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June 9, 2022

Mary de Alderete, Town Clerk
Town of Lexington
333 Washington Street
Lexington, MA 02445

Re: Lexington Special Town Meeting of November 8, 2021 -- Case # 10449
Warrant Articles # 12, 13, 14, 16, and 17 (Zoning) [1]

Dear Ms. de Alderete:

Under Article 17 the Town voted to amend its zoning by-law, Section 7.4.4, to add a new Section 7.4.4.2 that generally requires buildings over 65 feet in height in the Commercial Manufacturing (CM) District to have an HVAC system that does not utilize on-site fossil fuel combustion. The Town's vote thus presents the issue whether a zoning by-law may regulate interior building materials or methods of construction. The statutory language in the Zoning Act (G.L. c. 40A, § 3, and the broad preemptive scope of both the State Building Code ("Building Code") (780 CMR 100.00) and Chapter 164, all dictate the conclusion that a zoning by-law cannot regulate building materials or methods of construction. Because the proposed by-law amendments constitute the regulation of building materials or methods of construction, the amendments conflict with the plain language of the Zoning Act and are preempted by the Building Code. The amendments are also preempted by G.L. c. 164 and present additional state law conflicts as detailed herein. For these reasons we must disapprove Article 17.

We reiterate our statements in our decisions disapproving Brookline's attempts to regulate "On-Site Fossil Fuel Infrastructure" in new construction and major renovations. [2] The Attorney General is resolutely committed to reducing greenhouse gas emissions and other dangerous pollutants from the burning of fossil fuels. Our Office has engaged in numerous stakeholder-based and legal efforts to address climate change, including several efforts aimed at facilitating the transition of the Commonwealth away from the use of natural gas to renewable energy sources. [3] The Lexington by-

[1] In a decision issued May 25, 2022, we approved Articles 12, 13, 14 and 16 and extended our deadline on Article 17 as authorized by Chapter 299 of the Acts of 2000.

[2] See July 21, 2020, Decision in Case # 9725 at p.1, note 2; and February 25, 2022, Decision in Case # 10315 at p.1.

[3] For example, in 2016, the AGO released a study demonstrating that the state's electric utilities need

law amendments are clearly consistent with this policy goal. However, in carrying out her statutory obligation of by-law review under G.L. c. 40, § 32, the Attorney General is precluded from taking policy issues into account. Amherst v. Attorney General, 398 Mass. 793, 798-99 (1986) ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law."). Pursuant to G.L. c. 40, § 32, the Attorney General's by-law review is limited in scope to determining whether the by-law conflicts with the laws or Constitution of the Commonwealth. If it does conflict, the Attorney General must disapprove the by-law, regardless of the policy views that she may hold on the matter. Id.

Under this standard we must disapprove the by-law amendments adopted under Article 17 because they conflict with the laws of the Commonwealth in the following ways:

1. By requiring certain types of HVAC systems, the by-law amendments 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-law amendments 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-law 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 in the Commonwealth. See Boston Gas Co. v. City of Somerville, 420 Mass. 702, 706 (1995) ("[T]he [city] 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.") (emphasis added).

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not contract for new gas pipeline capacity to ensure electric reliability in New England. *See NSTAR Electric Company and Western Massachusetts Electric Company d/b/a Eversource Energy*, D.P.U. 15-181; *Massachusetts Electric Company d/b/a National Grid*, D.P.U. 16-05/16-07. In June 2020, the AGO filed a petition with the DPU that commenced an investigation into the future of the natural gas industry as Massachusetts transitions away from fossil fuels toward a cleaner energy future. The AGO remains an active participant in D.P.U. 20-80. Most recently, on May 6, 2022, the AGO filed with the DPU comprehensive Regulatory Recommendations and Technical Comments.

As part of the Commonwealth's *Statewide Three-year Energy Efficiency Programs*, the AGO has supported and advanced the transition of the building heating sector to electric heating technologies through aggressive electrification initiatives for all heating customers by gas and electric utilities in their Statewide 2022-2024 Three-year Energy Efficiency Plan (*see* D.P.U. 21-120 through D.P.U. 21-129).

The AGO has also pursued advocacy and litigation seeking to enforce federal and state laws that address climate change and its impact. As but one example, the AGO has advocated for, and initiated legal actions to compel, the U.S. Environmental Protection Agency and other federal agencies to secure greater reductions of greenhouse gas emissions from the electric power, oil and gas, transportation, and other sectors.

In this decision we briefly describe the by-laws amendments; discuss the Attorney General's limited standard of review of zoning by-laws under G.L. c. 40, § 32; and then explain why, governed as we are by that standard, we must disapprove the by-law amendments adopted under Article 17.

I. Description of Article 17

Under Article 17 the Town voted to amend the existing zoning by-law, Section 135-7.0, "Special District Regulations," by adding a new Section 135-7.4.4.2 to regulate buildings in the CM District. [4] The new Section 135-7.4.4.2 requires buildings over 65 feet in height to have certain types of HVAC systems as follows:

> 7.4.4.2. Buildings over sixty-five (65) feet shall utilize a heating, ventilation, and air conditioning (HVAC) system with a first stage of heating that uses a combination of air-source, ground-source or exhaust-source heat pumps or other heating system with a Coefficient of Performance (COP) greater than 1.0 that does not use on-site fossil fuel combustion and which has a minimum heating capacity of five (5) British thermal units (Btu) per hour per gross square foot or equal to the building's design heating load, whichever is lower.
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> a. Any additional stage of heating capacity above five (5) British thermal units (Btu) per hour per gross square foot may utilize on-site combustion, provided the HVAC and building management systems are designed and programmed such that normal operation initially relies on the non-combustion system to serve all building heating loads as the first stage before using any on-site combustion heating systems to supplement in a subsequent stage.
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> b. This subsection 7.4.4.2 shall not apply to systems not related to building heating, such as emergency backup power generators, humidification, and process equipment.

II. Attorney General's Standard of Review of Zoning Bylaws and Preemption

Pursuant to G.L. c. 40, § 32, the Attorney General has a "limited power of disapproval," and "[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986). The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.") Rather, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. Id. at 796. Where the Legislature intended to preempt the field on a topic, a municipal by-law on that topic is invalid and must be disapproved. Wendell v. Attorney General, 394 Mass. 518, 524 (1985).

[4] Although the title of the warrant article refers to regulations only for Hartwell Avenue buildings ("AMEND ZONING BYLAW-SUSTAINABLE DESIGN FOR HARTWELL AVENUE") the text of the amendment relates to all buildings in the CM District, not just those on Hartwell Avenue.

In determining whether a by-law is inconsistent with a state statute, 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, 394 Mass. at 524 (1985). "This intent can be either express or inferred." St. George, 462 Mass. at 125-26. Local action is precluded in three instances, paralleling the three categories of federal preemption: (1) where the "Legislature has made an explicit indication of its intention in this respect"; (2) where "the State legislative purpose can[not] be achieved in the face of a local by-law on the same subject"; and (3) where "legislation on a subject is so comprehensive that an inference would be justified that the Legislature intended to preempt the field." Wendell, 394 Mass. at 524. "The existence of legislation on a subject, however, is not necessarily a bar to the enactment of local ordinances and by-laws exercising powers or functions with respect to the same subject[, if] the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject[.]" Bloom v. Worcester, 363 Mass. 136, 156 (1973); see Wendell, 394 Mass. at 527-28 ("It is not the comprehensiveness of legislation alone that makes local regulation inconsistent with a statute. . . . The question . . . is whether the local enactment will clearly frustrate a statutory purpose.").

Article 17, as an amendment to the Town's zoning by-laws, must be accorded deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002). When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General's standard of review is equivalent to that of a court. "[T]he proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare." Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). Because the adoption of a zoning by-law by the voters at Town Meeting is both the exercise of the Town's police power and a legislative act, the vote carries a "strong presumption of validity." Id. at 51. "Zoning has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body, since it is familiar with local conditions." Concord v. Attorney General, 336 Mass. 17, 25 (1957) (*quoting* Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 117 (1955)). "If the reasonableness of a zoning bylaw is even 'fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.'" Durand, 440 Mass. at 51 (*quoting* Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). In general, a municipality "is given broad authority to establish zoning districts regulating the use and improvement of the land within its borders." Andrews v. Amherst, 68 Mass. App. Ct. 365, 367-368 (2007). However, a municipality has no power to adopt a zoning by-law that is "inconsistent with the constitution or laws enacted by the [Legislature]." Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

III. The By-law Amendments Conflict with the Zoning Act (G.L. c. 40A, § 3) Because They Regulate the Use of Materials or Methods of Construction

Although municipalities have broad power to adopt local zoning regulations, there are certain statutory limitations on that power. The Zoning Act at G.L. c. 40A, § 3 details numerous categories that a municipality may not regulate in its zoning by-law or ordinance. The first such restriction is: "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." This restriction applies to all structures regulated by the Building Code.

A. The Building Code and the BBRS.

The Building Code was authorized by G.L. c. 143, § 93 wherein the Legislature abolished all local building codes, established the state Board of Building Regulations and Standards ("BBRS"), and charged the BBRS with adopting and regularly updating the Building Code. Id. § 94(a), (c,) (h). The BBRS must adopt the Building Code so as to further three "general objectives," the first of which is: "Uniform standards and requirements for construction and construction materials, compatible with accepted standards of engineering and fire prevention practices, energy conservation and public safety." Id. § 95(a) (emphasis added). The BBRS must also consider and balance two other "general objectives," including "[e]limination 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." Id. § 95(c). [5]

The Building Code is codified at 780 CMR 101.00 and applies to virtually all structures (with certain exceptions not applicable here). See 780 CMR 101.2 (9th ed.) ("780 CMR shall be the building code for all towns, cities, state agencies or authorities, …[and] shall apply to the construction, reconstruction,…installation of equipment….and use or occupancy of all buildings or structures…). The Building Code also 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 the Gas Code and the Fire Code regulate fuel piping and infrastructure.

B. Decisions Interpreting G.L. c. 40A, § 3, First Sentence.

Although there are no reported appellate level decisions interpreting Section 3's prohibition on regulation of the use of materials or methods of construction, one commentator has noted that "the clause was apparently added by 1975 Mass Acts 808 as codification of the result in Enos v. City of Brockton, 354 Mass 278 (1968)." Mark Bobrowski, *Handbook of Massachusetts Land Use & Planning Law* § 4.02 (4th ed. 2018). In Enos, the court ruled that a Brockton zoning ordinance requiring "a certain type of wall and floor to be utilized in the construction of a dwelling" was not authorized by the Zoning Act. Zoning ordinances and by-laws have a purpose different from building codes, the court explained: "Whereas the main purpose of zoning is to stabilize the use of property and to protect an area from deleterious uses, a building code relates to the safety and structure of buildings. Id. at 280 (internal quotations and citations omitted). "These matters [the type of walls and flooring] are properly the subject of building codes rather than zoning regulation." Id. at 280.

As discussed below in section IV, the Legislature has charged the BBRS — not any city or town — with determining what construction methods and materials should and should not be allowed to ensure "[u]niform standards and requirements for construction and construction materials...." G.L. c. 143, § 95 (a). As such, the Building Code occupies the field and any local by-law or ordinance that

[5] Section 95's third "general objective" is: "Adoption of modern technical methods, devices and improvements which may reduce the cost of construction and maintenance over the life of the building without affecting the health, safety and security of the occupants or users of buildings." Id. § 95(b).

attempts to regulate what the Building Code regulates is preempted. St. George Greek Orthodox Cathedral of Western Mass. Inc v. Fire Dept. of Springfield, 462 Mass. 120 (2012) (invalidating Springfield ordinance that required certain type of fire protective signaling equipment where the Building Code presented four different options for such systems). The text of the Zoning Act at G.L. c. 40A, § 3 reflects this preemption principle by expressly prohibiting zoning by-laws that "regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code." As the court stated in Meadowoods Dev. Corp. v. Town of Medway, 6 LCR 110 (Mass. Land Court 1998) (emphasis supplied):

> If each city and town were able to impose building construction standards through zoning enactments, it would not be long before each municipality had its own building code such as existed before the enactment of [the] uniform [State Building Code]. *It is clear the General Court intended the state code to preempt the area of building construction by the language it subsequently employed in G.L. c. 40A, § 3.*

See also Peters v. Town of Yarmouth, 5 LCR 126, 127-128 (Mass. Land Court 1997) (where "[i]t is clear from its express language that the purpose and effect of the [local by-law] is to regulate the use of materials or methods of construction of structures regulated by the state building code, [the by-law] is not an authorized exercise of power granted to municipalities under the Zoning Act.")

During our review of Article 17 we have communicated with the BBRS (which issues and administers the Building Code) and the Board of State Examiners of Plumbers and Gas Fitters (which oversees the Gas Code). Both Boards conclude that the by-law amendments violate G.L. c. 40A, § 3 because the by-law amendments regulate the materials or methods of construction of structures that are regulated by the Building Code. We agree with these Board determinations that the by-law amendments conflict with G.L. c. 40, § 3 by attempting to regulate the materials or methods of construction of buildings governed by the Building Code.

IV. The By-law Amendments Are Preempted by the Building Code

The by-law amendments regulate HVAC systems that includes building materials and methods of construction governed by the Building Code, including the incorporated Gas Code and Fire Code. General Laws G.L. c. 143, § 95(c) expressly states a goal of uniformity with which the by-law amendments interfere.

The Legislature established the Building Code, and the incorporated Gas Code and Fire Code, as the one state-wide building code, plainly rejecting the premise of each municipality having its own requirements. "All by-laws and ordinances of cities and towns…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. "In authorizing the development of the [C]ode, the Legislature has expressly stated its intention: to ensure '[u]niform standards and requirements for construction and construction materials." St. George, 462 Mass. at 126 (citing G.L. c. 143, § 95(c).). Based on this express legislative goal of uniformity, and the abolition of local by-law requirements, the St. George court found "the Legislature [had] demonstrate[d] its express intention to preempt local action." Id. at 129.

The Building Code, and the incorporated Gas Code and Fire Code, has 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 with implementing regulations regarding gas fittings in buildings throughout the Commonwealth); 527 CMR 105, § 11.5 (regulating the installation of "fuel oil burners and all equipment in connection therewith"); 527 CMR 105, § 11.5.1.10.8 (regulating "fill and vent piping"); and 527 CMR 105, § 11.5.10.10.1 (regulating oil supply and return lines). Where (as here) a statute authorizes a state agency to make a uniform statewide determination of what building materials and methods of construction should (as well as should not) be allowed, a local by-law imposing an additional layer of regulation of the same subject is invalid. Wendell v. Attorney General, 394 Mass. 518 (1985). Just as in St. George and Wendell, it is ultimately the BBRS — not any city or town — that is charged with determining construction methods and materials. Local ordinances and by-laws that second-guess the BBRS' determination of allowable building materials and construction methods would frustrate the statutory purpose of having a centralized, statewide process for such matters. See Wendell, 394 Mass. at 529. As the St. George court stated in rejecting Springfield's ordinance:

> 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 code was meant to foreclose.

St. George, 462 Mass. at 135.

The broad preemptive effect of the Building Code (and the incorporated Gas Code and Fire Code) is such that the Code preempts all municipal ordinances and by-laws that — even when as well-intentioned as the by-law amendments here — would restrict, expand, or in any way vary what is otherwise permitted or prohibited by the Code. If the Building Code (and the incorporated Gas Code and Fire Code) regulates a topic, a local by-law cannot second-guess the Board's determination by adopting a local regulation of that topic. See Town of Wendell v. Attorney General, 394 Mass. 518, 529 (1985) ("An additional layer of regulation at the local level, in effect second-guessing the subcommittee, would prevent the achievement of the identifiable statutory purpose of having a centralized, Statewide determination of the reasonableness of the use of a specific pesticide in particular circumstances. To permit a local board to second-guess the determination of the State board would frustrate the purpose of the act.").

It is true that, with the 2008 passage of the Global Warming Solutions Act ("GWSA") and the subsequent passage of the 2021 Climate Act (discussed below) the Legislature has mandated economy-wide greenhouse gas emissions reductions. The Supreme Judicial Court has twice affirmed that the emission reduction limits of the GWSA are mandatory and enforceable, Kain et al. v. Department of Environmental Protection, 480 Mass. 278 (2016); NEPGA v. Department of Environmental Protection, 480 Mass. 398 (2018) (upholding power sector emission limits). Indeed, in NEPGA, the court observed:

> Its name bespeaks its ambitions. The [GWSA] was passed to address the grave threats that climate change poses to the health, economy, and natural resources of the Commonwealth. The act is designed to make Massachusetts a national, and even

international, leader in the efforts to reduce the greenhouse gas emissions that cause climate change.

Id. at 399 (internal citations omitted). While the by-law amendments Lexington proposes would generally further the purpose of the GWSA, they would, nevertheless, frustrate other express statutory purposes and uniformity in the Building Code (including the incorporated Gas Code and Fire Code), and the proposed amendments are thus invalid. See Take Five Vending, Ltd. v. Town of Provincetown, 415 Mass. 741, 744 (1993) (stating general standards for determining whether statute preempts local ordinance or by-law)); see also Boston Gas Company v. City of Somerville, 420 Mass. 702, 705-06 (1995) (local ordinance in furtherance of a valid legislative delegation must nonetheless yield to state superintendence if the ordinance has the practical effect of frustrating fundamental State policy).

V. Other Ground for Disapproval

We note the following additional basis for our disapproval of Article 17 but dispense with an extensive discussion of this issue in light of our conclusions in Section III and IV above that the by-law amendments (1) 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, first sentence; and (2) are preempted by the Building Code.

A. Article 17 is Preempted by Chapter 164.

As with the by-law amendments we disapproved in Brookline Case # 9725 (issued July 21, 2020) (see discussion at pp. 10-12 which we incorporate by reference herein), and Brookline Case # 10315 (issued February 25, 2022) (see p. 9), the by-law amendments proposed by Article 17 are preempted by G.L. c. 164, through which the DPU comprehensively regulates the sale and distribution of natural gas in the Commonwealth. The Supreme Judicial Court has repeatedly recognized "the desirability of uniformity of standards applicable to utilities regulated by the Department of Public Utilities." New England Tel. & Tel. Co. v. City of Lowell, 369 Mass. 831, 834 (1976) (citing cases). Similarly, in Boston Gas Co. v. City of Somerville, 420 Mass. 702 (1995), the court invalidated a city ordinance regulating repair of street openings by utilities; "the [city] 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." Id. at 706 (emphasis added). And in Boston Gas Co. v. City of Newton, 425 Mass. 697 (1997), the court invalidated a city ordinance imposing street-opening fees on utilities, where it "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.'" Id. at 703 (quoting Boston Gas Co. v. Somerville). During our review of Brookline Case # 9725, we received a letter from the DPU concurring with the assessment that the proposed Brookline by-law amendments directly conflict with state law regulating the sale and distribution of natural gas and therefore and are preempted by state law, and that analysis also applies to Lexington's Article 17 at issue here.

VI. Options Available to Municipalities

Legislation enacted in March 2021 creates a future pathway for cities and towns to enact local measures to foster and align with clean energy initiatives statewide. *An Act Creating a Next Generation Roadmap for Massachusetts Climate Policy* (St. 2021, ch. 8, the "Climate Act"), among

other things, directs the DOER, in consultation with the BBRS, to promulgate a municipal opt-in statewide specialized stretch energy code. Climate Act, §31. The stretch code must include a net-zero building energy performance standard "designed to achieve compliance with the [C]ommonwealth's statewide greenhouse gas emission limits and sublimits." Id. DOER must develop and promulgate the stretch energy code no later than 18 months after enactment of the Climate Act (by December 2022). Climate Act, §101. According to the statute: "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. On February 8, 2022, DOER released its straw proposal for a stretch code update and the new specialized stretch code. [6] DOER indicated that it intended to meet the December 2022 deadline.

Moreover, the Executive Office of Energy and Environmental Affairs also must establish by July 2022, enforceable sublimits for greenhouse gas emissions from various sectors of the Massachusetts economy, including building heating and from natural gas distribution and service. Climate Act, §9. By Executive Order No. 596 [7] the Administration created a Clean Heat Commission to advise the Commonwealth on how best to achieve legally mandated emission reductions by reducing greenhouse gas emissions associated with heating fuels. According to its January 12, 2022, Press Release, the Commission "will seek to sustainably reduce the use of heating fuels and minimize emissions from the building sector while ensuring costs and opportunities arising from such reductions are distributed equitably." [8]

In addition, several bills have been introduced this legislative session to allow municipalities to adopt by-laws or ordinances that restrict fossil fuel infrastructure in buildings, including Lexington's H. 3893, *An Act Authorizing the Town of Lexington to Adopt and Enforce Local Regulations Restricting New Fossil Fuel Infrastructure in Certain Construction*., which is currently before the Joint Committee on Telecommunications, Utilities and Energy ("TUE Committee"). Other home rule petitions include H. 3750, *An Act Authorizing the Town of Arlington to Adopt and Enforce Local Regulations Restricting the Use of Fossil Fuels in Certain Construction*; H. 4117, *An Act Authorizing the Town of Concord to Adopt and Enforce Local Regulations Restricting New Fossil Fuel Infrastructure in Certain Construction*; S. 2515, *An Act Authorizing the Town of Acton to Adopt and Enforce Local Regulations Restricting New Fossil Fuel Infrastructure in Certain Construction*; and S. 2473, *An Act Authorizing the Town of Brookline to Adopt and Enforce Local Regulations Restricting New Fossil Fuel Infrastructure in Certain Construction*. On June 2, 2022, the House of Representatives entered an extension order for the House-filed home rule petition bills listed above until June 30, 2022, pending concurrence by the Senate. The Senate-filed home rule petitions listed above are subject to an extension order expiring June 2, 2022. Section 65 of S. 2842, *An Act Driving Climate Policy Forward*, a broader climate bill engrossed by the Senate, would create a pilot program for municipalities that have adopted home rule petitions similar to those noted above. S. 1333, *An Act to Reduce Greenhouse Emissions by Permitting Local Option All-Electric Buildings and Homes Ordinances*, which could have implications for all municipalities, was referred by the TUE

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

[7] *See* https://www.mass.gov/executive-orders/no-596-establishing-the-commission-on-clean-heat

[8] *See* https://www.mass.gov/news/baker-polito-administration-launches-first-in-the-nation-commission-on-clean-heat

Committee to the Senate Committee on Ways and Means in January 2022. The House version of this bill, H. 2167, was included with the home rule petitions in the TUE Committee's extension order expiring June 30, 2022.

VII. Conclusion

The Attorney General supports the Town's efforts to reduce the use of fossil fuels in the CM district in the Town. And the Attorney General notes that pending State actions may soon provide the Town with greater latitude to regulate fossil fuel infrastructure. However, the Legislature (and the courts) have made plain that at the present time the Town cannot utilize the methods it has selected to achieve those goals. The Town cannot regulate, through its zoning by-laws, building materials or construction methods, and cannot add an additional layer of regulation to the comprehensive scope of regulation in the Building Code (including the incorporated Gas Code and Fire Code), and Chapter 164. This is true no matter how meritorious the Town's proposal, and no matter how strong the Town's belief that its favored option best serves the public health of its residents. Because the by-law amendments adopted under Article 17 conflict with current state law, we must disapprove them.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

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