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CITY OF CAMBRIDGE
Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

July 27, 2020

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

Re: Response to Awaiting Reports No. AR 19-124 (Order No. O-3 of 10/7/19) seeking a Report on the Legal Authority of the City to Ban the Use of Natural Gas in Newly Constructed Buildings and AR 19-133 (Order No. O-19 of 10/7/19) seeking a Review of Proposed Amendments to the Municipal Code

Dear Mr. DePasquale:

I write to provide you with an update on the above-referenced legal opinion (the "Legal Opinion") that we provided to the City Council in response to Order No. O-3 of October 7, 2019 seeking a report on the legal authority of the City of Cambridge to ban the use of natural gas in newly constructed buildings and Order No. O-19 of October 7, 2019 seeking a report on the review of proposed amendments to the Municipal Code (the "Proposed Ordinance") prohibiting natural gas in newly constructed buildings, with some exceptions. A copy of the Legal Opinion is attached hereto for your reference.

Council Order No. O-19 of 10/7/19 was placed on the Calendar as Calendar Item #9 of 6/29/20, a copy of which is attached hereto for your reference. I am providing this further response as an update to our original response Calendar Item #9 relating to the City's legal authority to ban the use of natural gas in newly constructed buildings.

On July 21, 2020, the Attorney General of the Commonwealth of Massachusetts issued a legal opinion (the "Attorney General's Legal Opinion") addressed to the Town Clerk of the Town of Brookline in which she opined that a proposed Brookline by-law prohibiting the issuance of permits for construction of certain buildings with fossil fuel infrastructure conflicts with state law and the Constitution of the Commonwealth, and thus, was disapproved by the

Attorney General. A copy of the Attorney General's Legal Opinion to Brookline's Town Clerk is also attached hereto for your reference.

If you have any questions, please do not hesitate to let me know.

Very truly yours,

Nancy E. Glowa
City Solicitor

Enclosures

MAURA HEALEY
ATTORNEY GENERAL

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July 21, 2020

Patrick J. Ward, Town Clerk
Linda Goldburgh, Assistant Town Clerk
Town of Brookline
333 Washington Street
Brookline, MA 02445

Re: Brookline Special Town Meeting of November 19, 2019 -- Case # 9725
Warrant Article # 21 (General)[1]

Dear Mr. Ward and Ms. Goldburgh:

In this Case we must determine whether a Brookline by-law prohibiting any permits for construction of certain buildings with fossil fuel infrastructure (Article 21 of the Brookline Special Town Meeting of November 19, 2019) conflicts with the laws or Constitution of the Commonwealth. Because the State Building Code, the Gas Code, and G.L. c. 164 occupy the field of regulation and preempt local by-laws in their respective fields, we must disapprove the by-law.

If we were permitted to base our determination on policy considerations, we would approve the by-law. Much of the work of this Office reflects the Attorney General's commitment to reducing greenhouse gas emissions and other dangerous pollution from fossil fuels, in the Commonwealth and beyond. [2] The Brookline by-law is clearly consistent with this policy goal. During our review of the

[1] In a decision issued July 17, 2020 we approved the remaining Articles from Case # 9725.

[2] For example, citing the threats of dangerous climate change to the Commonwealth, the Attorney General has filed and joined legal actions seeking to compel the U.S. Environmental Protection Administration to secure greater reductions of greenhouse gas emissions from the electric power, oil and gas, and transportation sectors. As the state's ratepayer advocate, the Attorney General has advanced the transition of the Commonwealth's electricity supply to renewable, non-carbon emitting sources of electric generation and the electrification of the heating sector. In 2016, the Office opposed attempts by the state's electric utilities to contract for gas pipeline capacity to anchor the construction of an unnecessary new interstate gas pipeline. *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. Most recently, the Attorney General petitioned the Department of Public Utilities to investigate and plan for an energy future that includes an electrified heating sector (*see Petition of Attorney General to Investigate Local Gas Distribution Companies*, D.P.U. 20-80) and executed a settlement agreement that requires Eversource Gas to study and report on the steps necessary for gas distribution companies to comply with the emission

by-law we received numerous letters from interested parties urging our approval of the by-law for both policy and legal reasons. We appreciate this input as it has demonstrated the importance of the environmental policy goal that prompted the Town to adopt the by-law. [3]

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 adopted under Article 21 because it conflicts with the laws of the Commonwealth in three ways:

1. The by-law is preempted by the State Building 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);
2. The by-law is preempted by the Gas Code and G.L. c. 142, §13 in that it creates a new reason to deny a gas permit and would "allow a locality to impose additional requirements and second-guess the determination of the State [Plumbing] board." St. George, 462 Mass. at 128; and

3. The by-law is 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).

In this decision we briefly describe the by-law; discuss the Attorney General's limited standard of review of town 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 adopted under Article 21. [4]

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reduction mandates of the Global Warming Solutions Act (*see Joint Petition of Eversource Energy, NiSource Inc., and Bay State Gas Company d/b/a Columbia Gas of Massachusetts*, D.P.U, 20-59).

[3] We appreciate the letters we received from, among others, Town Counsel Joslin Murphy and Jonathan Simpson on behalf of the Town; Attorney Raymond Miyares on behalf of the petitioners; Attorney Sarah Krame on behalf of The Sierra Club; Attorney Aladdine D. Joroff on behalf of Mothers Out Front Massachusetts and others; and Attorney Alyssa Rayman-Read on behalf of the Conservation Law Foundation.

[4] As we have done in the past, our Office conferred with certain petitioners and opponents at their request regarding procedural matters in connection with the by-law. As is our practice, at no time did we offer an opinion as to the viability of the by-law or whether we would approve it.

I. Summary of Article 21

Under Article 21 the Town voted to adopt a new general by-law, 8.39 "Prohibition on New Fossil Fuel Infrastructure in Major Construction." The by-law establishes that "no permits shall be issued by the Town for the construction of New Buildings or Significant Rehabilitations that include the installation of new On-Site Fossil Fuel Infrastructure" with certain exceptions outlined in the by-law.

The by-law defines "On-Site Fossil Fuel Infrastructure" as:

> [F]uel gas or fuel oil piping that is in a building, in connection with a building, or otherwise within the property lines of premises, extending from a supply tank or from the point of delivery behind a gas meter (customer-side of gas meter).

(Section 8.40.2, Definitions). The term "permits" is not defined but the by-law applies broadly to "to all permit applications for New Buildings and Significant Rehabilitations proposed to be located in whole or in part within the Town," with certain exemptions as listed in the by-law (Section 8.40.3 Applicability).

The by-law includes a process by which applicants may request a waiver on the grounds of "financial infeasibility" or "impracticability of implementation." (Section 8.40.5, Waivers). The by-law directs the Selectboard to establish a "Sustainability Review Board," comprised of at least three members representing expertise in affordable housing, commercial development, architecture etc., to review and decide on waiver applications. (Sections 8.40.2, Definitions and 8.40.5, Waivers). The by-law also establishes an appeal process for denial of a building permit: "An appeal may be sought from the SRB following a denial of a building permit." (Section 8.40.6 Appeals).

II. Attorney General's Standard of Review 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.").

III. The By-law is Preempted Because it Conflicts with Three Uniform Statewide Regulatory Schemes

The Supreme Judicial Court has frequently held that in determining whether a statute "impliedly preclude[s] regulation by municipalities," a court must examine "whether there is a need for uniformity in the subject of the legislation." Golden v. Selectmen of Falmouth, 358 Mass. 519, 524 (1970). Where there is "importance in uniformity in the law to govern the administration of the subject[, a] statute of that nature displays on its face an intent to supersede local and special laws and to repeal inconsistent special statutes." McDonald v. Justices of the Superior Court, 299 Mass. 321 (1938) (discussing statute imposing uniform statewide regulation of alcoholic beverage sales). Where a state statutory scheme demonstrates an intention to create a uniform statewide regulatory system, municipal enactments in the area are invalid.

Brookline's by-law implicates three statutory schemes that preempt local regulation: G.L. c. 143, § 95(c) (creating the State Building Code); G.L. c. 142, §13 (charging the Plumbing Board with administration of the Gas Code regulating "gas fitting in buildings throughout the commonwealth"); and G.L. c. 164 (through which the DPU comprehensively regulates the sale and distribution of natural gas in the Commonwealth).

A. The By-law is Preempted Because it Interferes with the Express Statutory Goal of Uniformity in the State Building Code.

General Laws G.L. c. 143, § 95(c) expressly states a goal of uniformity with which the by-law interferes. In addition, the state Board of Building Regulations and Standards ("BBRS") has exercised its statutory authority to prescribe the process for issuance and denial of permits, and the process for waivers and appeals from building officials' decisions. The by-law here purports to create a new basis for denial of permits, and a new waiver and appeal process, all of which conflict with the Building Code and state law.

1. State Building Code and Board of Building Regulations and Standards.

The BBRS is established by G.L. c. 143, § 93, and charged with adopting and regularly updating the Building Code. Id. § 94(a), (c,) (h). The BBRS must administer 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). "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).). As such, the Legislature established the Building 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. 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 has broad application regarding building construction, including (most relevant here) the issuance of building and occupancy permits:

> 780 CMR, and other referenced specialized codes as applicable, shall apply to:
>
> 1. the construction, reconstruction, alteration, repair, demolition, removal, inspection, issuance and revocation of permits or licenses, installation of equipment, classification and definition of any building or structure and use or occupancy of all buildings and structures or parts thereof…;

101.2 Scope (emphasis supplied).

It is the local building official who makes the determination whether a building or occupancy permit application complies with the Building Code requirements and thus whether a permit should issue:

> **104.2 Applications and Permits.** The building official shall receive applications, review construction documents and issue permits for the erection, and alteration, demolition and moving of buildings and structures, inspect the premises for which such permits have been issued and enforce compliance with the provisions of 780 CMR.
>
> **105.1 Required.** It shall be unlawful to construct, reconstruct, alter, repair, remove or demolish a building or structure; or to change the use or occupancy of a building or structure; or to install or alter any equipment for which provision is made or the installation of which is regulated by 780 CMR without first filing an application with the building official and obtaining the required permit.

Further, the Building Code establishes the local building official as the decision-maker regarding any requested waivers:

> **104.10 Modifications.** Wherever there are practical difficulties involved in carrying out the provisions of 780 CMR, the building official shall have the authority to grant modifications for individual cases, upon application of the owner or owner's representative, provided the building official shall first find that special individual reason makes the strict letter of 780 CMR impractical and the modification is in compliance with the intent and purpose of 780 CMR and that such modification does not lessen health, accessibility, life and fire safety, or structural requirements.

Finally, the Legislature has designated the BBRS, sitting as the State Building Code Appeals Board, as the entity to hear appeals from local and state enforcement officials' orders under and interpretations of the Building Code. G.L. c. 143, § 100:

> There shall be in the division of professional licensure a building code appeals board, hereinafter called the appeals board, to consist of the board established under the provisions of section ninety-three.
>
> Whoever is aggrieved by an interpretation, order, requirement, direction or failure to act by any state or local agency or any person or state or local agency charged with the administration or enforcement of the state building code or any of its rules and regulations, except any specialized codes as described in section ninety-six, may within forty-five days after the service of notice thereof appeal from such interpretation, order, requirement, direction, or failure to act to the appeals board.

2. G.L. c. 143, § 95(c)'s Stated Intention of Uniform Standards Preempts Additional Local Requirements.

Where (as here) a statute authorizes a state agency to make a uniform statewide determination of what products and practices 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). In Wendell, the statute established a "pesticide board" within the state Department of Food and Agriculture and empowered a subcommittee of the board to "register" a pesticide for general or restricted use if the subcommittee found that the pesticide met specific statutory criteria. Id. at 526, 528-29. In the face of this scheme, "[t]he Wendell by-law contemplate[d] the possibility of local imposition of conditions on the use of a pesticide beyond those established on a Statewide basis under the act." Id. at 528. The court held that "[a]n 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 [and] …frustrate the purpose of the act." Wendell, 394 Mass. at 529.

In determining that Springfield's ordinance was preempted by the Building Code, the St. George court relied on the reasoning of the Wendell decision:

> The same reasoning applies here. The Legislature intended to occupy the field by promulgating comprehensive legislation and delegating further regulation to a State board. The board's regulations, in turn, set a Statewide standard as to what products and practices were permissible in a particular field, a process involving a discretionary weighing of relevant factors, such as cost and safety. In response the local government created an additional layer of regulation imposing requirements beyond those contemplated by the board. There is no meaningful distinction between these cases, and we reach the same conclusion here: the code preempts inconsistent local regulations.

St. George, 462 Mass. at 133-134.

Just as in St. George and Wendell, it is ultimately the BBBRS -- not any city or town -- that is charged with determining the process by which a building or occupancy permit is granted or withheld.[5] Local ordinances and by-laws that second-guess the BBBRS' determination of when a

[5] As explained above, the initial determination is made by the local building official but any appeal from that decision goes to the Board sitting as the State Building Code Appeals Board. G.L. c. 143,

permit should (or should not) be allowed would frustrate the statutory purpose of having a centralized, statewide process for such matters. See Wendell, 394 Mass. at 529. The Town's attempt to second-guess the BBRS, by prohibiting the issuance of a permit in a circumstance where the Building Code does not prohibit a permit, and assigning the waiver and appeal decision to a town board instead of the local building official and State Building Code Appeals Board, frustrates the purposes of § 95 -- including the purpose of uniformity -- and is therefore invalid.[6] 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. [7]

The proponents and the Town err in arguing that the Town's additional layer of regulation is authorized by cases like Lovequist v. Conservation Commission of Town of Dennis, 379 Mass. 7 (1979), which held that "[s]ince the language of the [challenged] by-law parallels that of the statute, it appears plain that [the by-law] furthers rather than derogates from the legislative purpose embodied in the Wetlands Protection Act." Id. at 15. That principle is inapposite here, because, as the Lovequist court emphasized, "we have specifically held that [the Wetlands Protection Act] sets forth minimum standards only, 'leaving local communities free to adopt more stringent controls.'" Id. (quoting Golden v. Selectmen of Falmouth, 358 Mass. 519, 526 (1970)).

Essential to the Golden court's holding was its recognition that whether a statute preempted local regulation depended in part on whether the statute demonstrated "a need for uniformity in the subject," id. at 524; and its conclusion that the Wetlands Protection "Act does not attempt to create a uniform statutory scheme." Golden, 358 Mass. at 526 (emphasis added). Thus Golden and Lovequist cannot be applied here, where the statute authorizing the State Building Code expressly makes "[u]niform standards and requirements" a principal objective. G.L. c. 143, § 95(a).

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§ 100.

[6] Although G.L. c. 40A, § 7 and the Code (at Section105.3.1**)** authorize the local building inspector to withhold a building permit for non-compliance with local *zoning* by-laws or ordinances, they do not authorize the withholding of a permit for non-compliance with a general (non-zoning) by-law such as Brookline's.

[7] To illustrate how the by-law undermines the Code's uniformity requirements: imagine one building project in Newton and one building project in Brookline, each with the same proposed architectural plans, construction and construction materials, and both proposing on-site fossil fuel infrastructure. Assuming the projects complied with the Building Code (and local zoning requirements) in all other respects, the Newton project would be entitled to a building permit, but the Brookline project would not.

The proponents and the Town are correct that the Building Code does not directly regulate fossil fuel infrastructure as defined in the by-law. However, the by-law's enforcement and waiver/appeal mechanism -- withholding of a permit and waivers/appeals therefrom -- is directly and comprehensively regulated by the Code. The BBRS asserts that "the Legislature has intended, by M.G.L. c. 143, § 94, for the Building Code to govern the issuance of permits" [and] "a local ordinance creating a new basis for denial of permits would conflict with the Building Code." (Letter from DPL Office of Legal Counsel to Hurley, p. 4). [8] As such, the by-law cannot stand.

It is true that, with the 2008 passage of the Global Warming Solutions Act ("GWSA") the Legislature has also mandated economy-wide greenhouse gas emissions reductions, and 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 Global Warming Solutions Act, St.2008, c.298 (act), 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 would further the purpose of the GWSA, it would, nevertheless, frustrate other express statutory purposes, uniformity in the Building Code, Gas Code and Chapter 164, and the by-law is 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). During the unprecedented reality of climate disruption, the Town has acted in an exemplary manner to attempt a bold step to tackle the problem locally. Yet, to the extent the Commonwealth has not yet taken the necessary steps to ensure the state will achieve the 2050 net zero emissions limit, the by-law proponents' remedy lies with the Legislature and the courts.

B. The By-law is Preempted Because it Interferes with the Express Statutory Goal of Uniformity in the State Gas Code**.**

Just as with the State Building Code, the by-law is also preempted by the State Gas Code. The Gas Code is comprehensive, uniform, and directly regulates the gas piping targeted by the Brookline

[8] As does the court, "[w]e afford substantial deference to an agency's interpretation of a statute that it is charged with administering." Boston Edison Co. v. Town of Bedford, 444 Mass. 775, 783 (2005) (internal citations and quotations omitted). Thus, where the BBRS, Plumbing Board (see pp. 16-19 below), and DPU all concur that the by-law is preempted by the statutes and regulations each Board administers, those interpretations are entitled to great deference, particularly "[w]here, as here, the case involves interpretation of a complex statutory and regulatory framework." MCI Telecomm. Corp. v. Dep't of Telecomm. & Energy, 435 Mass. 144, 150-151 (2001) (internal quotations and citations omitted).

by-law. The Gas Code regulates when a permit may be issued and the waiver/appeal process for denial of a permit. Because the by-law creates an additional layer of regulation, a new ground for denial of a permit, and a new waiver/appeal procedure, all not found in the Gas Code, the by-law interferes with the express legislative goal of uniformity in the Gas Code.

1. The Fuel Gas Code and the Plumbing Board.

The Massachusetts Fuel Gas Code (Gas Code) is comprised of a series of regulations adopted by the Board of State Examiners of Plumbers and Gas Fitters (Plumbing Board), specifically 248 CMR 4.00 through 8.00. The Gas Code's authorizing legislation is G.L. c. 142, §13 which charges the Board with the duty to "alter, amend, and repeal rules and regulations relative to gas fitting in buildings throughout the commonwealth." Id. Further said regulations "shall be reasonable, uniform, based on generally accepted standards of engineering practice, and designed to prevent fire, explosion, injury and death." Id. (emphasis added).

Chapter 142, Section 1 defines "gas fitting" as:

> [A]ny 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 including the connection therewith and testing of gas fixtures, ranges, refrigerators, stoves, water heaters, house heating boilers, and any other gas using appliances, and the maintenance in good and safe condition of said systems, and the making of necessary repairs and changes.

Thus, in regulating "fossil fuel infrastructure" (as defined in the by-law), the Brookline by-law directly regulates the same gas piping regulated by Chapter 142 and the Gas Code.

The Gas Code is enforced by Inspectors of Plumbing and/or Inspectors of Gas Fitting, individuals who personally hold licenses issued by the Plumbing Board. G.L. c. 142, §11. Prior to commencing most work governed by the Gas Code, a permit must be issued by the plumbing and/or gas inspector. See 248 CMR 3.05. The Gas Code designates who may obtain a gas permit (a licensed plumber or gas fitter) as well as describes how permits are issued and, if necessary, terminated. Id. Finally, a plumbing inspector's determination that a permit should be denied is appealed to the Plumbing Board per G.L. c. 142, §13 and 248 CMR 3.05, not a locally created entity as contemplated by the Brookline by-law.

2. *G.L. c. 142, § 13's Stated Intention of Uniform Standards Preempts Additional Local Requirements*.

As an initial matter, pursuant to G.L. c. 143, §96, the State Gas Code is incorporated into the State Building Code. Id. ("The state building code shall incorporate any specialized construction codes…") Thus, the Building Code field preemption found by the St. George court applies with equal measure to the State Gas Code. See St. George, 462 Mass. at 133-134 ("[T]he Legislature intended to occupy the field by passing comprehensive legislation and delegating further regulation to a State board.").

In addition, G.L. c. 142, §13 mandates creation of uniform, statewide standards for gas fittings with which the Brookline by-law interferes. By restricting the installation of "On-Site Fossil Fuel Infrastructure" (By-law, Section 8.40.2), the Brookline by-law is in reality restricting the installation of "gas fitting" -- work governed by the Gas Code. By way of example, if a consumer in Brookline decided to replace an aging oil heater with a new gas furnace, the consumer could have the gas furnace installed and have a local gas utility bring a new gas line into the property to a gas meter, all without interference by the by-law. Where the Brookline by-law directly applies is when the consumer then hires a licensed plumber or gas fitter to install gas piping connecting the new gas furnace to the meter installed by the utility company. For that step, the consumer needs a licensed plumber or gas fitter to apply for a locally issued -- but state regulated -- gas permit and perform work exclusively governed by the Gas Code. The Brookline by-law would prohibit the state regulated gas permit and bar the state regulated plumbing work.

The St. George court's reasoning applies here and dictates the conclusion that the Brookline by-law is preempted by the Gas Code. The by-law and the Gas Code have different requirements for when gas fitting work can occur and have different appellate/waiver procedures governing relief from denial of a permit. As a result, "the [by-law] would frustrate the achievement of the stated statutory purpose of having centralized, Statewide standards in this area." Id. at 129-130. The Gas Board asserts that the by-law is preempted by the Gas Code and G.L. c. 142, §13 because the by-law "attempt[s] to supplement the rules for permits governed by the Gas Code" and "attempts to regulate the performance of work that the legislature has deemed exclusively governed by the Gas Code." (Letter from Plumbing Board Executive Director to Hurley, p. 6). As such the by-law is preempted by the Gas Code.

C. The By-law is Preempted by Chapter 164, Which Reflects the Fundamental State Policy of Ensuring Uniform Utility Services to the Public.

The by-law is also 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). In that case, a city ordinance created "a burden for the [utility] company additional to those which it carries elsewhere. To the extent that this is so, there is a variation from the uniformity desirable in the regulation of utilities throughout the Commonwealth," and accordingly the ordinance was invalid. Id. (invalidating ordinance requiring registered engineer to stamp utility's street-opening plans, where state statute exempted companies under DPU jurisdiction from requirement that company's engineers be registered).

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 because "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). 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). And in Boston Edison Co. v. Town of Bedford, 444 Mass. 775 (2005) the court invalidated a town by-law that would have imposed a penalty on pole owners for having double poles in the town, concluding

that, "[a]lthough there is no express legislative intent to forbid local activity regarding double pole removal, the 'comprehensive nature' of G.L. c. 164 implies that the Legislature intended to preempt municipalities from enacting legislation on the subject." Id. at 781.

The Superior Court recently applied the Boston Gas line of cases in overturning a Boston ordinance regulating the inspection, maintenance, and repair of natural gas leaks within the city. Boston Gas Company v. City of Boston, 35 Mass.L. Rptr.141, 2018 WL 4198962. The court ruled that "the [Supreme Judicial Court]'s decisions in City of Somerville and City of Newton make it plain that, with limited exceptions, non-incidental local rules and ordinances affecting the manufacture and sale of gas and electricity are preempted by Chapter 164." Id. The court rejected the City's argument that because the City ordinance was a "permitting" requirement (like the Brookline by-law here) the ordinance was not preempted:

> The fact that the City couches its inconsistent obligations as "permitting" requirements does not make them any less objectionable, or any less subject to preemption, because the net effect on Boston Gas is the same as if the obligations had been imposed directly. *Cf*. City of Newton, 425 Mass. at 699-706 (portion of ordinance charging inspection and maintenance fees as a prerequisite to acquiring a permit to excavate public ways and sidewalk was invalid).

Id.

Just as in Wendell and St. George, the Legislature here has granted to the DPU, not to individual cities and towns, the authority to regulate the sale and distribution of natural gas throughout the Commonwealth. The DPU views the by-law as conflicting with this legislative grant of authority because, "[i]n effect, the [by-law] restricts National Grid's ability to add new customers in Brookline (particularly heating customers) and restricts National Grid's ability to serve existing customers who perform significant renovations on their buildings." (Letter from DPU General Counsel to Hurley, p. 2). Clearly the Town could not directly prohibit National Grid from adding new customers in Brookline because such a move would directly interfere with the DPU's authority. As in the City of Boston, the Town cannot do indirectly (through a permitting requirement) what it is prohibited from doing directly. See Boston Gas Company v. City of Boston, 35 Mass.L.Rptr.141, 2018 WL 4198962 ("The fact that the City couches its inconsistent obligations as 'permitting' requirements does not make them any less objectionable, or any less subject to preemption, because the net effect on Boston Gas is the same as if the obligations had been imposed directly.")

The by-law also interferes with the express legislative objective in Chapter 164 for uniform service throughout the Commonwealth. As the DPU explains:

> [The by-law] would impose non-uniform service among its residents with new customers forced to become residential non-heating customers (Rate Class R-1), rather than having the option to become residential heating customers (Rate Class R-3). Article 21 prevents the uniform service that G.L. c. requires and, therefore, Article 21 is preempted by the well-established, comprehensive scope of G.L. c. 164.

Letter from DPU General Counsel to Hurley, p. 3. By prohibiting gas and oil service to the Town's residents, the by-law interferes with the legislative intent in G.L. c. 164, § 105A that there be "absolute interdependence of all parts of the Commonwealth and all of its inhabitants in the matter of availability of public utility services, [so that] all may obtain a reasonable measure of such services." Pereira v. New England LNG Co., Inc., 364 Mass. 109, 120-121 (1973). To be sure, even without the

by-law, residential and commercial property owners may choose energy systems that do not rely on fossil fuels. And the Town may consider adopting incentive programs to nudge property owners in that direction. However, the by-law here forces a decision on property owners and thereby interferes with the legislative goal in Chapter 164 of uniform utility options statewide. The Town is thus preempted from utilizing this method to achieve its stated goals. [9]

IV. CONCLUSION

The Attorney General agrees with the policy goals behind the Town's attempt to reduce the use of fossil fuels within the Town. However, the Legislature (and the courts) have made plain that the Town cannot utilize the method it selected to achieve those goals. The Town cannot add an additional layer of regulation to the comprehensive scope of regulation in the State Building Code, State Gas 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-law adopted under Article 21 is preempted, we must disapprove it.

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,
MAURA HEALEY
ATTORNEY GENERAL

Margaret J. Hurley
By: Margaret J. Hurley
Chief, Central Massachusetts Division
Director, Municipal Law Unit
10 Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600 ext. 4402

cc: Town Counsel Joslin Murphy and Assoc. Town Counsel Jonathan Simpson

[9] We considered whether we could disapprove only the offending text (the withholding of a building permit and appeal/waiver scheme) and approve the remaining text. When a portion of a law or regulation is found to be invalid, "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987). Here no fully operable by-law would remain if we excised only the offending text. Therefore, we determine that the offending text is non-severable, and we must disapprove the entire by-law.

City of Cambridge

~~O-19~~
Calendar Item # 9
IN CITY COUNCIL
~~October 7, 2019~~
June 29, 2020

COUNCILLOR ZONDERVAN
COUNCILLOR CARLONE
MAYOR SIDDIQUI
VICE MAYOR DEVEREUX

WHEREAS: Cambridge's Climate Vulnerability Assessment has established that many Cambridge residents are vulnerable to (and are already experiencing) extreme heat and flooding impacts from climate change, underscoring the need to rapidly reduce our emissions to avoid even worse impacts in the future; and

WHEREAS: Scientific evidence has established that natural gas combustion, procurement, and transportation produce significant greenhouse gas emissions that worsen the climate crisis; and

WHEREAS: Cambridge first declared a climate emergency in 2009 and has a goal of reaching zero emissions no later than 2050; and

WHEREAS: In order to reach these goals, new buildings will have to use electric heating and cooling equipment (chiefly ground and air source heat pumps) that is powered by electricity generated from renewable sources such as wind and solar; and

WHEREAS: All-electric buildings are cheaper to build than those that use natural gas for heating, and the price of natural gas is expected to significantly increase in the future; and

WHEREAS: Retrofitting buildings that are designed to rely on natural gas infrastructure is a costly proposition that will take decades to complete, and it makes no sense to add more such buildings now, only to have to retrofit them later; and

WHEREAS: Cambridge's aging natural gas infrastructure represents a severe and omnipresent danger to all residents, and expanding this infrastructure to meet additional demand from new buildings would further increase and prolong these risks and keep the City locked in to using natural gas in the future; now therefore be it

ORDERED: That the attached proposed amendments to the municipal code be referred to the Ordinance Committee for a hearing and consideration; and be it further

ORDERED: That the City Manager be and hereby is requested to direct the City Solicitor, Community Development, Public Works, Inspectional Services and any other related departments to review the proposed amendments and report back to the Council no later than the end of October.

In City Council October 7, 2019.
Adopted by the affirmative vote of eight members.
Attest:- Anthony I. Wilson, City Clerk

A true copy;

ATTEST:-

Anthony I. Wilson, City Clerk

Chapter 15.10

PROHIBITION OF NATURAL GAS INFRASTRUCTURE IN NEW BUILDINGS

Sections:

15.10.010 Purpose.

The Cambridge City Council finds that in order to reach its net zero emissions goals in response to the climate crisis, and pursuant to its declaration of a climate emergency in 2009, fossil fuel combustion in newly constructed buildings shall be prohibited. Furthermore, to protect the health and safety of its residents, combustion of Natural Gas specifically in newly constructed buildings, including major renovations, shall be prohibited.

15.10.020 Applicability.

A. The requirements of this Chapter shall apply to the permits of or the processing of development applications for all Newly Constructed Buildings proposed to be located in whole or in part within the City.

B. The requirements of this Chapter shall not apply to the use of portable propane appliances for outdoor cooking and heating.

C. This Chapter shall in no way be construed as amending energy code requirements under 780 CMR Chapter 115 AA (Stretch Energy Code, as adopted by the Cambridge City Council on December 21, 2009), nor as requiring the use or installation of any specific appliance or system as a condition of approval.

D. The requirements of this Chapter shall be incorporated into conditions of approval for applications for permits under Article 19 of the Zoning Ordinance.

15.10.030 Definitions.

A. "Accessory Dwelling Unit" shall have the same meaning as "Accessory Apartment in Article 2 of the Zoning Ordinance.

B. "Greenhouse Gas Emissions" mean gases that trap heat in the atmosphere.

C. "Natural Gas" shall have the same meaning as "Fuel Gas" as defined in 248 CMR 4.02

D. "Natural Gas Infrastructure" shall be defined as fuel gas piping, other than service pipe, in or in connection with a building, structure or within the property lines of premises, extending from the point of delivery at the gas meter as specified in 248 CMR 4.02.

E. "Newly Constructed Building" shall be defined as a building with a valid Building Permit or Special Permit application approved on or after the effective date of this Chapter that has never before been used or occupied for any purpose, or a building partially demolished and reconstructed where the demolition involved more than half of the most recent prior total floor area of the building.

F. "Occupancy Permit" shall have the same meaning as specified in Chapter 9.20.

G. "Special Permit" shall have the same meaning as specified in Chapter 10.40.

15.10.040 Prohibited Natural Gas Infrastructure in Newly Constructed Buildings.

A. Natural Gas Infrastructure shall be prohibited in Newly Constructed Buildings.

B. Notwithstanding 15.10.040.A, Natural Gas Infrastructure may be permitted in a Newly Constructed Building if the applicant establishes that it is not physically feasible to construct the building without Natural Gas Infrastructure.

C. For purposes of this section, "feasible to construct the building" means that the building is able to achieve the prevailing performance compliance standards using commercially available technology.

D. Natural Gas Infrastructure shall not be extended to any system or device within a building for which an equivalent all-electric system or design is available.

E. To the extent that an exemption and installation of Natural Gas Infrastructure is granted, Newly Constructed Buildings shall be required to have sufficient electric capacity and conduit to facilitate full building electrification.

15.10.050 Exception for Attached Accessory Dwelling Units.

The requirements of this Chapter shall not apply to attached Accessory Dwelling Units.

15.10.060 Public Interest Exemption.

A. Notwithstanding the requirements of this Chapter and the Greenhouse Gas Emissions and

other public health and safety hazards associated with Natural Gas Infrastructure, minimally necessary and specifically tailored Natural Gas Infrastructure may be allowed in a Newly Constructed Building provided that the permit granting authority for the project establishes that the use serves the public interest.

B. To the extent that stand-alone delivery systems are available, the exemption shall require that the permit granting authority for the project consider whether a stand-alone delivery system is physically feasible before granting an exemption.

15.10.070 Annual Review.

The City shall review annually the requirements of this ordinance for ongoing consistency with Massachusetts Building Energy Codes regulations under 780 CMR and the Commission's code adoption cycle.

15.10.080 Severability.

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the prescribed application thereof, shall be severable, and the remaining provisions of this Chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this title, and each section, subsection, sentence, clause and phrase of this Chapter, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases is declared invalid or unconstitutional.

15.10.090 Effective date.

The provisions of this Chapter shall become effective on January 1, 2020.

Nancy E. Glowa
City Solicitor

Arthur J. Goldberg
Deputy City Solicitor

Samuel A. Aylesworth
First Assistant City Solicitor

Assistant City Solicitors
Paul S. Kawai
Keplin K. U. Allwaters
Sean M. McKendry
Megan B. Bayer
Brian A. Schwartz
Katherine Sarmini Hoffman

Public Records Access Officer
Seah Levy

CITY OF CAMBRIDGE
Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

December 11, 2019

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

Re: Response to Awaiting Reports No. AR 19-124 (Order No. O-3 of 10/7/19) seeking a Report on the Legal Authority of the City to Ban the Use of Natural Gas in Newly Constructed Buildings and AR 19-133 (Order No. O-19 of 10/7/19) seeking a Review of Proposed Amendments to the Municipal Code

Dear Mr. DePasquale:

I write in response to Awaiting Reports Nos. AR 19-124 (Order No. O-3 of October 7, 2019) seeking a report on the legal authority of the City of Cambridge (the "City") to ban the use of natural gas in newly constructed buildings and AR 19-133 (Order No. O-19 of October 7, 2019) seeking a report on the review of proposed amendments to the Municipal Code (the "Proposed Ordinance") prohibiting natural gas in newly constructed buildings, with some exceptions. For the reasons outlined below, I am of the opinion that the City Council may adopt an ordinance prohibiting the use of natural gas infrastructure in newly constructed or partially reconstructed buildings if it submits a Home Rule Petition to the Commonwealth's Legislature seeking special legislation permitting the City to prohibit the installation of natural gas utilities in new construction and such legislation is enacted by the Legislature. Unless a Home Rule Petition is approved by the Legislature of the Commonwealth, under Section 6 of Article 89 of the Commonwealth's Constitution (the "Home Rule Amendment"), any ordinance enacted by the City prohibiting natural gas in new construction would likely be ruled by a court to be invalid as preempted by G. L. c. 164 which is a comprehensive statute regulating the provision of gas and electricity in the Commonwealth, in addition to regulations promulgated thereunder by the Commonwealth's Department of Public Utilities, and further, void as preempted by G. L. c. 143 and State Building Code regulations promulgated thereunder.

I. LEGAL ANALYSIS.

A. Home Rule Powers Under the Massachusetts Constitution

The Home Rule Amendment to the Constitution of the Commonwealth provides at Section 6 "Governmental Powers of Cities and Towns" thereof that "any 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 in conformity with the powers reserved to the general court by section 8 . . ." See Art. 89, § 6 of the amendments to the Massachusetts Constitution; see also Bloom v. Worcester, 363 Mass. 136, 145 (1973). Section 8 of the Home Rule Amendment expressly provides that "the general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws enacted (1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town . . . ." Art. 89, § 8 of the amendments to the Massachusetts Constitution.

B. Preemption by Existing Comprehensive Statutes (G. L. c. 164 and 143)

Consistent with the Home Rule Amendment, the Supreme Judicial Court has held that "municipalities may not adopt by-laws or ordinances that are inconsistent with State law. Boston Gas Company v. Newton, 425 Mass. 697, 699 (1997) citing Boston Gas Company v. Somerville, 420 Mass. 702 (1995). "To determine whether a local ordinance is inconsistent with a statute, [the Supreme Judicial Court] has looked to see whether there was either an express legislative intent to forbid local activity on the same subject or whether the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject." Id. at 704. In some circumstances, the Supreme Judicial Court infers that the Legislature intended to preempt the field because legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose. Id. citing Somerville, 429 Mass. at 706.

The Supreme Judicial Court has stated that the purpose of G. L. c. 164 is to ensure uniform and efficient utility services to the public. Id. In Boston Gas Company v. Newton, the Supreme Judicial Court reviewed whether an ordinance adopted by the City of Newton imposing a monetary cost on public utility companies as a prerequisite to acquiring excavation permits in addition to an inspection and maintenance fees in some circumstances was invalid with respect to maintenance and inspection fees under Section 6 of Article 89 of the Massachusetts Constitution. Newton, 425 Mass at 698. The Supreme Judicial Court ruled that "given the comprehensiveness of the statute [G. L. c. 164] and the remedies provided therein, we conclude that the statute does not permit a municipality to charge the fees in question." Id. at 704–705. The Supreme Judicial Court also stated that "we have long held that a municipality required by statute to participate in a scheme established by statute is entitled to cover reasonable expenses incident to the enforcement of the rules," and thus, ruled that only the portion of the ordinance requiring a fee for processing a permit application was permissible. Id. 706–707 citing Southview Coop. Hous. Corp. v. Rent Control Board of Cambridge, 396 Mass. 395, 400 (1985).

In a similar case, Boston Gas Company v. Somerville, the Supreme Judicial Court reviewed the validity of an ordinance enacted by the City of Somerville which required utility companies performing excavation work to hire a city contract representative selected by the City of Somerville to provide services at specified rates, to use certain materials and paving techniques, and to be responsible for the excavation site for three years beyond the final treatment of the site. Somerville, 420 Mass. at 704–705. In that case, the Supreme Judicial Court ruled that "the manufacture and sale of gas and electricity by public utilities is governed by G. L. c. 164" and that "given the comprehensive nature of this statute, we conclude that the Legislature intended to preempt local entities from enacting legislation in this area." Id. citing Boston Edison Company v. Boston, 390 Mass. 772, 774 (1984).

The Proposed Ordinance would also likely be held invalid by a court as preempted by the provisions of G. L. c. 143, which is a state statute governing, among other things, the inspection and regulation of all buildings in the Commonwealth and empowers the State Board of Building Regulations and Standards to adopt and administer the Massachusetts State Building Code. See St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire department of Springfield, 462 Mass. 120, 121 (2012). Specifically, the Proposed Ordinance would prohibit the issuance of a building permit where natural gas infrastructure appears on the construction plans for any new building or a building being reconstructed with few exceptions. However, G. L. c. 143 and the State Building Code promulgated thereunder regulate the issuance of building permits by municipalities in the Commonwealth.

In St. George Greek Orthodox Cathedral of Western Massachusetts, Inc., the Supreme Judicial Court reviewed the validity of an ordinance of the City of Springfield requiring all buildings in that city to utilize a "city approved radio box" under the State Building Code. St. George Greek Orthodox Cathedral of Western Massachusetts, Inc., 462 Mass. 120, 121–122 (2012). In ruling that the Springfield ordinance was invalid, the Supreme Judicial Court reasoned that "the Legislature intended to occupy a field by promulgating comprehensive legislation and delegating further regulation to a State board," "the Board's regulations . . . set a Statewide standard as to what products and practices were permissible . . .", and "where the Legislature demonstrates its express intention to preempt local action, inconsistent local regulations are invalid under the Home Rule Amendment." Id. at 128–129. The Springfield "ordinance would frustrate the achievement of the stated statutory purpose of having centralized, Statewide standards in this area." Id. at 129. Moreover, the Supreme Judicial Court reasoned that "if all municipalities in the Commonwealth were allowed to enact similarly restrictive ordinances and bylaws [as that enacted by Springfield], a patchwork of building regulations would ensue." Id. at 130. Therefore, in the absence of special legislation as to the City, an ordinance, the effect of which would prohibit the issuance of a building permit where gas infrastructure appears on plans for new construction or reconstruction of a building in most circumstances, would likely be held invalid by the courts as preempted by the provisions of G. L. c. 143 and the State Building Code.

II. CONCLUSION.

For the reasons set forth above, I am of the opinion that prior to adopting the Proposed Ordinance, the City Council must first submit, and the State Legislature must pass, special

legislation as to the City empowering the City Council to prohibit natural gas infrastructure in newly constructed or reconstructed buildings in the City. If the City Council so desires, we would be happy to prepare a draft Home Rule Petition for the City Council's review and consideration.

Very truly yours,

Nancy E. Glowa
City Solicitor