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CITY OF CAMBRIDGE
Office of the City Solicitor
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November 8, 2021

Louis A. DePasquale
City Manager
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: Awaiting Report No. Awaiting Report Item #21-84 of 11/1/21
Re: Proposed Amendments to Building Energy Use Disclosure Ordinance

Dear Mr. DePasquale,

I am submitting this response to the above referenced Awaiting Report in addition to having also participated with the Community Development Department ("CDD") in reviewing its proposed amendments to the Building Energy Use Disclosure Ordinance; Municipal Code Chapter 8.67 ("BEUDO").

In reviewing the proposed amendments to BEUDO, we have concerns that some aspects of the proposed amendments may be subject to challenge, which we wanted to bring to the City Council's attention. This type of measure aimed at reducing greenhouse gas ("GHG") emissions is novel and has yet to be reviewed by a court. While, as always, we would vigorously defend any challenge to these proposed amendments, we wanted to advise the Council that there are potential legal challenges that could be brought.

The proposed amendments to BEUDO set out GHG performance requirements that would be required for certain properties in the City (primarily large residential and commercial properties) and provide multiple pathways for compliance with the performance requirements. These pathways include alternative compliance payments, which are set out in the definition of the Alternative Compliance Credit that is included in the proposed amendments. It is possible that the option to make a payment in lieu of meeting other performance requirements could be challenged as an impermissible tax. In Massachusetts, municipalities have authority to collect fees but not to tax other than as specifically permitted by the Legislature. *Emerson College v. City of Boston*, 391 Mass. 415, 424-25 (1984). To be upheld as a valid fee, courts have applied a three-prong test: a fee is charged in exchange for a service that benefits the party paying the fee in a manner not shared by other members of society; the party paying has the option of not utilizing the service and avoiding the fee; and the fee is not collected to raise revenue but instead

to compensate the government for the services. Id. We would argue that the Alternative Compliance Credit is voluntary because a property owner has other available options for complying with the proposed amendments and does not need to avail itself of the Alternative Compliance Credit. We also have some concerns whether the Alternative Compliance Credit satisfies the other prongs of the tax versus fee test. However, because such a payment has not yet been tested, we do not know exactly what conclusion a court would reach if it were challenged.

Additionally, the proposed amendments require eliminating GHG emissions from regulated properties by 2050, with intermediate targets set at certain intervals, compared to an individual 2018-2019 baseline required for most buildings. For purposes of determining the GHG emissions by a covered property, the proposed amendments assume that nuclear and old or existing wind, solar and hydroelectric generated electricity emit the same amount of GHG as the burning of coal, oil and gas. It is possible that a reviewing court would find that there is not a logical basis for imposing penalties for exceeding maximum permissible GHG emissions if the building did not actually emit the assumed amount of GHG emissions during the relevant compliance period. For an ordinance to withstand a challenge it must be reasonable. There must be some logical connection between the object sought to be accomplished by an ordinance and the means prescribed to accomplish that end. The court will not substitute its judgment of what is reasonable for that of a city council unless it has been shown that the local legislative body has acted in an arbitrary or capricious manner. *Town of Milton v. Donnelly*, 306 Mass. 451, 459 (1940). If challenged, we believe there are arguments that could be advanced that a GHG emissions equivalent is permissible to advance the legitimate policy goals of creating new renewable electric generation facilities and to discourage the use of nuclear fuels.

Finally, because the Commonwealth of Massachusetts has recently enacted legislation that regulates certain aspects of greenhouse gas emissions, including in buildings; see, Chapter 8 of the Acts of 2021, entitled "An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy", an argument could be made that the state has potentially "occupied the field" with regard to GHG emissions, and that the City has exceeded its authority if it enacts the proposed amendments relating to this issue. Because the state has not yet promulgated regulations pursuant to the new law, however, it is not yet known whether the City's proposed amendments might be inconsistent with or prohibited by the new law or any new regulations promulgated pursuant thereto. Depending upon what the state's regulations provide, a court could find that the City's proposed amendments to BEUDO, if challenged, are inconsistent with the state statutory scheme or that the state statutory scheme has occupied the field; and the court could strike down the amendments as exceeding the City's authority. However, we will have no way of knowing that in advance of the state's promulgation of regulations.

In sum, measures aimed at GHG emission reduction present novel issues that have not yet been tested by the courts, and we do not know what a court would decide if there were a challenge. I will be available to answer any questions the Council may have.

Very truly yours,

Nancy E. Glowa
City Solicitor