating the elevation of a basement floor in a building "relat[ed] to the integrity of a structure and its waterproofing" and was "more properly addressed in the state [building] code"); *Peters* v. *Yarmouth*, 5 LCR 126, 127 (Mass. Land Ct. 1997) (Scheier, J.) (by-law which regulated "Flood Resistant Construction" was "not an authorized exercise of power granted to municipalities under the Zoning Act" because it "regulate[d] the use of materials or methods of construction of structures regulated by the state building code").

[7] Relying on *Wildstar Farm, LLC* v. *Planning Bd. of Westwood*, 81 Mass. App. Ct. 1114, 2012 WL 468226 (2012) (Rule 1:28), the plaintiffs urge this Court to conclude that fossil fuel infrastructure is not a method of construction. In that case, a panel of the Appeals Court determined in conclusory fashion that the sprinkler and fire protection systems at issue were not "methods of construction of structures" under G. L. c. 40A, § 3. As an unpublished summary decision, *Wildstar Farm, LLC* is not binding precedent, and given the lack of reasoning, the decision is of no persuasive value to this Court. See *311 West Broadway LLC* v. *Zoning Bd. of Appeal of Boston*, 90 Mass. App. Ct. 68, 73 n.6 (2016).

The plaintiffs contend that the Articles do not violate G. L. c. 40A, § 3, because they "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." Plaintiffs' Memorandum at 12. This argument misses the mark. The Articles prohibit or restrict the use of fossil fuel piping in all construction of new buildings and substantial rehabilitations.[8] Thus, they "regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code" in violation of G. L. c. 40A, § 3. To conclude otherwise would interfere with the intent of G. L. c. 143, § 95(a) to establish "uniform standards and requirements for construction and construction materials," and result in the type of "patchwork of building regulations" that Section 3 of the Zoning Act and the Building Code were intended to prevent. See *St. George*, 462 Mass. at 130.

The Attorney General's conclusion that the Articles violate G. L. c. 40A, § 3 was, therefore, not erroneous.

2. Whether the Building Code Preempts the Articles

Citing *St. George*, the Attorney General further concluded that the Articles are preempted by the Building Code. In *St. George*, the Supreme Judicial Court ("SJC") explained that the statutory language in G. L. c. 143, evinces the Legislature's clear intent to preempt municipal ordinances and by-laws on matters regulated by the Building Code:

> In authorizing the development of the code, the Legislature has expressly stated its intention: to ensure "[u]niform standards and requirements for construction and construction materials . . . ." G. L. c. 143, § 95(a). . . Further, the statute establishing the [State Board of Building Regulations

[8] The Court also does not find persuasive the plaintiffs' argument that the Articles merely "incentiviz[e] voluntary choices" residents must make about how to heat their homes rather than restrict materials or methods of construction. See Plaintiffs' Memorandum at 11. By withholding a special permit for buildings that include On-Site Fossil Fuel Infrastructure, as is the case with Article 25, or placing limitations on a special permit for buildings that use On-Site Fossil Fuel Infrastructure, as is the case with Article 26, the Articles regulate matters that are reserved for the Building Code.

> and Standards] states that the 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." St. 1972, c. 802, § 67. That statute further provides 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]." St. 1972, c. 802, § 75, as appearing in St. 1975, c. 144, § 1. "The 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 . . . ." *Shriners' Hosp. for Crippled Children* v. *Boston Redevelopment Auth.*, 4 Mass. App. Ct. 551, 560 (1976).

St. George, 462 Mass. at 126-127. In addition to G. L. c. 143, as noted above, G. L. c. 40A, § 3 prohibits municipalities from enacting zoning regulations that "restrict the use of materials, or methods of construction of structures regulated by the state building code." This language further demonstrates the intent of the Legislature "to preempt the area of building construction." *Meadowoods Dev. Corp.*, 6 LCR at 113.

In arguing that the Attorney General erred, the plaintiffs assert that zoning by-laws and ordinances often restrict or prohibit certain building elements regulated by the Building Code, and that in such instances, the Attorney General has historically approved the by-laws and ordinances. As examples, the plaintiffs cite previously approved by-laws and ordinances that limit or permit a different building height than that proscribed by the Building Code or require special permits for façade improvements, which the plaintiffs contend necessarily impact methods and materials for construction. The Court does not find this argument compelling. The examples provided by the plaintiffs primarily relate to external attributes of a building which affect the overall physical character of an area. Such regulations aimed at ensuring the architectural consistency of the designated land use are relevant to the purposes of the Zoning Act. The Articles, however, are aimed at regulating the structural components of a building and

thus implicate the "uniform standards and requirements for construction and construction materials." See G. L. c. 143, § 95(a).[9] The Articles, therefore, are properly regulated solely by the Building Codes, not zoning by-laws.

Accordingly, the Attorney General correctly decided that the Articles were preempted by the Building Code.

3. Whether G. L. c. 164 Preempts the Articles

The Attorney General concluded that the Articles are also preempted by G. L. c. 164. Chapter 164 governs the manufacture and sale of gas and electricity by public utilities. The purpose of the statute "is to ensure uniform and efficient utility services to the public." *Boston Gas Co.* v. *Newton*, 425 Mass. 697, 699 (1997) ("*Boston Gas II*"). See also *Boston Gas Co.* v. *Somerville*, 420 Mass. 702, 704 (1995) ("*Boston Gas I*") ("Given the comprehensive nature of this statute," the Supreme Judicial Court has concluded "that the Legislature intended to preempt local entities from enacting legislation in this area."). The Attorney General determined that the Articles would have "the practical effect of frustrating the fundamental State policy of ensuring uniform and efficient utility services to the public." A.R. at 2015, quoting *Boston Gas I*, 420 Mass. at 706.

The plaintiffs argue that the Attorney General's conclusion was an error because the Articles "ask nothing of regulated utility companies" and "do not prohibit gas companies' operation in a way that could disrupt the uniformity of their service." Plaintiffs' Memorandum at 17.[10] The Court does not agree.

---

[9] The by-laws regulating parking requirements which the plaintiffs also point to in support of their argument similarly do not implicate the structural components of a building.

[10] The plaintiffs also argue that it was beyond the scope of the Attorney General's review to consider the "practical effects" of the Articles. The Attorney General, however, may disapprove a by-law "if it violates State substantive or procedural law." *Amherst*, 398 Mass. at 795. The SJC has made clear that a zoning by-law that has the practical effect of frustrating the fundamental State policy of ensuring uniform and efficient utility services to the public violates G. L. c. 164. See *Boston Gas I*, 420 Mass. at 706.

In *Pereira* v. *New England LNG Co.*, 364 Mass. 109, 120–121 (1973), the SJC recognized that given the "absolute interdependence of all parts of the Commonwealth and of all of its inhabitants in the matter of availability of public utility services," the Legislature empowered the DPU through Chapter 164 "to take action necessary to insure that all may obtain a reasonable measure of such vital services." *Id.* While the Articles may "ask nothing of the regulated utility companies," they have the effect of restricting to whom the utility companies can sell and distribute their services. Thus, they undoubtedly disrupt the uniformity of service that Chapter 164 was designed to establish and that the DPU is charged with maintaining.[11] See *Boston Gas II*, 425 Mass. at 703 (city ordinance that charged fee to utility company for permit to excavate public ways was invalid because it undermined the "fundamental State policy of ensuring uniform and efficient utility services to the public"); *Boston Gas I*, 420 Mass. at 706 (city ordinance regulating repair of street openings by utilities was invalid because it had the "practical effect of frustrating the fundamental State policy of ensuring uniform and efficient utility services to the public").

The plaintiffs also argue that the AG Decision is "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." Plaintiffs' Memorandum at 17. This argument is flawed for two reasons. First, in reviewing the Articles under G. L. c. 40, § 32, the Attorney General was precluded from considering any policy preferences. *Amherst*, 398 Mass. at 798–799. Second, the recently enacted legislation aimed at

[11] The Court notes that the administrative record contains a letter from Massachusetts' gas companies to the Attorney General wherein they explain the cost increase that consumers will have to bear to heat their homes as a result of the Articles as well as the "detrimental impact to the cost of service to natural gas customers throughout the Gas Companies' service territories because utility costs are shared across the overall customer base." A.R. at 136-137. These issues underscore the purpose of Chapter 164 and the need for preemption in this area.

reducing emissions and averting climate change lends support for the Attorney General's position that the Articles are preempted. See A.R. at 206.

The Legislature's intent to preempt may "be inferred if the Legislature has explicitly limited the manner in which cities and towns may act on that subject." *Bloom*, 363 Mass. at 155. Here, with regard to fossil fuel infrastructure, the Legislature has done just that. Specifically, in March 2021, the Legislature enacted An Act Creating a Next Generation Roadmap for Massachusetts Climate Policy (the "Climate Act"). The Climate Act provides for the promulgation of a municipal opt-in statewide specialized energy code that will become part of the state Building Code. The specialized code includes a net-zero building energy performance standard "designed to achieve compliance with the Commonwealth's statewide greenhouse gas emission limits and submits." St. 2021, ch. 8 at § 31. The Climate Act required the Massachusetts Department of Energy Resources ("DOER") to develop and promulgate the specialized code by December 2022. "Notwithstanding any special or general law, rule or regulation to the contrary, any municipality may adopt the municipal opt-in specialized stretch energy code following its promulgation." *Id.* at § 101.

Additionally, in August 2022, the Legislature enacted An Act Driving Clean Energy and Offshore Wind (the "Drive Act"). See St. 2022, c. 179. The Drive Act requires DOER to establish a demonstration project in which ten cities and towns may "notwithstanding [G. L. c. 40A, G. L. c. 142, § 13, or G. L. c. 164] or any other general or special law to the contrary, 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 enforce restrictions and prohibitions on new building construction and major renovation projects." *Id.* at § 84(b). A city or town may apply

to participate in the demonstration project after receiving local approval and submitting a home rule petition.[12]

The Climate Act and the Drive Act demonstrate the Legislature's recognition that for municipalities to enact legislation restricting fossil fuel infrastructure that is not violative of the Zoning Act or Chapter 164, there must be a mechanism for them to do so. The Acts also evince the Legislature's intent to have a defined and limited process for how cities and towns may act to regulate fossil fuels in their communities which is overseen by a statewide agency, DOER.[13] Such a purpose cannot "be achieved in the face of [the Town's] . . . by-law[s] on the same subject." *Bloom*, 363 Mass. at 156.

4. Whether Article 26 Conflicts with G. L. c. 40A, §§ 9 and 4

Finally, the Attorney General found that Article 26 conflicts with the special permit and uniformity provisions in G. L. c. 40A, §§ 9 and 4, by "contemplat[ing] a decision by the SPGA based upon an improper factor rather than the *use* of the building and the impacts of that use." A.R. at 206 (emphasis in original). There was no error in this conclusion.

Section 9 of the Zoning Act states that "[z]oning ordinances or by-laws shall provide for specific types of uses which shall only be permitted in specified districts upon the issuance of a special permit." Special permits, therefore, are for specific land uses "which are deemed necessary or desirable but which are not allowed as of right because of their potential for incompatibility with the characteristics of the district." *SCIT, Inc.* v. *Planning Bd. of Braintree*,

[12] Brookline has already filed its home rule petition to be part of the project.

[13] Boston Gas Company asserts that in addition to demonstrating the Legislature's intent to preempt municipal action like the Articles, the recently enacted legislation also makes the plaintiffs' action moot. The Court does not agree. "[L]itigation is considered moot when the party who claimed to be aggrieved ceases to have a personal stake in its outcome." *Bronstein* v. *Board of Registration in Optometry*, 403 Mass. 621, 627 (1988). "A moot case is one where a court can order 'no further effective relief.'" *Branch* v. *Commonwealth Emp. Relations. Bd.*, 481 Mass. 810, 817 (2019), citing *Lawyers' Comm. for Civ. Rights & Economic Justice* v. *Court Adm'r of the Trial Court*, 478 Mass. 1010, 1011 (2017). At this point in time, neither the Climate Act nor the Drive Act is available to Brookline to afford the relief it seeks.

19 Mass. App. Ct. 101, 109 (1984). Article 26 requires a special permit not for a specific type of land use (e.g., a multi-family dwelling where only single-family dwellings or two-family dwellings are allowed as of right) but rather for the "use of materials" or installation of a particular "method[] of construction" (i.e., fossil fuel infrastructure). Article 26, therefore, requires a special permit for an improper basis.

Section 4 of the Zoning Act requires that any by-law "be uniform within the district for each class or kind of structure or uses permitted." "If a zoning bylaw permits a certain use, that use is allowed as of right within the district without the landowner needing 'to seek permission which depends upon the discretion of local zoning authorities.'" *Knapik Tr. of Douglas Rd. Indus. Realty Tr.* v. *Hansson*, 2018 WL 1719533, at *9 (Mass. Land Ct. 2018) (Piper, J.), quoting *SCIT, Inc.*, 19 Mass. App. Ct. at 107. Article 26 requires a special permit for landowners of new buildings and significant rehabilitations who utilize On-Site Fossil Fuel Infrastructure even if their property is being used in a way that is otherwise permitted as of right. Thus, although two landowners may be using their property in the same way (e.g., two retail establishments), under Article 26 the SPGA would only require the one using On-Site Fossil Fuel Infrastructure to obtain a special permit. Section 4 of the Zoning Act is designed to prevent local zoning boards from having such "power to discriminate as to uses between land owners similarly situated." *SCIT, Inc.*, 19 Mass. App. Ct. at 108. See *Cumberland Farms, Inc.* v. *Jacob*, 2015 WL 5824402, at *6 (Mass. Land Ct. 2015) (Long, J.) (by-law requiring a special permit for a franchise convenience store but not for an identical convenience store that was independently operated violated Section 4). Therefore, Article 26 violates Section 4 of the Zoning Act.

CONCLUSION AND ORDER

For the foregoing reasons, the Court concludes that there was no error in the Attorney General's Decision disapproving of Article 25 and Article 26.

Plaintiff's Motion for Judgment on the Pleadings is **DENIED**. The Attorney General's Cross Motion for Judgment on the Pleadings is **ALLOWED**. Judgment shall enter for the Attorney General.

Claudine A. Cloutier
Justice of the Superior Court

Dated: March 23, 2023