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October 13, 2021

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Margaret J. Hurley, Assistant Attorney General
Chief, Central Massachusetts Division
Director, Municipal Law Unit
Ten Mechanic Street, Suite 301
Worcester, MA 01608

Re: G.L. Chapter 40, § 32 Review
Articles 25 and 26 Adopted at Town of Brookline 2021 Annual Town Meeting

Dear Attorney Hurley:

This letter is sent on behalf of the Massachusetts Energy Marketers Association ("MEMA") in connection with the review being conducted by the Municipal Law Unit under G.L. c 40, § 32, for Articles 25 and 26 as adopted by the Town of Brookline ("Town") at the 2021 Annual Town Meeting that closed on June 7, 2021. Article 25 is proposed as an amendment to Section 5.06.4(j)(2)(d) of the Town's Zoning Bylaw for the Emerald Island Special District ("EISD"). Article 26 is proposed as an amendment to the Town's Zoning Bylaw for special permit applications for New Buildings or Significant Rehabilitations by adding a new Section 9.13. MEMA appreciates your consideration of these comments urging the Attorney General ("AG") to invalidate both articles because they conflict with existing Massachusetts law.

1. Background on MEMA.

MEMA was established in 1955 and is the Massachusetts trade association for the industry providing residential and commercial heating oil and liquid renewable biofuel. MEMA currently represents nearly 300 companies, including companies providing retail heating oil, biofuel, diesel fuel and propane; wholesale petroleum operations; biofuel producers and distributors; heating equipment manufacturers and distributors; and a host of companies providing goods and services to the industry. MEMA also serves as the qualified state association for the National Oilheat Research Alliance ("NORA"), a congressionally authorized program aimed at promoting heating oil and biofuel blends; developing energy efficiency

initiatives; educating consumers and the industry; and developing research and development projects leading to cleaner heating fuels and more efficient heating equipment.

Collectively, MEMA's retail members store, sell and deliver nearly 70 percent of the residential and commercial heating oil used in Massachusetts. These companies and related businesses employ several thousand highly skilled workers statewide. Retail heating oil companies provide a reliable, safe and economical liquid fuel energy source to more than 750,000 homes and businesses in the Commonwealth. Additionally, the industry installs and maintains high-efficiency heating and hot water systems and has a proven track record of unsurpassed service to its customers.

MEMA has supported efforts by Governor Baker, the Massachusetts Department of Energy Resources ("DOER") and the Massachusetts legislature to limit fossil fuel use and seek renewable sources for heating and transportation fuels as a pathway for reducing greenhouse gas emissions. The heating oil industry continues to demonstrate that support through expanded use of clean, renewable "biofuel" (also known as "biodiesel"), and significant reductions in greenhouse gas emissions are being achieved through its use as a gallon-for-gallon substitute for petroleum-based fuels used for space heating and transportation. Biofuel is a non-toxic, biodegradable, renewable fuel, produced from agricultural byproducts and coproducts, including used cooking oil, animal fats, inedible corn oil, soybean oil and canola oil, and reduces greenhouse gas emissions by 52% to 86%.

Under DOER's Alternative Energy Portfolio Standard program that incentivizes biofuel blends of 10% (B10) or higher, heating oil use in Massachusetts has been cut by more than 46 million gallons since the program started in January 2018. To further demonstrate that the heating oil industry is committed to be a partner in significant climate change control, in September 2019 the industry in Massachusetts and the Northeast committed to a resolution to reduce greenhouse gas emissions, based on 1990 levels, by 15 percent by 2023, 40 percent by 2030, and net-zero by 2050. These goals can be met by using higher blends of biofuel in heating oil, including a 50% blend (B50) by 2030.

2. Summary of Article 25.

At its 2021 Annual Town Meeting, the Town passed Warrant Article 25 ("Article 25"), which would amend Section 5.06.4(j)(2)(d) of the Town's Zoning Bylaw for the EISD by adding a requirement that any new building proposed in the EISD with a design that requires a special permit must be "free of on-site fossil fuel infrastructure." The term "on-site fossil fuel infrastructure" is defined to include "fossil fuel piping that is in a building, in connection with a building, or otherwise within the property lines of premises, including piping that extends from a supply source." Thus, Article 25 would create a condition that a project proponent who pursues a special permit to relax any of the dimensional requirements for a new building is compelled (with few minor exceptions) to abandon the use of fossil fuel in the building. An applicant may still develop the property using fossil fuel infrastructure if they conform to

underlying zoning criteria and do not seek a special permit, but the only other option to relax dimensional zoning without a special permit is a variance. The prerequisites for variances are extremely difficult to meet. G.L. c. 40A, § 10. Variances are rarely granted and often successfully challenged. See Guiragossian v. Board of Appeals of Watertown, 21 Mass. App. Ct. 111 (1985); Blackman v. Board of Appeals of Barnstable, 344 Mass. 446, 450 (1956); Coolidge v. Zoning Board of Appeals of Framingham, 343 Mass. 742, 743 (1962); Warren v. Board of Appeals of Amherst, 383 Mass. 1, 2 (1981). Thus, the effect of Article 25 is to deny an applicant's ability to use on-site fossil fuel infrastructure in a new building while also seeking a special permit to modify any dimensional zoning standards for that building.

A document identified as "Reports of Select Board and Advisory Committee on the Articles in the Warrant for the Annual Town Meeting" (herein "Reports") was distributed at the 2021 Town Meeting. In the Reports, the Article 25 proponents indicated they were seeking a way "to create a zoning incentive strategy to encourage Fossil Fuel Free (FFF) construction" in response to the AG's ruling dated July 21, 2020 that Warrant Article 21, adopted at the Town's November 2019 Town Meeting (herein "Article 21"), was in conflict with state law. In the Reports, the proponents' description of Article 25 included a claim that "the use of incentives to encourage FFF development was suggested as an alternative" by the AG in the ruling on Article 21, and they stated that Article 25 "tests the concept of incentivizing FFF development with new zoning opportunities."

In the Reports, the proponents observed that in a ruling dated March 13, 2017, the AG had approved the bylaw passed as Article 7 at the Town's Special Town Meeting of November 15, 2016 (herein "Article 7"), which amended the EISD to add a provision offering dimensional zoning relief through a special permit if a new building or renovation in the EISD met LEED® Silver Certifiable (or higher) development standards. In this regard, the proponents asserted the language of Article 7 "was approved by the [AG], ***presumably because*** it was an incentive for obtaining the special permit with the expanded dimensional allowances in the EISD" (emphasis added). With respect to Article 25, the proponents also maintained in the Reports that "this simple but significant change in the EISD requirements can establish incentivized FFF 'proof-of-concept for new construction,' a major step entirely consistent with Article 21 and the Town's movement toward a more sustainable future."

These claims are inaccurate. The 2017 letter approving Article 7 did not fully validate Article 7. The AG's letter stated "it is unclear what the Town means by shall be 'LEED Silver Certifiable or higher' and whether LEED® certified standards are directory or mandatory. However, for the reasons provide below, ***the Town cannot mandate*** LEED® certified standards" (emphasis added). The AG's letter also stated that because "LEED® is, in part, a building energy conservation code and its specific building energy conservation requirements may compete with building energy conservation requirements of 780 CMR . . . the ***Town is not authorized to mandate that private (non-municipal) construction projects in Town meet the LEED® certified standards***" (all emphasis added). Based on those views, the AG recommended that the Town should consult with town counsel and the state Board of Building

Regulations and Standards ("State Board") when applying the new LEED® requirement "to ensure that the Town is not in conflict with the State Building Code." Thus, contrary to the assertions by the Article 25 proponents, the AG had *not* indicated that the LEED® standards *mandate* in Article 7 was valid because it was presented as an "incentive" for zoning relief.

In the Reports, the Town's Planning Board offered a "Report and Recommendation" in favor of Article 25 with a claim that "the use of zoning incentives to encourage FFF development was suggested as an alternative" in the AG's 2020 letter invalidating Article 21. In fact, the AG's letter stated only the following: "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" (emphasis added). The AG's letter did *not* use the word "zoning" in suggesting adoption of "incentive programs," and the *mandate* in Article 25 to use FFF design as a *condition* of seeking a special permit is clearly more than a "nudge."

The Planning Board's comments also indicated that "the ***concept of requiring FFF development in order to use*** any new incentive zoning opportunities" emerged after the Town separately began examining various zoning strategies to promote housing development. According to the Planning Board, the Town's 2016 Housing Production Plan (HPP) "encouraged zoning amendments to incentivize multifamily or mixed-use development in select areas as a key implementation strategy." Plainly, *encouraging* zoning *amendments* as a planning strategy is not the equivalent of *mandating* a prohibition on fossil fuel use as a pre-condition to using the special permit procedures. Thus, the mandate in Article 25 is inconsistent with the general "incentive" concept suggested previously by the AG.

In the Reports, the Town's Advisory Committee offered its Recommendation in favor of Article 25, which included the following statement:

> By requiring FFF as a condition of receiving the incentives offered under the Special Permit provisions of the EISD, WA 25 will encourage FFF in a small area of town ***while simultaneously testing*** and clarifying the AG's position ***so that we can better craft future FFF initiatives in Brookline that will pass legal scrutiny*** [emphasis added].

Despite acknowledging the legal uncertainty of Article 25, the Advisory Committee claimed that Article 25 "does not *mandate* FFF" and suggested that Article 25 "attempts to be responsive to the AG's concerns and specific suggestion to pursue incentives as an approach" and "will test and clarify the AG's interpretation of the law."

In sum, despite their mischaracterizations of the positions stated by the AG in the 2017 ruling on Article 7 and the 2020 ruling on Article 21, the proponents of Article 25 and several Town boards have acknowledged that the article is designed to "test" the limits of those rulings. As discussed below, Article 25 is invalid because it conflicts with those rulings and state law.

3. Summary of Article 26.

At the 2021 Annual Town Meeting, the Town also passed Article 26, which applies in all zoning districts (except two overlay districts) to all special permit applications for New Buildings and Significant Rehabilitations and uses to be located within such New Buildings or Significant Rehabilitations. Under Article 26, if a special permit applicant commits to FFF construction, the special permit would not contain "special" FFF conditions. If the special permit applicant does not commit to FFF design, they will receive an "expiring" special permit or a special permit with conditions "exclusive to the applicant." The "expiring" special permit would allow the applicant to install fossil fuel infrastructure but provide a mandatory deadline of five years (with the option to petition for a one-year extension) to convert to FFF. Upon the expiration of such a permit, the owner would be required to incur the costs to replace the fossil fuel infrastructure with FFF infrastructure. Failure of an owner to make that conversion after the expiration of a special permit would expose the owner to fines or other zoning enforcement.

A special permit that is "exclusive to the applicant" is not transferrable, including by transfer of stock or other ownership interest in a business organization or trust, except in limited cases involving an owner's primary residence. Thus, a new special permit would be required upon a transfer of ownership, and during that special permit review, the new owner would be forced to convert to FFF infrastructure. These "expiring" and "exclusive to the applicant" limitations in Article 26 place significant restrictions on the development, use and transfer of property rights based solely upon the use of fossil fuel.

In the Reports, the Town's Planning Board offered a "Report and Recommendation" on Article 26. Among the comments, the Planning Board stated the following:

> Article 26 is a continuation of recent efforts to ***encourage*** FFF construction; it offers a mechanism for encouraging FFF buildings that ***does not immediately appear to constitute a mandate*** (as overturned by the Attorney General) but instead ***attempts to offer a benefit*** to property owners who propose FFF buildings [emphasis added].

The Planning Board also stated the following:

> This Article has incorporated many of the exemptions and provisions for waiver of its requirements that were previously approved in WA21. The purpose of this Article is to advance the goals of WA21, while incorporating the procedural elements harmoniously with the Town's Zoning By-Law ***and addressing the concerns previously highlighted by the Attorney General*** [emphasis added].

The Planning Board commented on the ruling on Article 21 with the following: "The Attorney General's disallowal of WA21 highlighted how legacy laws at the state level enshrine a right to pollute and to emit greenhouse gases that imperil our collective future ***making it impossible***

for Brookline, other municipalities, or the Commonwealth at-large ***to begin to address our building emissions via simple Fossil Fuel Free (FFF) mandates*** [all emphasis added]. However, the Planning Board also acknowledged that during a public hearing on Article 26, "some Board members did not interpret the provisions of the article as an incentive, but rather a 'stick'-like requirement, while others were confused about how the waiver exemptions would be applied as applications go through the zoning process."

The Town's Advisory Committee presented a discussion of Article 26 in the Reports. Among these comments, the Committee acknowledged the following: "There was extensive discussion on whether the Warrant Article is a true incentive as suggested by the Attorney General's Office. Is it an incentive, or a requirement? It was concluded by the Committee that perhaps it is best for the AG's office to make that determination." Further, the Committee cited the following concerns expressed by the Town's Planning Department about Article 26:

> The Department is concerned that the new [Article 26] requirements may further dampen the rate of construction of multi-family projects through the Special Permit process and could have the opposite effect on projects through the Chapter 40B process. Another concern was cost parity for operation of all-electric buildings and what effect that would have on tenants, especially those with less economic means. Finally, there was discussion of the Planning Department's research of zoning based fossil-fuel free incentives and how it is perceived by developers and other industry experts as a non-viable option.

In sum, Article 26 is designed to "test" the limits of the positions stated by the AG in the 2017 ruling on Article 7 and the 2020 ruling on Article 21 by proposing a "mandate" in the form of purported "incentive." As discussed below, Article 26 also must be found to be invalid as in conflict with existing state law.

4. Legal Standards for Review of Articles 25 and 26.

A local by-law should be invalidated under G.L. c. 40, § 32 where the by-law is inconsistent with the state Constitution or state laws. Town of Amherst v. Attorney General, 398 Mass. 793, 796 (1986). MEMA is aware that the review by your office is not a review of the policy arguments presented for or against the enactments. Id., at 798-799. Municipalities may not adopt by-laws or ordinances that are inconsistent with state law. Boston Gas Co. v. Somerville, 420 Mass. 702, 703 (1995), and cases cited. Notwithstanding broad home rule authority available to municipalities, where the Legislature's intent to preclude local action is clear, and where a "sharp conflict" exists between the local by-law and state law, the local by-law should be declared invalid. Bloom v. Worcester, 363 Mass. 136, 154-155 (1973).

In assessing whether a local enactment is inconsistent with state law, our courts will consider "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." Boston Gas Co. v. Somerville, 420 Mass. at 704. The Supreme Judicial Court ("SJC") has said it can infer that the Legislature intended to preempt the entire field of a topic "when legislation on the subject is so comprehensive that a local enactment would frustrate the statute's purpose." Id.; Accord Town of Wendell v. Attorney General, 394 Mass. 518, 527–528 (1985); New England Tel. & Tel. Co. v. Lowell, 369 Mass. 831, 834–835 (1976).

5. Articles 25 and 26 Are Preempted By the Massachusetts State Building Code.

Under G.L. c. 143, § 93, the State Board has been established and directed "to adopt and administer" a comprehensive state building code. Under c. 143, § 94, the State Board's authority includes the following powers and duties [all emphasis added]:

> (a) To formulate, propose, adopt and amend rules and regulations relating to (i) 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 and parts thereof or classes of buildings and structures and parts thereof . . . ; (ii) the rehabilitation and maintenance of existing buildings; (iii) the ***standards or requirements for materials to be used in connection therewith***, ***including but not limited to*** provisions for safety, ingress and egress, ***energy conservation***, and sanitary conditions; (iv) the establishment of reasonable fees for inspections, which fees shall be collected and retained by the city or town conducting such inspections. Such rules and regulations, together with any penalties for the violation thereof, as hereinafter provided, shall comprise and be collectively known as the state building code.
>
> . . .
>
> (c) To make a continuing study of the operation of the state building code, and other laws ***relating to the construction of buildings*** to ascertain their effect upon the cost of building construction ***and the effectiveness of their provisions for*** health, safety, ***energy conservation*** and security.
>
> . . .
>
> (o) To adopt and fully integrate the latest International Energy Conservation Code as part of the state building code, ***together with any more stringent energy-efficiency provisions that the board, in consultation with the department of energy resources, concludes are warranted***. The energy provisions of the state building code shall be updated within 1 year of any revision to the International Energy Conservation Code.
>
> (p) In consultation with [DOER], to develop requirements and promulgate regulations as part of the state building code for the training and certification of city and town inspectors of buildings, building commissioners and local inspectors

> regarding the energy provisions of the state building code, and to require that all new construction and any major reconstruction, alteration or repair of residential and non-residential buildings pass inspection by inspectors who have been trained and certified, demonstrating full compliance with the energy provisions of the state building code.
>
> (q) In consultation with [DOER], to develop requirements and promulgate regulations as part of the state building code, in addition to the requirements of the latest International Energy Conservation Code, requiring a process ***to ensure that all new non-residential buildings*** larger than 10,000 square feet and any major reconstruction, alteration or repair of all such buildings ***perform as designed with respect to energy consumption*** by undergoing building commissioning or acceptance testing. Such commissioning must be completed before the issuance of a certificate of occupancy.
>
> (r) In consultation with [DOER], professional organizations and other stakeholders, to prepare a report evaluating the advisability of a requirement of periodic commissioning for large non-residential buildings and, if such a requirement is deemed advisable, evaluating possible approaches to periodic commissioning.

These detailed provisions in the statute establishing the State Board demonstrate that the Legislature expected the State Board's broad powers and duties to encompass ***setting standards for energy conservation in building design and construction*** and working with DOER to develop standards for energy efficiency and energy consumption.

Under c. 143, § 95, "the powers and duties of the State Board set forth in § 94 shall be exercised to effect the following general objectives:"

> (a) ***Uniform standards and requirements for construction and construction materials***, compatible with accepted standards of engineering and fire prevention practices, ***energy conservation*** and public safety. In the formulation of such standards and requirements, performance for the use intended shall be the test of acceptability, in accordance with accredited testing standards.
>
> (b) 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.
>
> (c) Elimination 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.

These additional detailed provisions in the state statute establishing the State Board demonstrate that the Legislature expected the State Board's broad powers and duties to encompass setting uniform standards for energy conservation in building design, construction and materials.

Within the context of this broad and comprehensive scope of authority for the State Board, under c. 143, § 98, a municipality may *recommend* that the State Board adopt rules and regulations imposing more restrictive standards than those in the State Building Code for building construction, alteration, repair, demolition, and removal in that municipality. The State Board is authorized to adopt that recommendation if it finds that more restrictive standards are reasonably necessary because of special conditions prevailing in that municipality, and that "such standards conform with accepted national and local engineering and fire prevention practices, with public safety and with the general purposes of a statewide building code." This provision in the state statute is a clear indication that the Legislature intended for municipalities with specific ideas relating to building regulations to direct those to and through the State Board, and ***not to attempt to implement individual standards that create a patchwork of regulation for building design, construction and permitting***.

Under the broad authority of these statutory provisions, the State Board has adopted the extensive and comprehensive set of regulations at 780 CMR § 101 *et seq*. as the Massachusetts State Building Code ("State Code"). The State Code is effectuated through the comprehensive regulation of the issuance of building permits by municipalities. Articles 25 and 26 ultimately are designed to be implemented by impeding the issuance of building permits that the Town would otherwise be obligated to issue "for the construction of New Buildings or Significant Rehabilitations that include the installation of new On-Site Fossil Fuel Infrastructure."

Based upon these factors, it must be determined that Articles 25 and 26 are preempted because they interfere with the comprehensive statutory objectives on the subject of building construction and permitting in G.L. c. 143, §§ 93-95. Given the comprehensive legislation on this subject, it can be inferred the Legislature intended to preempt the entire field and preclude inconsistent local enactments like Articles 25 and 26 that would frustrate the statute's purpose.

The language of G.L. c. 143, §§ 93-95 "evince a clear legislative intent . . . to create uniform standards throughout the Commonwealth for the construction of buildings and materials used therein . . . ." St. George Greek Orthodox Cathedral of Western Mass, Inc. v. Fire Dep't of Springfield, 462 Mass. 120, 126-127 (2012), quoting Shriners' Hosp. for Crippled Children v. Boston Redevelopment Auth., 4 Mass.App.Ct. 551, 560 (1976). Importantly, as noted above, the Legislature established c. 143, § 98 as the method for a municipality to ask the State Board for authority to use more restrictive standards than those required by the State Code. The Legislature's intent to preempt local action can be inferred when "the Legislature has explicitly limited the manner in which cities and towns may act on that subject." Id., at 127, quoting Bloom, 363 Mass. at 155.

The same conclusion was reached in Town of Wendell, and all of the factors in that decision apply here. Here, the State Board's regulations set statewide standards in a particular field and a local government has attempted to add a layer of regulation imposing requirements beyond those contemplated by the State Board. As succinctly stated in St. George, 462 Mass. at 130, "if all municipalities in the Commonwealth were allowed to enact similarly restrictive ordinances and bylaws, a patchwork of building regulations would ensue."

Importantly, Articles 25 and 26 also are in conflict with the Commonwealth's zoning statute, G.L. c. 40A, § 3, ¶ 1, which states: "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 . . . ." Without question, Articles 25 and 26 regulate and restrict the use of materials and methods of construction of structures that are regulated by the State Code. See discussion *supra* of G.L. c. 143, §§ 93-95.

The Town has ignored the important caveats contained in the 2017 ruling by the AG on Article 7, and the Town has completely misconstrued the "suggestion" regarding "incentives" made by the AG in the 2020 ruling that invalidated Article 21. Even if, hypothetically, there was a way for a town to use zoning incentives to promote a reduction in the use of fossil fuels in new or renovated buildings, the mandates in Articles 25 and 26 (even the Town characterizes them as "mandates") are invalid because they conflict with the state statutes and regulations relating to the use of materials and methods of construction.

6. Climate Act

Articles 25 and 26 also conflict with elements of the recently-enacted *Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy*, Chapter 8 of the Acts of 2021 ("Climate Act"). Rather than delegating authority to municipalities to regulate the use of fossil fuels, Section 31 of the Climate Act amended G.L. c. 25A, § 6, to require DOER, in consultation with the State Board, to develop and promulgate "a municipal opt-in specialized stretch energy code that includes, but is not limited to, net-zero building performance standards and a definition of net-zero building, designed to achieve compliance with the commonwealth's statewide greenhouse gas emission limits and sublimits established pursuant to chapter 21N." After DOER promulgates this code, any municipality may adopt it notwithstanding any special or general law, rule or regulation to the contrary. St. 2021, c. 8, § 101. Accordingly, in order for the Town to adopt stricter limits on buildings regarding fossil fuel use, it will need to adopt the new statewide process established by DOER and the State Board under the Climate Act.

The Legislature is presumed to have been aware of the current stretch energy code contained in the state building code when it directed DOER to consult with the State Board in developing the "municipal opt-in specialized stretch energy code." See Comm. v. Katsirubis, 45 Mass. App. Ct. 132, 135 (1998). If the Legislature had intended to allow municipalities to separate limits for fossil fuel use apart from the standards and process that will be established

by DOER and the State Board, the Legislature had the authority to do so as part of the Climate Act. See New England Power Co. v. Amesbury, 389 Mass. 69, 74-75 (1983).

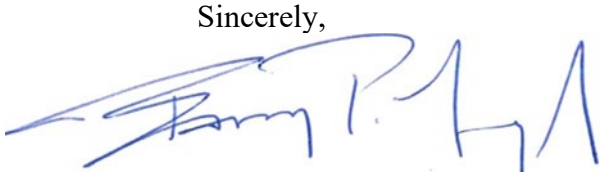
Notably, the summaries of conference committee hearings held January 4, 2021, reflect the Legislature's awareness of the Town's desire to preclude the use of fossil fuels and the choice to direct that effort through the parameters applicable statewide through the opt-in specialized stretch energy code. For example, Senator Barrett stated that "Brookline took a path breaking approach which also lacked in supporting state law, such that it could be enabled. We're providing that state law support today, creating a local option net zero stretch energy code." Tr. of January 4, 2021, State House News Service, (www.statehousenews.com). Like the State Building Code, the Climate Act vests authority to establish energy design standards for buildings with the State Board (with DOER). The Legislature created a uniform statewide process to ensure consistency and preclude the inefficiency that would be created by piecemeal local regulation on climate change issues. See St. George, 462 Mass. at 133-134.

7. Conclusion.

Based upon the analysis provided above, MEMA urges the Attorney General to issue a decision in accordance with c. 40, § 32, that declares Articles 25 and 26 to be invalid. Any attempt to regulate, restrict, or otherwise prohibit the use of fossil fuels (heating oil), *including by a mandate characterized as incentive zoning*, is preempted by state law. The Town simply cannot impose a mandate banning fossil fuel use under the guise of applying the zoning authority in G.L. c. 40A where the mandate conflicts with other state law. In short, the "incentive" in incentive zoning must be grounded in a valid proposition, i.e., any requirement that an applicant must agree to meet in order to receive a relaxed zoning benefit must itself be one that the Town has the authority to enforce. Articles 25 and 26 should be invalidated because they fail to comply with this constraint.

Thank you for your consideration of these comments.

Sincerely,



Barry P. Fogel

BPF/pf

cc: Michael Ferrante, MEMA