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February 25, 2022

Benjamin Kaufman
Town Clerk
Town of Brookline
333 Washington Street
Brookline, MA 02445

Re: Brookline Annual Town Meeting of May 19, 2022 -- Case # 10315
Warrant Articles # 25 and 26 (Zoning) [1]

Dear Mr. Kaufman:

Our review of Articles 25 and 26 from the 2021 Brookline Annual Town Meeting presents the issue whether a town zoning by-law may regulate buildings based upon whether the building materials include "On-Site Fossil Fuel Infrastructure" (as defined in the by-law). 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 town zoning by-law cannot regulate building materials or methods of construction. Because the Brookline proposed by-law amendments conflict with the plain language of the Zoning Act, are preempted by the Building Code and G.L. c. 164, and present additional state law conflicts as detailed herein, we must disapprove Articles 25 and 26.

We reiterate our statements in our decision of July 21, 2020, in Case # 9725 disapproving Brookline's prior attempt 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 Brookline by-laws are clearly consistent with this policy goal. During our review we

[1] We acted on or will be acting on additional Articles in Case # 10315 as follows. In a decision issued October 21, 2021, we approved Article 11. In a decision issued December 1, 2021, we approved Articles 12, 13, 14, 16, 21, 23, 24, 29, 30 and 32. In a decision issued January 27, 2022, we approved Articles 22 and 33. We will issue our decision on the remaining Articles (17, 19 and 20) on or before our deadline of March 1, 2022.

[2] See Decision in Case # 9725 at p.1, note 2.

[3] For example, in 2016, the AGO released a study demonstrating that the state's electric utilities need not contract for

received numerous letters from interested parties urging our approval of the by-law amendments for both policy and legal reasons. We appreciate this input as it has demonstrated the importance of the environmental policy goal – and state law emissions reduction mandates - that prompted the Town to adopt the by-law amendments. [4]

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 Articles 25 and 26 because they conflict with the laws of the Commonwealth in the following 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. See Boston Gas Co. v. City of Somerville, 420 Mass. 702, 706 (1995)

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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 February 14, 2022, the Office, together with the Department of Energy Resources ("DOER"), filed with the DPU a comprehensive proposal for moving the investigation forward.

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.

[4] We appreciate the letters we received from, among others, Town Counsel Jonathan Simpson; Attorney Raymond Miyares on behalf of the petitioners; and Attorneys Colin Parts and Sarah Krame on behalf of The Sierra Club.

("[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).

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.*

In this decision we briefly describe the by-laws; 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-laws adopted under Articles 25 and 26.

I. Summary of Articles 25 and 26

Under Article 26 the Town voted to adopt a new zoning by-law, 9.13 "On-Site Fossil Fuel Infrastructure." The zoning by-law applies to all special permit applications for "new buildings" or "significant rehabilitations" (as defined in the by-law), with some exceptions. [5] The by-law requires the special permit granting authority (SPGA) to base its decision 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." (Article 26, Section 9.13.4) 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 special permit that is personal to the applicant and non-transferrable except in certain circumstances. (Article 26, Section 9.13.4.b.1-3). If the application does not include On-Site Fossil Fuel Infrastructure, there is no restriction on the decision of the SPGA. (Article 26, Section 9.13.4.a)

If (for buildings with On-Site Fossil Fuel Infrastructure) the SPGA issues a special permit that is time limited, the permit will be in effect only for a term "not to exceed five years from the date of its first exercise, or until January 1, 2030, whichever is later." (Article 26, Section 9.13.4.b.1) Such a time limited special permit "may, for good cause, be renewed one or more times, for a term not to exceed one year." (Article 26, Section 9.13.4.b.2)

The SPGA may modify the special permit "at the applicant's request" "to run with the land in perpetuity, upon a funding that the applicant has removed, disconnected, or otherwise disabled any On-Site Fossil Fuel Infrastructure." (Article 26, Section 9.13.4.b.3)

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 gas source to a meter or to the meter itself; or b. Fossil fuel piping related to backup electrical generators, cooking appliances, or portable propane appliances for outdoor cooking and heating.

[5] The by-law exempts the following uses from its scope: scientific or medical research laboratories, health care uses license by the Department of Public Health, among other exceptions.

(Article 26, Section 9.13.2, Definitions) (emphasis applied). [6]

Article 25 is very similar to Article 26 except that it has an even broader scope. Under Article 25 the Town voted to amend existing requirements for the Emerald Island Special District, Section 5.06.4.j, The existing by-law 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. (Existing by-law, Section 5.06.4.j.2). The proposed by-law amendment in Article 25 requires that all such new buildings be free from On-Site Fossil Fuel Infrastructure. (Article 25, Section 5.06.4.j.2.d).

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).

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.").

Articles 25 and 26, as amendments 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

[6] The term "fossil fuel" is not defined in the by-law but has the commonly understood meaning of "a fuel (such as coal, oil, or natural gas) formed in the earth from plant or animal remains." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/fossil fuel.

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."[7] Id. § 95(c).

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,

[7] 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).

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 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 Articles 25 and 26 we received letters from 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-laws violate G.L. c. 40A, § 3 because the by-laws 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-laws 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-laws Are Preempted by the Building Code

The by-laws regulate On-Site Fossil Fuel Infrastructure 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 and rejected 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 proponents and supporters err in arguing that the by-laws are not preempted because they do not prohibit the installation of On-Site Fossil Fuel Infrastructure but rather "present property owners with a choice as they pursue zoning relief." (Town Counsel letter to Hurley, p.5). As an initial matter, a special permit is a *requirement* for certain land uses to operate: "Zoning 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." G.L. c. 40A, § 9. Both Articles 25 and 26 apply to an extensive list of uses that require a special permit in order to operate in the Town, and for those uses subject to the special permit requirement in the Emerald Island Special District the prohibition is clear: "All new buildings shall also be free of On-Site Fossil Fuel Infrastructure." (Article 25, Section 5.06.4.j.2.d). With respect to Article 26, the by-law text does not, as the supporters contend, give the applicant a choice regarding what type of special permit the applicant will receive. The by-law includes no text that references a choice or election by the applicant – rather it *requires* the SPGA to issue one type of special permit for "On-Site Fossil Fuel Infrastructure" and another type of special permit if no such infrastructure exists. Further, although the "conditional" time-restricted special permit provided under Article 26 for a building with On-Site Fossil Fuel Infrastructure may be renewed upon request there is no guaranty that such a request will be granted – or that the special permit will be approved in the first place. A special permit granting authority has broad discretion to deny a special permit application. "Even if the record reveals that a desired special permit could lawfully be granted by the board because the applicant's evidence satisfied the statutory and regulatory criteria, the board retains discretionary authority to deny the permit issued so long as that denial is not based upon a legally untenable or arbitrary and capricious ground." Davis v. Zoning Bd. of Chatham, 52 Mass.App.Ct. 349, 355-356 (2001) (internal citations omitted).

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 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 also 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, 474 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 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 Grounds for Disapproval

We note the following additional bases for our disapproval of Articles 25 and 26 but dispense with an extensive discussion of these issues 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 (sentence one); and (2) are preempted by the Building Code.

A. Both Articles 25 and 26 Are Preempted by Chapter 164.

As with the by-law amendments we previously disapproved in Case #9725 (issued July 21, 2020) (see discussion at pp. 10-12 which we incorporate by reference herein), the by-law amendments proposed by Articles 25 and 26 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 Articles 25 and 26 we received a letter from the DPU concurring with the assessment that Articles 25 and 26 directly conflict with state law regulating the sale and distribution of natural gas and therefore and are preempted by state law. [8]

B. The By-law Amendments Adopted Under Article 26 Conflict with the Special Permit and Uniformity Provisions of the Zoning Act.

[8] We recognize the argument raised by the proponents that Articles 25 and 26 are not preempted by Chapter 164 because they apply only to those uses requiring a special permit. See e.g., Miyares letter to Hurley, December 7, 2021, p.10. It also could be argued that the proposed by-law amendments are not so direct a regulation of gas companies as the ordinances at issue in the Boston Gas line of cases. On balance however we determine that Chapter 164 and the Boston Gas line of cases dictate the conclusion that these proposed by-law amendments are preempted. As noted in Section VI below, the adoption of a municipal opt-in statewide specialized stretch energy code as required by *An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy*, Section 31 would change this analysis for future by-laws.

Article 26 requires the SPGA to act on a special permit application in a certain way (issue either a "conditional" time-restricted special permit or an unrestricted special permit) depending upon whether the application includes On-Site Fossil Fuel Infrastructure, a consideration that, as explained above, cannot lawfully be regulated under a town zoning by-law. The by-law thus contemplates a decision by the SPGA based upon an improper factor rather than the *use* of the building and the impacts of that use. As such the by-law conflicts with the special permit provision in G.L. c. 40A, § 9, and the uniformity requirement in G.L. c. 40A, § 4. See SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 109-110 (1984) (explaining the limitation in G.L. c. 40A, § 9 that special permits are only authorized for "specific types of uses" and the uniformity principle in G.L. c. 40A, § 4 that all land in similar circumstances should be treated alike); see also Cumberland Farms, Inc. v. Jacob, 2015 WL 5824402 (Land Court 2015) (invalidating Wellfleet formula business by-law because it regulated based on ownership not land use impacts).

VI. Options Available to Municipalities

Recent legislation enacted last March 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. [9] 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 [10] 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." [11]

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

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

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

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 Brookline's home rule petition, S. 2473, *An Act Authorizing the Town of Brookline 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 H. 3893, *An Act Authorizing the Town of Lexington to Adopt and Enforce Local Regulations Restricting New Fossil Fuel Infrastructure in Certain Construction*. The TUE Committee has sought an extension order for these home rule petition bills until May 2, 2022. The TUE Committee's all-electric buildings and homes ordinances, which could have implications for all municipalities, has since been referred to the Senate Committee on Ways and Means. The House version of this bill, H. 2167, was included with the home rule petitions in the TUE Committee's extension order until May 2, 2022.

VII. Conclusion

The Attorney General supports the Town's efforts to reduce the use of fossil fuels within the Town. And the Attorney General notes that pending state actions may provide the Town with greater latitude in the near future. 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 well-intentioned the Town's action, and no matter how strong the Town's belief that its favored option best serves the public health of its residents. Because the by-laws adopted under Articles 25 and 26 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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