



**Town of Arlington
Office of the Town Manager**

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By Electronic Mail

**Ian Finlayson
Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston MA 02114**

Re: Ten Community Demonstration Comments

Please receive this correspondence on behalf of the Town of Arlington as comment regarding the Department of Energy Resource's ("DOER") draft regulations for the "Municipal Fossil Fuel Free Building Construction and Renovation Project" 225 CMR 24.00, as well as its "Project Model Rule." Arlington is grateful for the opportunity to participate in this important pilot program. By DOER's reckoning, Arlington was the first to file a Home Rule Petition and an accompanying bylaw, which was approved by an overwhelming majority, largely prohibiting the installation of fossil fuel infrastructure in new construction and major renovations. In concert, those actions proposed a local regulatory authority and process very similar to that which DOER is developing following the passage of Chapter 179 of the Acts of 2022, *An Act Driving Clean Energy and Offshore Wind*. The Town provides the comments herein to further DOER and municipalities' mutual interest in balancing certainty with experimentation to yield the best long-term demonstration of the value of fossil fuel-free homes and businesses.

A. Support for the Regulations & Model

Foremost, the regulations provide a solid framework with an elegant bridge to common goals and attributes of the Specialized Stretch Code. The Town further appreciates the development of a Model Rule ordinance that is not explicitly required. Taken on the whole, the Model Rule presents a firm best-practice, baseline ordinance/bylaw to promote common

structure and substance across participating communities. However, it is likely helpful both for individual interests of communities and the experimental nature of the overall pilot to afford reasonable opportunities for customization.

B. Concerns & Requests

While Arlington is pleased with the draft regulations and Model Rule overall, it holds four categories of concern or feedback respectfully submitted for your consideration:

1. Timing and Defining “Application” and “Eligibility”

- a. Timing – Per the draft regulations, prioritized communities like Arlington must submit a Letter of Intent by September 1, 2023; Application Materials by November 10, 2023; and satisfy Eligibility Requirements by February 11, 2024. However, specific components of the Application and Eligibility *may* depend on acquiring approval from other departments of the Commonwealth outside of Arlington’s control.

For example, pursuant to G.L. c. 40 sec. 32, the Attorney General’s Municipal Law Unit (“MLU”) has up to ninety (90) days to review town bylaws for approval. As such, assuming Arlington held a Special Town Meeting to adopt the Model Rule or a comparable bylaw on October 1, 2023 (earlier than most Special Town Meetings in Arlington), the Town may not have an approved bylaw from the MLU until January of 2024, several months after the Application deadline set forth in proposed 225 CMR 24.04(1)(b). Furthermore, should a Special Town Meeting need to occur later in the fall, the Town may not have an approved bylaw from the MLU prior to the February 11, 2024 deadline. Similarly, under these circumstances, any zoning bylaw changes necessary to meet the MBTA Communities criteria set forth in proposed 225 CMR 24.04(1)(d) and 225 CMR 24.05(1)(c)(3) would not have approval from the MLU prior to either the November 10, 2023 Application deadline or the February 11, 2024 Eligibility deadline; and potentially would not have approval from Town Meeting prior to the November 10, 2023 Application deadline.

In the same vein, Eligibility based upon certification of compliance with housing production eligibility thresholds as outlined in proposed 225 CMR 24.05(1)(c) may also depend on action by the Department of Housing and Community Development beyond municipalities’ control with respect to time.

Proposed 225 CMR 24.04(1)(b) states that an Application must include a “Copy of [the] proposed bylaw or other ordinance for participation in the Demonstration Project.” The use of the phrase “proposed” suggests that an Application would be complete should the municipality take sufficient steps to demonstrate plans to pass the proposed bylaw prior to the February 11,

2024 deadline. However, proposed 225 CMR 24.04(1)(d) states that an Application must also include “Documentation sufficient to demonstrate that the applicant has achieved at least one of the three housing production eligibility thresholds set forth in 24.05(1)(c).” The use of the phrase “has achieved” suggests that demonstrated plans to achieve the housing eligibility threshold (such as approval by Town Meeting) would be insufficient to render an Application complete. This contradicts Chapter 179 of the Acts of 2022, which states that a city or town must “approve such a multifamily zoning ordinance or by-law within 18 months of the effective date of this act.” “Approve” here implies that city or town approval may occur any date prior to February 11, 2024.

- b. Defining “Application” and “Eligibility” – We offer two solutions to the foregoing concerns with respect to timing:
 - i. Clarify that Application criteria shall be met by indication of plans to achieve the Eligibility criteria by the February 11, 2024 statutory deadline rather than the November 10, 2023 Application deadline. For example, the proposed 225 CMR 24.04(1)(d) could instead state that Application materials must include “Documentation sufficient to demonstrate that the applicant *will achieve* at least one of the three housing production eligibility thresholds set forth in 24.05(1)(c) *by February 11, 2024.*”
 - ii. Clarify that both Application and Eligibility criteria shall be met by local approval and intent to submit bylaws to relevant state authorities for approval rather than end approval of bylaws by state authorities. Hence, a positive vote of Town Meeting, subsequently resulting in a proposed bylaw pending before the MLU would satisfy both Application and Eligibility requirements for the local fossil fuel-free bylaw, and/or a positive vote of Town Meeting, followed by application to DHCD for a determination that the Town meets housing production eligibility thresholds, would satisfy both Application and Eligibility requirements, even as such matters may be pending before those agencies.

2. *Authority to Customize the Model Rule and Amend the Specialized Stretch Code*

- a. Affirming Customization of the Model Rule – The specific provisions of Arlington’s fossil fuel-free bylaw reflect considerable effort on the part of residents and Town staff to engage the community in design of a bylaw that achieves common goals. As previously noted, Arlington values the ability to provide additional details to the Model Rule, some of which are currently included in its local fossil fuel-free bylaw, such as criteria for waiving the application of the bylaw in instances where fossil fuel-free construction would be impractical or financially infeasible, at the discretion of Town officials. Similarly, the Town may wish to retain some exemptions that were included in its previously adopted bylaw, or modify those exemptions in ways

that differ from the provisions of the Model Rule.¹ The Town considers flexibility an important opportunity for individual municipalities to demonstrate what may or may not work well, in the spirit of a true Demonstration Project.

As such the Town wishes to affirm that the requirements to detail and explain departure from the Model Rule in draft regulation 225 CMR 24.04(b) are not intended to preclude customization consistent with of Chapter 179 of the Acts of 2022.

- b. Authority to Amend the Specialized Stretch Code – Section 4 of the proposed Model Rule (which would be adopted by a municipality, not the State) provides: “With the adoption of the Fossil Fuel-Free Demonstration, and upon approval by DOER, the following amendments to the Specialized Energy Code are adopted.” Arlington is concerned that this provision, which envisions a town amending state law by the adoption of a bylaw, may not be approved by the MLU. Moreover, even if the DOER approval mentioned in the bylaw could function to amend the Specialized Stretch Code, it is not clear how that could be made effective without following the usual rules for amending the state building codes. While Arlington is fully supportive of the concept underlying the DOER’s integration of the demonstration project and the Specialized Stretch Code, it is unsure that the legal framework will be acceptable to the Attorney General. It recommends that DOER obtain assurances on that score before finalizing the proposed rules.

3. *Mechanism for Applying the Specialized Stretch Code to Major Renovations*

- a. Major Renovations – Several sections of the Specialized Stretch Code (Sections RC 101 and RC 104-105 of the Residential Specialized Stretch Code and CC103 and CC105 of the Commercial Specialized Code) purport to eliminate the codes’ “Zero Energy Pathway” and “Mixed-Fuel Pathway.” The Specialized Stretch Code does not, however, apply to major renovations. For example, Section 101.1 defines the various pathways envisioned by the Residential Code as applying only to new construction, and states that “existing residential buildings shall comply with Chapter 5 of the stretch energy code.” Section 503.1.5, to be sure, applies to major renovations (defined as Level III alterations) and requires such renovations to follow the HERS ratings set forth in Table R406.5. That table has different requirements for mixed-fuel and all-electric buildings, and arguably elimination of the mixed-fuel pathway in RC 101.1 could be construed as eliminating the option to use the mixed-fuel row in Table R406.5. That conclusion is far from obvious.

¹ A copy of the Arlington fossil free bylaw approved by Town Meeting, but not by the MLU, is attached for your convenience, containing a series of exemptions, waivers and definitions varying from the Model Rule.

- b. In communities like Arlington, it is extremely important to apply fossil-fuel-free rules to major renovations. We believe that the recommended Model Rule should be completely clear about how it applies to major renovations. It should not be necessary to engage in subtle and complex legal arguments to conclude that provisions that, on their face do not appear to apply to existing buildings, actually do. The language of the proposed rule should make it clear.

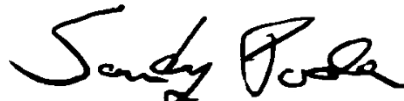
4. *Reporting Requirements for Participating Communities*

- a. Clarifying definition of “square footage” – Proposed 225 CMR 24.07(2)(a) requires that Participating Communities submit, “For each applicant for a building permit, the applicant’s name, street address, building usage type, square footage, and estimated construction cost.” The Town requests that DOER either clarify the range of acceptable data points for “square footage,” or use a more specific term that can be interpreted consistently across municipalities. In Arlington, the Town’s Inspectional Services Department collects square footage of the total floor area and gross living area in the permitting process. While recognizing the value of requesting a data point already used in the Stretch Code, such as conditioned floor area, a more expansive definition of square footage that accepts data points already collected by municipalities would reduce administrative burden for departments who will be reporting these data.

C. Conclusion

The Town of Arlington is enthused to participate in this innovative demonstration project. While Arlington is encouraged by the quality of the draft regulations to date, modest clarifications and confirmations could help to ensure that communities meet eligibility without depending on approvals from outside authorities; and further aid the project in maximizing the opportunity to balance uniformity with experimentation based on local conditions. If the Town can be of any further assistance in detailing its comment, please so advise me at your convenience.

Very truly yours,



Sandy Pooler
Arlington Town Manager



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TOWN CLERK

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**ARTICLE 5 HOMERULE LEGISLATION/BYLAW AMENDMENT
FOSSIL FUEL INFRASTRUCTURE**

VOTED: YES – 225, NO – 18

That the Town does hereby request and authorize the Select Board to file Home Rule Legislation to provide substantially as follows:

“AN ACT AUTHORIZING THE TOWN OF ARLINGTON TO ADOPT AND ENFORCE LOCAL REGULATIONS RESTRICTING NEW FOSSIL FUEL INFRASTRUCTURE IN CERTAIN CONSTRUCTION”

Be it enacted as follows:

SECTION 1. Notwithstanding chapter 164 of the General Laws, section 13 of chapter 142 of the General Laws, the State Building Code, or any other general or special law or regulation to the contrary, the town of Arlington is hereby authorized to adopt and further amend general or zoning by-laws that restrict new construction or major renovation projects that do not qualify as fossil-fuel-free, as defined in section 4 of this act.

SECTION 2. Notwithstanding section 7 of chapter 40A of the General Laws, or any other general or special law or regulation to the contrary, the Building Inspector of the town of Arlington, or any designee thereof, shall be authorized to enforce restrictions on new construction and major renovation projects that do not qualify as fossil-fuel-free, as defined in section 3 of this act, including through the withholding of building permits.

SECTION 3. As used in this act, the term “fossil-fuel-free” shall refer to construction or renovation that results in an entire building or an entire condominium unit that does not utilize coal, oil, natural gas other fuel hydrocarbons (including synthetic equivalents), or other fossil fuels in support of its operation.

SECTION 4. This act shall take effect upon its passage and shall authorize any pending bylaw already approved by Arlington’s Town Meeting consistent with Sections 1 through 3 above.

SECTION 5. If any provision or section of this act is invalidated, the remainder shall survive in full force and effect.

AND FURTHER VOTED, that at Title VI of the Town Bylaws be and hereby is amended to add a new Article 10 entitled “Prohibition on New Fossil Fuel Infrastructure in Major Construction” as follows:

ARTICLE 10. PROHIBITION ON NEW FOSSIL FUEL INFRASTRUCTURE IN MAJOR CONSTRUCTION

Section 1 Purpose

This Bylaw is adopted by the Town of Arlington, under its home rule powers and its police powers under Massachusetts General Laws, Chapter 40, Sections 21 (clauses 1, 18) and 21D, and Chapter 43B, Section 13, to protect the health and welfare of the inhabitants of the town from air pollution, including that which is causing climate change and thereby threatens the Town and its inhabitants.

Section 2 Definitions

“New Building” shall mean a new building or new accessory building (a building devoted exclusively to a use accessory to the principal use of the lot) that is associated with a valid building permit application on or after the Effective Date.

“On-Site Fossil Fuel Infrastructure” shall mean piping for fuel gas, fuel oil, or other fuel hydrocarbons, including synthetic equivalent 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).

“Major Renovation” shall mean a renovation project associated with a valid building permit application on or after the Effective Date of this article that:

(1) For existing structures regulated by the current edition of the International Residential Code as amended by 780 CMR 51: Massachusetts Residential Code, includes the reconfiguration of space and/or building systems, in which the Work Area, not including any added space, is more than 75% of the Gross Floor Area, as defined in Section 2 of the Arlington Zoning Bylaw, prior to the project;

(2) For existing structures regulated by the current edition of the International Building Code as amended by 780 CMR 34: Massachusetts Commercial Code, includes the reconfiguration of space and/or building systems, in which the Work Area, not including any added space, is more than 50% of the building floor area prior to the project, as defined by the Massachusetts Building Code.

“Work Area” shall mean the portions of a building affected by renovations for the reconfiguration of space and/or building systems, as indicated in the drawings associated with a building permit application. Areas consisting of only repairs, refinishing, and/or incidental work are excluded from the Work Area.

“Effective Date” shall mean July 1, 2022, or six months following the date by which the Town is authorized by Special Act to regulate fossil fuel infrastructure by the Commonwealth of Massachusetts, whichever is later in time.

Section 3 Applicability

The requirements of this article shall apply to all permit applications for New Buildings and Major Renovations proposed to be located in whole or in part within the Town, except that:

A. The requirements of this article shall not apply to utility service piping connecting the grid to a meter, or to a gas meter itself.

B. The requirements of this article shall not apply to piping required to fuel backup electrical generators.

C. The requirements of this article shall not apply to piping required for cooking appliances and related appliances.

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

E. The requirements of this article shall not apply to the piping required to produce potable or domestic hot water from centralized hot water systems in buildings with building floor areas of at least 10,000 square feet, provided that the Engineer of Record certifies that no commercially available electric hot water heater exists that could meet the required hot water demand for less than 150% of installation or operational costs, compared to a conventional fossil-fuel hot water system.

F. So long as new fossil fuel piping is not installed, the requirements of this article shall not apply to the extension or modification of heating systems via HVAC system modification, or modification of radiator, steam, or hot water piping.

G. The requirements of this article shall not apply to research laboratories for scientific or medical research or to medical offices regulated by the Massachusetts Department of Public Health as a healthcare facility.

H. The requirements of this Article shall not apply to repairs of any existing portions of a fuel piping system deemed unsafe or dangerous by the Plumbing and Gas Fitting Inspector.

Section 4 Enforcement

Upon the Effective Date, no permits shall be issued by the Town for the construction of New Buildings or Major Renovations that include the installation of new On-Site Fossil Fuel Infrastructure, except as otherwise provided in Sections 3, 5, and 6 of this bylaw

Section 5 Waivers

A. In the event that compliance with the provisions of this bylaw makes a project financially infeasible or impractical to implement, the Building Inspector may grant a waiver subject to reasonable conditions. Where appropriate, such waivers shall be issued narrowly for specific portions of a project that are financially infeasible or impractical to implement under the

requirements of this Article. Waiver requests shall be supported by a detailed cost comparison, inclusive of available rebates and credits. A waiver request may be made at any time and may be based upon submission of conceptual plans. Particular consideration for waivers will be given to projects sponsored by non-profit or government-sponsored affordable housing entities.

B. Guidance regarding the granting of waivers and prescription of conditions shall be provided by the Select Board prior to the Effective Date and periodically extended or amended in the light of experience and changing circumstances.

Notwithstanding the foregoing, Compliance with this bylaw may be considered financially infeasible if:

1. As a result of factors beyond the control of the proponent the additional cost of the project over the long term, including any available subsidies, would make the project commercially unviable; and/or

2. If technological or other factors would make the project unsuitable for its intended purpose.

C. The Building Inspector's decision with respect to the granting of a waiver, the scope thereof, and any conditions prescribed, shall be appealable to the Town Manager in accordance with procedures established by the Town Manager.

Section 6 Appeals

The Town Manager shall hear appeals from decisions by the Building Inspector on the applicability of this bylaw under section 3 in accordance with such procedural rules as may be adopted from time to time by the Town Manager.

**A true copy of the vote under
Article 5 of the Warrant for the
Special Town Meeting of the
Town of Arlington at the session
held November 18, 2020.**

ATTEST:

Juliana H. Bregida

Town Clerk

