Drafting Ordinances with Environmental Goals in Mind:

Berkeley's Natural Gas Ban

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Overview

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

Legal Framework: State Law

Building Standards

- Adoption of building standards is a field “fully occup[ied]” by state law. (*Building Industry Assn. v. City of Livermore* (1996) 45 Cal.App.4th 719.)
- Local jurisdictions can adopt more stringent requirements if stricter standards are “reasonably necessary due to local climatic, geological and topographical conditions.” (Health & Saf. Code, §§ 17958.5, 17958.7.)

Legal Framework: State Law

Energy Code

- CEC authorized to adopt statewide energy “efficiency” and “conservation design standards.” (Pub. Res. Code, § 25402)
- Local jurisdictions may choose to enforce stricter standards if standards are found to be (1) cost effective and (2) reduce the consumption of energy. (Pub. Res. Code, § 25402.1(h)(2); Title 24, Part 1, § 10-106(a).)

Legal Framework: Federal Law

Energy Policy and Conservation Act (EPCA)

- Purposes include providing for "improved energy efficiency of motor vehicles, major appliances, and certain other consumer products." (42 U.S.C. § 6201(5).)
- Subchapter III requires DOE to set standards for energy efficiency of "covered products" (including common household appliance).

Policy Framework

- State commitment to reduce to a level 40 percent below 1990 levels by 2030. (SB 32, 2016.)
- Goal of achieving carbon neutrality statewide by 2045. (CARB, 2022 Scoping Plan for Achieving Carbon Neutrality.)
- Residential/commercial building responsible for up to 25% of GHG emissions.

Understanding Berkeley's Approach

- Identifies the use of natural gas in buildings as a health and safety issue that local jurisdictions have authority to regulate under their police power.
- Targets newly constructed buildings to minimize disruption and limit the installation of soon-to-be-obsolete infrastructure.
- Implements requirements through entitlement process, with exemptions to ensure flexibility.

Key Elements of Ordinance (BMC Chapter 12.80)

- Applied as condition of approval of planning applications
- “Natural Gas Infrastructure shall be prohibited in Newly Constructed Buildings.” (BMC 12.80.040(A).)
- Exceptions where gas is not “physically feasible” or use of natural gas “serves the public interest. ” (BMC 12.80.040(A), 12.80.050(A).)
- Delayed effective date (January 1, 2020)

Impact of Berkeley Ordinance

- California: 76 cities have adopted natural gas ban or electrification ordinances
- Nationwide: 98 municipalities and four states have adopted electrification policies

Legal Challenge

- Nov. 2019: CRA files lawsuit seeking to invalidate Berkeley ordinance
- Based on federal and state law preemption of ordinance:
  - EPCA
  - Building Standards Code
  - Energy Code

District Court Ruling

***CRA v. City of Berkeley*, 547 F. Supp. 3d 878 (N.D. Cal. 2021)**

- "The Berkeley Ordinance does not facially regulate or mandate any particular type of product or appliance. Instead, the Ordinance focuses on regulating the underlying natural gas infrastructure."
- ". . . [T]he fact that an ordinance focused on natural gas piping for new buildings may have some downstream impact on commercial appliances is insufficient."
- ". . . EPCA does not require[] a city to extend natural gas infrastructure, nor does the statute preclude a city's exercise of its power to regulate building infrastructure to protect public health and safety."