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Patrick Woodcock, Commissioner
Massachusetts Department of Energy Resources
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Re: Stretch Code Straw Proposal Comments

Dear Commissioner Woodcock,

The Office of the Attorney General (“AGO”) appreciates the opportunity to comment on the Department of Energy Resources’ (“DOER”) straw proposal for the updated stretch energy code (“Updated Stretch Energy Code”) and specialized opt-in code (“Specialized Opt-in Code”), as set forth in DOER’s February 2022 *Building Energy Code Straw Proposal* presentation (the “Straw Proposal”).¹ The AGO submits these comments recognizing that DOER intends, for both the Updated Stretch Energy Code and Specialized Opt-in Code, to make draft code language available for public comment and to hold public hearings on the draft code language in advance of finalizing the codes.

The AGO commends DOER for its efforts in drafting and presenting the Straw Proposal and values the opportunity to provide input at this preliminary stage. The AGO’s comments at this stage focus on the scope of DOER’s authority in developing and promulgating the Specialized

¹ Patrick Woodcock, Commissioner, Massachusetts Department of Energy Resources, *Building Energy Code Straw Proposal: Updated Stretch Code & Specialized Opt-In Code*, February 2022, <https://www.mass.gov/doc/building-energy-code-straw-proposal-updated-stretch-code-specialized-opt-in-code-feb-2022/download>.

Opt-in Code. The comments also include requests for further information from DOER. The AGO looks forward to continuing to participate in this process among the robust stakeholder community.

I. Massachusetts Climate Act

On March 26, 2021, Governor Charlie Baker signed into law *An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy* (the “Climate Act” or the “Act”).² The Climate Act codifies the Commonwealth’s net-zero by 2050 statewide greenhouse gas emissions limit³ and requires the Secretary of Energy and Environmental Affairs (the “Secretary”)⁴ to adopt interim statewide greenhouse gas emissions limits for 2025, 2030, 2035, 2040, and 2045.⁵ The Act further directs the Secretary⁶ to “adopt sector-based statewide greenhouse gas emissions sublimits as components of each statewide greenhouse gas emissions limit . . . for the sectors of electric

² St. 2021, ch. 8.

³ Climate Act, § 8 (requiring that the Secretary of Energy and Environmental Affairs adopt “a 2050 statewide emissions limit that achieves at least net zero statewide greenhouse gas emissions; provided however, that in no event shall the level of emissions in 2050 be higher than a level 85 per cent below the 1990 level”). In his January 21, 2020 State of the Commonwealth address, Governor Baker announced that he was committing the Commonwealth to achieving net-zero greenhouse gas emissions by 2050. See Press Release, Office of Governor Charlie Baker and Lt. Governor Karyn Polito, *Governor Baker Delivers 2020 State of the Commonwealth Address* (Jan. 21, 2020), <https://www.mass.gov/news/governor-baker-delivers-2020-state-of-the-commonwealth-address>. Additionally, pursuant to the Global Warming Solutions Act, St. 2008, ch. 298, Secretary Theoharides established a 2050 statewide emissions limit of net zero greenhouse gas emissions in April 2020. Kathleen Theoharides, *Determination of Statewide Emissions Limit for 2050* (Apr. 22, 2020) <https://www.mass.gov/doc/final-signed-letter-of-determination-for-2050-emissions-limit/download>.

⁴ The Secretary shall adopt the statewide greenhouse gas emissions limits in consultation with the Department of Environmental Protection and DOER. Climate Act, § 8; G.L. c. 21N, § 1 (defining the terms “secretary” and “department”).

⁵ Climate Act, § 8. The Act further requires that the interim 2030 statewide greenhouse gas emissions limit shall be at least 50 percent below the 1990 level and that the interim 2040 statewide greenhouse gas emissions limit shall be at least 75 percent below the 1990 level. Climate Act, § 10.

⁶ The Secretary shall adopt the sector-based statewide greenhouse gas emissions sublimits in consultation with the Secretary of Housing and Economic Development and the Secretary of Transportation. Climate Act, § 9.

power, transportation, commercial and industrial heating and cooling, residential heating and cooling, industrial processes, and natural gas distribution and service.”⁷

As part of the Commonwealth’s efforts to meet these greenhouse gas emissions limits, Section 31 of the Climate Act directs DOER to:

[D]evelop and promulgate, in consultation with the state board of building regulations and standards, 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.⁸

Pursuant to Section 101 of the Act, DOER must promulgate the municipal opt-in specialized stretch energy code by December 2022.⁹

II. DOER’s Straw Proposal

On February 8, 2022, DOER released and held a virtual briefing on the Straw Proposal, which consists of a 48-slide presentation.¹⁰ As noted in the Straw Proposal, the municipal opt-in specialized stretch energy code mandated by the Climate Act will provide a third energy code option for municipalities in addition to the existing (i) base energy code and (ii) stretch energy code.¹¹ In addition to addressing the Specialized Opt-in Code, the Straw Proposal proposes updates

⁷ *Id.*

⁸ Climate Act, § 31.

⁹ Climate Act, § 101 (requiring DOER to “develop and promulgate the municipal opt-in specialized stretch energy code required by section 6 of chapter 25A of the General Laws not later than 18 months after the effective date of this act”).

¹⁰ See Department of Energy Resources, *Stretch Energy Code Development 2022*, (providing links to the Straw Proposal and webinar recording), <https://www.mass.gov/info-details/stretch-energy-code-development-2022>.

¹¹ See Straw Proposal, at 10. Pursuant to G.L. c. 143, the Board of Building Regulations and Standards (“BBRS”) is charged with regularly updating the state building code, including the energy provisions of the code. See G.L. c. 143, §§ 93, 94. Specifically, the BBRS must “adopt and fully integrate the latest International Energy Conservation Code and any more stringent amendments thereto as part of the state building code, in consultation with the department of energy resources.” G.L. c. 143, § 94(o). The Building Code is promulgated at 780 CMR 101 *et seq.* As part of the Green Communities Act, Massachusetts approved a stretch energy code that may be adopted by

to the existing stretch energy code.¹² For both the Specialized Opt-in Code and the Updated Stretch Energy Code, the Straw Proposal outlines proposals for both residential and commercial buildings.

The Straw Proposal also includes an expected timeline for code adoption, which is structured to align with the Board of Building Regulation and Standards' projected timeline for finalizing the Tenth Edition of the Massachusetts Building Code and to meet the Climate Act's requirement to promulgate the Specialized Opt-in Code by December 2022.¹³ The expected timeline states that, for both the Updated Stretch Energy Code and the Specialized Opt-in Code, DOER plans to make draft code language available for public comment in Spring 2022 and to hold public hearings on the draft code language in Summer 2022.¹⁴

As described in the Straw Proposal, in 2019 DOER commissioned analysis of different building code standards specific to the Massachusetts climate.¹⁵ This analysis considered twelve

municipalities. *See An Act Relative to Green Communities*, St. 2008, ch. 169, § 22 (codified, as amended, at G.L. c. 25A § 10). The Stretch Energy Code is located at 780 CMR 51, Appendix AA and 780 CMR 115, Appendix AA.

¹² Pursuant to Section 98A of the Climate Act, DOER may, in consultation with the BBRS, update the existing stretch energy code. Climate Act, § 98A (“the department of energy resources, in consultation with the state board of building regulations and standards, may update [any stretch energy code adopted by the BBRS and in effect on March 1, 2021] from time to time”).

¹³ Straw Proposal, at 11.

¹⁴ *Id.* Pursuant to Section 101 of the Climate Act, to develop the Specialized Opt-in Code, DOER shall “hold not less than 5 public hearings in geographically diverse locations throughout the [C]ommonwealth that shall represent the distinguishing characteristics of rural, suburban and urban households, 1 of which shall be held in an underserved community or community with a high percentage of low-income households.” Climate Act, § 101.

¹⁵ Straw Proposal, at 12. This analysis is described in further detail in DOER’s supplemental presentation, *Summary of Stretch Code Study Energy Efficiency Analysis* (“Stretch Code Study Summary”). Summary of Stretch Code Study Energy Efficiency Analysis, February 2022, <https://www.mass.gov/doc/summary-of-stretch-code-study-energy-efficiency-analysis-feb-2022/download>. Additionally, DOER has recently released backup documentation regarding this analysis on its Stretch Energy Code Development Support Documentation page. *See* <https://www.mass.gov/lists/stretch-energy-code-development-support-documentation>. This backup documentation consists of 20 commercial analysis documents and three residential analysis documents, including, for example, a Stretch Code Pricing Analysis and Residential Stretch Code Costs and Benefits Case Studies. The support documentation page states that it will be updated with two summary reports for commercial and residential analysis as they become available.

building use types¹⁶ and analyzed up-front costs, operational costs, and total cost of ownership.¹⁷ It also employed distinct approaches for its residential analysis and commercial analysis.¹⁸ DOER is utilizing this analysis to support the development of both the Updated Stretch Energy Code and the Specialized Opt-in Code.¹⁹

A. Updated Stretch Energy Code

For the Updated Stretch Energy Code residential low-rise proposal, the Straw Proposal offers three options for code compliance:²⁰ (1) Home Energy Rating System (“HERS”) 42²¹ for fossil fuel heating; (2) HERS 45 for electric heating; or (3) construction to Passivehouse standards.²² As proposed, the Updated Stretch Energy Code would include a transition year that would set 52/55 maximum HERS ratings for 2023 and implement the 42/45 HERS rating requirements in December 2023.²³ According to the Straw Proposal analysis, at or below a HERS 42 requirement, “most homes will choose electric heat because heat pumps can lower construction costs for builders and lower ownership costs for buyers;”²⁴ the Straw Proposal further notes that

¹⁶ Straw Proposal, at 12. The twelve building types considered are: small office, large office, office-lab, elementary school, high school, large multi-family tower, 4-story multi-family, multi-family mid-rise podium, 6-unit multi-family, townhouse, single family small, and single family large. *Id.* at 13; Stretch Code Study Summary, at 4.

¹⁷ Straw Proposal, at 12.

¹⁸ *See* Stretch Code Study Summary, at 6, 33.

¹⁹ *See id.* at 2.

²⁰ Straw Proposal, at 17.

²¹ Under the HERS index, homes that use more energy have higher HERS ratings, and homes that use less energy have lower HERS ratings. *See* Straw Proposal, at 16.

²² Passivehouse is a “building standard that includes” a “[s]uper-efficient building envelope” and “[i]mproved indoor air quality with high performance ventilation.” *Id.* at 45.

²³ *Id.* at 17.

²⁴ Straw Proposal, at 19; *see also* Stretch Code Study Summary, at 13-14.

heat pumps are “more efficient and save significant [greenhouse gas] emissions compared to gas or propane heating.”²⁵

For the Updated Stretch Energy Code commercial proposal, the Straw Proposal offers five pathways for code compliance, depending on building use type. They are: (1) the Prescriptive Pathway (for small buildings less than 20,000 square feet); (2) the Targeted Performance Pathway (required for offices and schools, and an option for multi-family buildings);²⁶ (3) the Relative Performance Pathway (for complex, high ventilation buildings such as labs and hospitals); (4) Passivehouse (an option for all building types); and (5) HERS 42/45 (an option for multi-family).²⁷ According to the Straw Proposal analysis, the Updated Stretch Energy Code commercial proposal would lower life cycle costs and result in significant greenhouse gas emissions reductions for all building types.²⁸ Additionally, the Straw Proposal states that it allows flexibility for certain building types and “[e]ncourages, but does not[] require[,] electrification.”²⁹

B. Specialized Opt-in Code

With respect to the Specialized Opt-in Code, the Straw Proposal slide on the proposed net-zero definition states, “Net-Zero new construction is compatible, as-built, with the Commonwealth’s net-zero emissions economy in 2050.”³⁰ It further states:

- Consistent with electrification and deep efficiency approach in [the Executive Office of Energy and Environmental Affairs’] 2050 Roadmap

²⁵ Straw Proposal, at 19; *see also* Stretch Code Study Summary, at 10-11.

²⁶ The Targeted Performance Pathway would require buildings to meet heating and cooling Thermal Energy Demand Intensity (TEDI) limits by building type and size. Straw Proposal, at 36, 38.

²⁷ *Id.* at 35.

²⁸ *Id.* at 34.

²⁹ *Id.*

³⁰ *Id.* at 23.

- Does not necessitate onsite or offsite renewables, nor the assumption that an individual building is net-zero energy
- A building becomes net zero energy when MA electric grid is net zero³¹

As with the Updated Stretch Energy Code residential low-rise proposal, the Specialized Opt-in Code residential low-rise proposal includes three options for compliance: (1) HERS 42 for fossil fuel heating; (2) HERS 45 for electric heating; or (3) construction to Passivehouse standards.³² As proposed, the Specialized Opt-in Code would require homes following the HERS 42 fossil fuel pathway to install rooftop solar PV where feasible³³ and to be pre-wired for electrification.³⁴ Passivehouse homes using fossil fuel heating also would need to be pre-wired for electrification.³⁵

Likewise, for all commercial buildings other than large multi-family buildings, the Specialized Opt-in Code commercial proposal includes fossil fuel, electric, and Passivehouse options for compliance.³⁶ For non-Passivehouse commercial buildings that use fossil fuels, the proposal would require rooftop solar PV where feasible and pre-wiring for electrification.³⁷ For multi-family buildings with 6+ units, the Specialized Opt-in Code would phase in a Passivehouse requirement.³⁸ Large multi-family buildings up to five stories would be required to meet the

³¹ *Id.*

³² *Id.* at 24; *see id.* at 17.

³³ The Straw Proposal states that solar PV installation would be required on “all unshaded roof with good solar access.” *Id.* at 27.

³⁴ *Id.* at 24.

³⁵ *Id.*

³⁶ *Id.* at 42.

³⁷ *Id.*

³⁸ *Id.* at 44.

Passivehouse standard as of January 2023, and large multi-family buildings of six stories or more would be required to meet the Passivehouse standard as of January 2024.³⁹

III. DOER’s Authority With Respect to the Specialized Opt-in Code Pursuant to the Climate Act

The Climate Act expressly grants DOER the authority to promulgate the Specialized Opt-in Code, and, in doing so, to set net-zero building performance standards and define net-zero building.⁴⁰ The overall powers and duties of DOER are set forth in G.L. c. 25A, § 6. Among the broad powers conveyed, DOER shall, among other things, “develop and administer programs relating to energy conservation, alternative energy development, [and] non-renewable energy supply and resource development . . .”⁴¹ and “advise, assist, and cooperate with other . . . agencies in developing appropriate programs and policies relating to energy planning and regulation in the [C]ommonwealth . . .”⁴² Section 31 of the Climate Act amends G.L. c. 25A, § 6 and adds to the list of DOER obligations the requirement to develop and promulgate the Specialized Opt-in Code. The Climate Act itself does not define “net-zero building” nor set forth net-zero building performance standards but instead requires that DOER do so. Section 31 of the Act requires that DOER’s actions be “designed to achieve compliance with the [C]ommonwealth’s statewide greenhouse gas emissions limits and sublimits.”⁴³ It also directs that DOER’s authority “is not limited” to promulgating a net-zero building definition and net-zero building performance standards and does not impose any other substantive restrictions on the scope of DOER’s authority

³⁹ *Id.*

⁴⁰ *See* Climate Act, § 31.

⁴¹ G.L. c. 25A, § 6(1).

⁴² G.L. c. 25A, § 6(2).

⁴³ Climate Act, § 31.

with respect to the Specialized Opt-in Code. Thus, the Legislature has granted DOER broad authority, in line with its other powers and duties, in developing and promulgating the Specialized Opt-in Code.

A. DOER Has the Authority to Promulgate a Specialized Opt-in Code That Includes All-Electric Requirements

Particularly where the Commonwealth has established policy that promotes the decarbonization of the building sector through electrification, and where DOER has been delegated significant authority to act in accordance with its specialized knowledge and expertise, DOER may exercise that authority to put forth a Specialized Opt-in Code that includes all-electric requirements.⁴⁴ As described in the Executive Office of Energy and Environmental Affairs’ (“EEA”) *Massachusetts 2050 Decarbonization Roadmap* (“Decarbonization Roadmap”), the widespread electrification of space heating and other building energy needs is a key strategy to achieve net-zero greenhouse gas emissions by 2050.⁴⁵ Additionally, as the *2050 Decarbonization Roadmap Building Sector Technical Report* (“Building Sector Technical Report”) describes in further detail:

Given the cost and scarcity of low- or zero-carbon drop-in replacement fuels, coupled with the current and growing availability and applicability of heat pump technology – as well as induction cooking – and the practical necessity for residual 2050 emissions elsewhere in the economy, the building sector must approach near-zero emissions in the aggregate by 2050 in order for the Commonwealth to achieve net-zero statewide emissions in the same time frame. Although multiple technologies exist to decarbonize buildings, *electrification of end uses, particularly*

⁴⁴ While, as proposed, the Specialized Opt-in Code includes all-electric pathways for residential and commercial buildings, it also would permit fossil fuel use for all building types. *See supra* Section II.B.; Straw Proposal at 25, 42-43.

⁴⁵ Executive Office of Energy and Environmental Affairs, *Massachusetts 2050 Decarbonization Roadmap*, December 2020, at 44-45, <https://www.mass.gov/doc/ma-2050-decarbonization-roadmap/download>.

*through the use of highly efficient electric heat pumps and other building appliances, appear to be the dominant least-cost strategy . . .*⁴⁶

Moreover, the Straw Proposal itself acknowledges that it is “[c]ritical that buildings migrate toward electrification.”⁴⁷ With this clear-cut policy requirement, it would be well within the discretion of DOER, as well as its express and implied authority under G.L. c. 25, § 6, to advance this goal through a Specialized Opt-in Code that includes all-electric requirements.

The Climate Act’s requirements that DOER both define “net-zero building” and establish net-zero building performance standards reinforce this point⁴⁸—these net-zero requirements are reasonably interpreted to empower electric-only requirements. Indeed, in evaluating “two advanced versions [Net Zero and Passive House] of new construction buildings,” the Building Sector Technical Report assumed “the effective elimination of on-site combustion.”⁴⁹ More specifically, with respect to Net Zero new construction, the Report’s analysis assumed, “enhanced energy efficiency compared to current code and effective elimination of on-site emissions from

⁴⁶ *Building Sector Report: A Technical Report of the Massachusetts 2050 Decarbonization Roadmap Study*, December 2020, at 5, (emphasis added) <https://www.mass.gov/doc/building-sector-technical-report/download>. The Decarbonization Roadmap and the Building Sector Technical Report were released in December 2020 following Governor Baker’s announcement in January 2020 that he was committing the Commonwealth to net-zero greenhouse gas emissions by 2050 and Secretary Theoharides’ April 2020 determination of a net-zero greenhouse gas emissions limit for 2050. *See supra*, note 3. The Decarbonization Roadmap was commissioned by EEA “to identify cost-effective and equitable strategies to ensure Massachusetts achieves net-zero greenhouse gas emissions by 2050.” Decarbonization Roadmap, at 1. The Building Sector Technical Report is one of six companion technical reports to the Decarbonization Roadmap.

⁴⁷ Straw Proposal, at 14.

⁴⁸ Notably, in adopting in part an amendment to Section 31 of the Climate Act recommended by Governor Baker, the Legislature rejected proposed language for “a specialized stretch energy code that includes a *higher performing* municipal opt-in standard,” Governor’s Message S. 13, *Message from His Excellency the Governor returning with recommendation of amendment the engrossed Bill creating a next-generation roadmap for Massachusetts climate policy* (Feb. 8, 2021) (emphasis added), instead mandating the “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 . . .” Climate Act, § 31.

⁴⁹ Building Sector Technical Report, at 39.

space heating, domestic hot water, cooking and other process uses.”⁵⁰ While these assumptions reflect the Building Sector Technical Report’s specific new building performance level analysis, which predates the enactment of the Climate Act,⁵¹ Section 31’s repeated use of the term “net-zero” makes clear that DOER has the authority to adopt a Specialized Opt-in Code that includes all-electric requirements.

This authority is further confirmed by DOER’s broad authority to tailor code requirements in accordance with the needs of different building types. As reflected in the Straw Proposal, DOER can establish different requirements based on building type, size, and other factors. Further adding to this flexibility, the Specialized Opt-in Code “may phase in requirements based on building types, uses, or load profiles.”⁵²

Moreover, the energy code structure set forth by the Climate Act clearly establishes a three-tier, statewide program that allows municipalities to opt into a specialized code beyond the base or stretch energy code. Pursuant to Section 98A of the Act, communities designated as green communities in accordance with the Green Communities Act⁵³ are not required to adopt the Specialized Opt-in Code to maintain their green community status.⁵⁴ Rather, municipalities, including existing green communities, *may* affirmatively adopt the Specialized Opt-in Code. Further, pursuant to Section 73 of the Climate Act, the “state building code shall incorporate . . .

⁵⁰ *Id.*

⁵¹ As noted above, the 2050 Decarbonization Roadmap and the Building Sector Technical Report were published in December 2020, three months before the Climate Act was enacted.

⁵² Climate Act, § 101. As discussed above, the Straw Proposal phases in certain building standard requirements.

⁵³ *An Act Relative to Green Communities*, St. 2008, ch. 169. As of November 16, 2021, 299 municipalities have adopted the existing stretch energy code. Straw Proposal, at 9.

⁵⁴ Climate Act, § 98A (“A community designated as a green community under subsection (c) of section 10 of said chapter 25A that elects not to adopt the municipal opt-in specialized stretch energy code under said section 6 of said chapter 25A shall not lose its designation as a green community as a result of that election.”).

specialized construction codes,” including “the specialized stretch energy code developed and promulgated by the department of energy resources.”⁵⁵ Thus, while the amended energy code structure presents municipalities with multiple options, it reflects a statewide, ordered approach.

B. The AGO’s Brookline By-Law Determinations Reinforce DOER’s Authority to Promulgate a Specialized Opt-in Code That Includes All-Electric Requirements

In 2020, and separately in 2022, the AGO issued determinations concerning the legality of by-laws adopted by the Town of Brookline that sought to restrict the construction of new buildings or significant rehabilitations that utilized fossil fuel infrastructure. Pursuant to the Home Rule Amendment to the Massachusetts Constitution,⁵⁶ all municipal by-laws must be consistent with state law. On July 21, 2020, acting in accordance with its responsibility pursuant to G.L. c. 40, § 32 to review municipal by-laws, the AGO disapproved a Brookline by-law prohibiting the issuance of building permits for construction of certain buildings with fossil fuel infrastructure, finding that it was preempted by the state Building Code, the Gas Code, and the regulation of gas service by the Department of Public Utilities under G.L. c. 164.⁵⁷ Additionally, on February 25, 2022, the AGO disapproved two Brookline zoning by-law amendments that sought to regulate buildings based on whether the building materials included “On-Site Fossil Fuel Infrastructure” (as defined in the by-law), finding that they conflicted with the Zoning Act, and that such zoning restrictions were preempted by the Building Code and G.L. c. 164.⁵⁸ In holding that Brookline’s by-law approach was untenable under the Home Rule Amendment, these determinations incidentally

⁵⁵ Climate Act § 73; G.L. c. 143, § 96.

⁵⁶ Massachusetts Constitution, Article 89 of the Articles of Amendment; *see also* G.L. c. 43B § 13,

⁵⁷ *See* Brookline Special Town Meeting of November 19, 2019 – Case # 9725 Warrant Article #21 (General), July 21, 2020 (“2020 Brookline Determination”).

⁵⁸ Brookline Annual Town Meeting of May 19, 2022 – Case # 10315 Warrant Articles # 25 and 26 (Zoning) (“2022 Brookline Determination”).

show why, in contrast, the Specialized Opt-in Code approach promulgated by the Climate Act grants DOER the authority to delegate to municipalities broader authority with respect to building energy codes.

As an initial matter, any analysis of the scope of DOER’s authority acting pursuant to state law to develop and promulgate the Specialized Opt-in Code is distinct from the AGO’s analysis of the Home Rule Amendment’s limitations on municipal legislative authority in its two determinations regarding the Brookline by-laws. Those determinations examined whether particular by-laws adopted by a municipality conflicted with state laws and thus contravene the Home Rule Amendment.⁵⁹ The Home Rule Amendment does not apply to DOER, as a state agency taking action under state law to develop the Specialized Opt-in Code. The AGO’s determinations regarding preemption of local action do not apply to DOER actions taken pursuant to express statutory authority.

In addition, as discussed above, the statutory scheme established by the Climate Act is structured to expressly empower municipalities that choose to do so to opt into a specialized code once promulgated and thus act consistent with state law. While this approach may result in differences in requirements from municipality to municipality, this approach is by express legislative design in the Climate Act and is implemented through a uniform state building code. Further, with respect to G.L. c. 164, the AGO specifically noted in the 2022 Brookline Determination that, while the by-law amendments at issue were preempted, “the adoption of a municipal opt-in statewide specialized stretch energy code as required by *An Act Creating a Next-*

⁵⁹ See 2020 Brookline Determination, at 2 (citing G.L. c. 40, § 32).

Generation Roadmap for Massachusetts Climate Policy, Section 31 would change this analysis for future by-laws.”⁶⁰

Additionally, the AGO’s 2020 Brookline Determination provides relevant context regarding the enactment of the Climate Act. In that determination, the AGO observed that “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.”⁶¹ Eight months later, the Legislature passed the Climate Act, including the directive for DOER to promulgate a municipal opt-in specialized stretch energy code. The Legislature also included in Section 101 of the Act language to foreclose any question of whether municipalities’ adoption of the Specialized Opt-in Code could be found under the Home Rule Amendment to conflict with the laws of the Commonwealth. The Act states, “Notwithstanding any special or general law, rule or regulation to the contrary, any municipality may adopt the municipal opt-in specialized stretch energy code following its promulgation.”⁶² The United States Supreme Court has weighed in on the use of such statutory language, stating that explaining that “the Courts of Appeals generally have interpreted similar ‘notwithstanding’ language . . . to supersede all other laws, stating that a clearer statement is difficult to imagine.”⁶³ As the 2022 Brookline Determination recognized, the Climate Act creates a pathway for cities and towns—through, if

⁶⁰ 2022 Brookline Determination, at 9 n. 8.

⁶¹ 2020 Brookline Determination, at 8.

⁶² Climate Act, § 101.

⁶³ *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (internal citations and quotations omitted).

they choose to do so, adoption of the Specialized Opt-in Code—to enact local measures to foster and align with clean energy initiatives statewide notwithstanding other general state laws.⁶⁴

IV. The AGO’s Commitment to Promoting the Commonwealth’s Greenhouse Gas Emissions Reduction Goals

The AGO is resolutely committed to reducing greenhouse gas emissions and to promoting policy to achieve the Commonwealth’s climate goals. The AGO is likewise committed to doing so in an equitable manner that protects all consumers, especially low-income and environmental justice communities. As DOER is aware, in June 2020 the AGO filed a petition with the Department of Public Utilities (“DPU”) that commenced an investigation into the future role of the natural gas industry as Massachusetts transitions away from fossil fuels toward a cleaner energy future.⁶⁵ In that petition, the AGO noted that the “consensus-identified pathway emerging for the residential and commercial building heating sector, under present technologies, is electrification, powered by low- or zero-emission sources.”⁶⁶ The AGO further identified concerns regarding ratepayer protection, equity, and fairness, proposing, for example, that the DPU consider what “policy measures may be necessary to ensure that no customer is left behind in the transition to a clean heating sector.”⁶⁷ Most recently, on February 14, 2022, the AGO, together with DOER, filed with the DPU a

⁶⁴ 2022 Brookline Determination, at 10. The AGO also notes that several bills have been introduced this legislative session to allow individual municipalities to adopt by-laws or ordinances that would restrict fossil fuel infrastructure in buildings. See S. 2473, *An Act Authorizing the Town of Brookline to Adopt and Enforce Local Regulations Restricting New Fossil Fuel Infrastructure in Certain Construction*; H. 3750, *An Act Authorizing the Town of Arlington to Adopt and Enforce Local Regulations Restricting the Use of Fossil Fuels in Certain Construction*; H. 4117, *An Act Authorizing the Town of Concord to Adopt and Enforce Local Regulations Restricting New Fossil Fuel Infrastructure in Certain Construction*; S. 2515, *An Act Authorizing the Town of Acton to Adopt and Enforce Local Regulations Restricting New Fossil Fuel Infrastructure in Certain Construction*; and H. 3893, *An Act Authorizing the Town of Lexington to Adopt and Enforce Local Regulations Restricting New Fossil Fuel Infrastructure in Certain Construction*.

⁶⁵ *Petition of Attorney General to Investigate Local Gas Distribution Companies*, D.P.U. 20-80 (June 4, 2020).

⁶⁶ *Id.* at 7 (citation omitted).

⁶⁷ *Id.* at 11.

comprehensive procedural proposal for moving the investigation forward. Additionally, the AGO supports allowing municipalities to opt into a specialized building energy code that includes all-electric requirements if they choose to do so, in accordance with an organized, statewide process.⁶⁸ In its 2020 Brookline Determination disapproving the Brookline by-law that would have imposed restrictions on construction of certain buildings with fossil fuel infrastructure, the AGO noted, “If we were permitted to base our determination on policy considerations, we would approve the by-law.”⁶⁹

V. The AGO’s Requests for Further Information Concerning DOER’s Proposed Specialized Opt-in Code

DOER stated at a public hearing on the Straw Proposal that it was working on a frequently asked questions document to address common issues raised by stakeholders. DOER further indicated that it could provide more information regarding why the proposed Specialized Opt-in Code currently does not include any all-electric requirements. Given the directives in the Climate Act and DOER’s legal authority to include all-electric requirements, more information regarding DOER’s choices would be helpful to the AGO and other stakeholders. The AGO encourages DOER to promptly make such information publicly available in written form. The AGO, and likely other stakeholders, would benefit from better understanding, for example, the specifics of the proposed definition of net-zero building and the components of the net-zero building performance standards, as well as alternatives considered by DOER.

Additionally, the AGO would be interested in further information regarding the relationship between the Stretch Code Study Summary (and the underlying analysis) and the

⁶⁸ A statewide approach such as the Specialized Opt-in Code allows municipalities that opt-in to innovate without imposing the same requirements on other cities and towns.

⁶⁹ 2020 Brookline Determination, at 1.

Specialized Opt-in Code including, again, in particular, the Specialized Opt-in Code’s inclusion of a fossil-fuel pathway for all building types.⁷⁰ Likewise, if DOER is utilizing additional analyses or data that address potential impacts of or impediments to offering a Specialized Opt-in Code that includes all-electric requirements, the AGO requests that DOER share that information. To the extent DOER’s analysis or reasoning depends on building type, time frame, or other factors, the AGO would be interested in additional information regarding any such differences. In short, the AGO has key questions regarding the Specialized Opt-in Code and believes it would be beneficial to the code development process to promptly provide further information to stakeholders.

VI. Conclusion

The AGO appreciates DOER’s effort in developing the Straw Proposal. The AGO respectfully requests that DOER provide further information regarding the Specialized Opt-in Code and incorporate these comments as it works toward proposing draft code language.

Respectfully submitted,

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⁷⁰ As noted above, *see supra*, note 15, DOER recently released voluminous “Stretch Energy Code Development Support Documentation.” The AGO has not yet reviewed this material, and it may address some of the issues raised here. Nevertheless, the AGO encourages DOER to provide information regarding how this analysis led to the proposals made in the Straw Proposal in a manner accessible to members of the public, including non-technical experts.