Drafting Ordinances with Environmental Goals in Mind: *CRA v. Berkeley* at the Ninth Circuit

PUBLIC HEALTH
LAW CENTER
at Mitchell Hamline School of Law

OVERVIEW

- Legal and Policy Framework
- Adoption of Berkeley's Natural Gas Ban
- Trial Court Litigation
- Appellate Proceedings ← **We are here**
- Options and Implications for Local Governments

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THE *CRA V. BERKELEY* ARGUMENTS ON APPEAL
CRA'S ARGUMENT

- EPCA preempts regulations "concerning the energy efficiency, energy use, or water use of [a product covered by EPCA]"
  - Term "energy use" is the basis for the argument
  - "Energy use" means "quantity of energy directly consumed by a consumer product at point of use"
  - "Energy" means "electricity, or fossil fuels"
- The Berkeley ordinance requires appliances in buildings to "use zero natural gas"
- Therefore, the ordinance "concerns" the "quantity of energy" used by appliances

THE *CRA V. BERKELEY* ARGUMENTS ON APPEAL
BERKELEY'S ARGUMENT

- EPCA regulates the design and manufacture of appliances, not gas distribution
  - The Berkeley ordinance does not affect the design or manufacture of appliances
  - CRA's reading would turn EPCA into a mandate to make gas available everywhere
- No gas appliance uses "zero natural gas"
  - By definition, a gas appliance uses gas
  - EPCA language doesn't make sense if "zero" is read as a possible "quantity of energy"
- Therefore, EPCA doesn't preempt regs that have the effect of cutting of gas access
- Also argued that CRA's standing declaration was insufficient

THE *CRA V. BERKELEY* DECISION
PANEL OPINION

- EPCA guarantees ability to use EPCA-covered appliances
  - References “point of use” in definition of “energy use”
  - Zero is a “quantity” in ordinary use, therefore ban on energy type is within EPCA scope
- “Concerning” in EPCA preemption has broad scope
  - Includes regulations that indirectly prohibit appliance use
  - EPCA must apply to “building codes” because of exception for them
- Requirement that governments make gas available “does not follow” from decision
- Assertion that “one or more” CRA members would go to new building but for the ordinance was sufficient for standing

THE *CRA V. BERKELEY* DECISION
JUDGE BAKER'S CONCURRENCE

- Acknowledges potentially unlimited scope of "concerning"
  - "[H]ost" of regs "incidentally" restrict gas consumption
- Suggests limitation in "text or structure" of EPCA
  - Carbon taxes and restrictions on gas distribution other than at the meter are "likely" OK
  - Water curtailment and public-safety power shutoffs are "almost certainly" OK
- Restrictions on customer-owned gas pipes are not OK
  - Ordinance is "building code"
  - EPCA specifically addresses "building codes"

THE *CRA V. BERKELEY* DECISION
LIMITATIONS TO CONSIDER

- Reasoning is broad
  - "Concerning" not given clear limitation, without reference to EPCA's purpose
  - Parties did not consider the ordinance to be a "building code"
- Likely limitations on opinion's logic
  - Panel unwilling to commit to preemption of regulations beyond the meter
  - Focus on EPCA exception for "building code for new construction" could indicate flexibility for regulations of existing buildings
  - Apparently applies to prohibition on fuel use, not all regulations of fuel use
  - Only applies to EPCA-covered appliances, for whatever that's worth

THE *CRA V. BERKELEY* DECISION
NEXT STEPS IN THE LITIGATION

- Berkeley filed petition for rehearing en banc;
  - 9th Cir. requested response from CRA, which they provided (along with one amicus)
  - Should know outcome by mid-November, if not earlier
- Possible outcomes:
  - Judges vote against rehearing, current opinion stands
  - Panel revises opinion in exchange for rehearing denial
  - Judges vote for rehearing, opinion becomes uncitable and en banc court gives new opinion

TAKE-AWAYS FOR MUNICIPALITIES
MANY OPTIONS REMAIN

- Substantial possibility that opinion will change or be replaced entirely
  - More information available soon
  - No need to pause work on existing plans
- Actions that do not prohibit appliance use likely unaffected
  - Still some question regarding “concerning”
  - Energy efficiency: benchmarking, retrofitting, building energy performance standards
  - Building performance standards for emissions that do not completely eliminate fuel use
  - Requirements for on-site generation
  - Subsidy programs

TAKE-AWAYS FOR MUNICIPALITIES
REACH CODE OPTIONS

- Requires seven elements:
  - Menu of options whose combined energy efficiency meets the goal
  - No EPCA-covered product required to exceed EPCA standards
  - If a builder decides to exceed EPCA standards, gets “one-for-one” credit
  - If using baseline designs, baseline cannot include EPCA exceedances
  - If choice is between sets of efficiency measures, one set has no EPCA exceedances
  - Energy goal must be specified as “estimated total consumption of energy”
  - Any testing procedures must be consistent with EPCA testing procedures
- Caselaw suggests that penalizing builders for sticking to the EPCA standards is not allowed

TAKE-AWAYS FOR MUNICIPALITIES
YOU'RE NOT ALONE!

- Local governments are taking action on energy and efficiency all over the country
- Major benefits for municipalities and their residents
  - Public health and air-pollution reduction
  - Cost savings, especially when including on-site generation
  - In future, potential to eliminate high fixed costs of gas infrastructure
- Support is available
  - Building Performance Standards Coalition
  - Support orgs: RMI, ACEEE, Building Decarbonization Coalition

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