

*Legal Disclaimer: The information contained in this document is provided for informational purposes only and should not be construed as legal advice on any subject matter.*

## **Impact of 9<sup>th</sup> Circuit’s Decision in *California Restaurant Association v. City of Berkeley***

### **Case History:**

In 2019, the City of Berkley enacted Berkely Municipal Code Chapter 12.80 titled Prohibition of Natural Gas Infrastructure in New Building (“the Ordinance”). The Ordinance provides that “Natural Gas Infrastructure shall be prohibited in Newly Constructed Buildings.” Berkeley Mun. Code § 12.80.040(A).<sup>1</sup> And further defines “Natural Gas Infrastructure” ... as fuel gas piping, other than service pipe, in or in connection with a building, structure or within the property lines of premises, extending from the point of delivery at the gas meter as specified in the California Mechanical Code and Plumbing Code.” *Id.* § 12.80.030(E).

In November of 2019 the California Restaurant Association filed suit arguing that the federal Energy Policy and Conservation Act (“EPCA”) preempted the Ordinance. EPCA directs the Department of Energy (“DOE”) to set energy efficiency standards for appliances and expressly states that “no State regulation concerning energy efficiency, energy use, or water use of such covered product shall be effective with respect to [that] product.” 42 U.S.C. § 6297(c). The District Court ruled in favor of Berkely and in doing so reasoned that EPCA should be “interpreted in a limited manner,” in order to give deference to an area of law “historically the province of state and local regulation.” *Cal. Rest. Ass’n v. City of Berkeley*, 547 F. Supp. 3d 878, 891 (N.D. Cal. 2021). Further, the District Court determined that because the Ordinance does “not facially regulate or mandate any particular type of product or appliance” it is not preempted by EPCA. *Id.* In other words, EPCA only prevents the direct regulation of appliances and does not prohibit local laws that only indirectly affect the use of regulated appliances.

Recently, the 9<sup>th</sup> Circuit Court of Appeals overturned the District Court’s decision, finding EPCA preemption to be broader and “extend[ing] to regulations that address the products themselves and the onsite infrastructure for their use of natural gas.” *Cal. Rest. Ass’n. v. City of Berkely*, No. 21-1678 at p.15 (9th Cir. Apr. 17, 2023). The Court of Appeals decision hinged in large part on its understanding of the term “energy use” in EPCA. The Court stated that “energy use” is based on consumption that happens “at point of use.” 42 U.S.C. § 6291(4). “This means that we measure energy use not from where the products roll off the factory floor, but from where consumers use the

---

<sup>1</sup> In California, cities are allowed to amend the California Building Code through a process that involves submission and approval by the state Building Standards Commission. “HSC Section 18941.5, with reference to HSC Section 17958.7, allows for more restrictive local amendments that are reasonably necessary because of local climatic, geological, or topographical conditions. CALGreen Section 101.7.1 allows the use of environmental conditions as an acceptable finding.” However, Berkley chose to adopt their natural gas Ordinance outside of this process using their general authority to adopt laws intended to protect the health and safety of residents, also referred to as “police powers.”

*Legal Disclaimer: The information contained in this document is provided for informational purposes only and should not be construed as legal advice on any subject matter.*

products.” *Cal. Rest. Ass’n.*, No. 21-1678 at p.15. The Court reasoned that preventing natural gas appliances from being connected to natural gas infrastructure was essentially regulating their “energy use” to a level of zero. *Id.* Additionally, the Court cited the explicit exceptions in the preemption section of EPCA, § 6297(f)(1)–(3) as further confirmation that EPCA preemption extends to building codes that regulate natural gas usage. Specifically, EPCA provides an exemption to preemption for building codes regulating energy use that meet 7 specific requirements.<sup>2</sup>

The 9<sup>th</sup> Circuit rejected similar arguments from DOE itself which filed an amicus brief in favor of the City of Berkley. The DOE argued that EPCA only prohibits “state and local regulations that impose energy conservation standards or similar performance standards for the efficiency or energy consumption of certain appliances.” *Rest. Ass’n. v. City of Berkely*, No. 21-1678 at p.18. Again, the Court rejected the notion that EPCA’s preemption is this narrow and that the plain meaning of EPCA requires a broader

---

<sup>2</sup> (3)Effective on the effective date of an energy conservation standard for a covered product established in or prescribed under section 6295 of this title, a regulation or other requirement contained in a State or local building code for new construction concerning the energy efficiency or energy use of such covered product is not superseded by this part if the code complies with all of the following requirements:

(A)The code permits a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective.

(B)The code does not require that the covered product have an energy efficiency exceeding the applicable energy conservation standard established in or prescribed under section 6295 of this title, except that the required efficiency may exceed such standard up to the level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d).

(C)The credit to the energy consumption or conservation objective allowed by the code for installing covered products having energy efficiencies exceeding such energy conservation standard established in or prescribed under section 6295 of this title or the efficiency level required in a State regulation referred to in subparagraph (B) is on a one-for-one equivalent energy use or equivalent cost basis.

(D)If the code uses one or more baseline building designs against which all submitted building designs are to be evaluated and such baseline building designs contain a covered product subject to an energy conservation standard established in or prescribed under section 6295 of this title, the baseline building designs are based on the efficiency level for such covered product which meets but does not exceed such standard or the efficiency level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d).

(E)If the code sets forth one or more optional combinations of items which meet the energy consumption or conservation objective, for every combination which includes a covered product the efficiency of which exceeds either standard or level referred to in subparagraph (D), there also shall be at least one combination which includes such covered product the efficiency of which does not exceed such standard or level by more than 5 percent, except that at least one combination shall include such covered product the efficiency of which meets but does not exceed such standard.

(F)The energy consumption or conservation objective is specified in terms of an estimated total consumption of energy (which may be calculated from energy loss- or gain-based codes) utilizing an equivalent amount of energy (which may be specified in units of energy or its equivalent cost).

(G)The estimated energy use of any covered product permitted or required in the code, or used in calculating the objective, is determined using the applicable test procedures prescribed under section 6293 of this title, except that the State may permit the estimated energy use calculation to be adjusted to reflect the conditions of the areas where the code is being applied if such adjustment is based on the use of the applicable test procedures prescribed under section 6293 of this title or other technically accurate documented procedure.

42 U.S.C. § 6297(f)(3)

*Legal Disclaimer: The information contained in this document is provided for informational purposes only and should not be construed as legal advice on any subject matter.*

interpretation. Further, adding that “the ability to use covered products is “meaningless” if consumers can’t access the natural gas available to them within the City of Berkeley.” *Cal. Rest. Ass’n.*, No. 21-1678 at p. 23.

### **Impact on Potential Natural Gas Ban in Ann Arbor:**

9<sup>th</sup> Circuit’s ruling is not binding in Michigan:

The City of Ann Arbor is in the United States District Court for the Eastern District of Michigan, which is part of the 6<sup>th</sup> Circuit. A decision by the 9<sup>th</sup> Circuit while persuasive and likely to be cited in any future natural gas ban challenges both in California and elsewhere is only binding on courts in the 9<sup>th</sup> Circuit. It can be argued, as Berkeley and the DOE have done, that a narrower reading of EPCA is more appropriate and this argument could prevail outside of the 9<sup>th</sup> Circuit. It does seem unlikely that Congress intended for EPCA to prevent cities from completely banning natural gas infrastructure because at the time of the EPCA’s passage the idea of banning natural gas infrastructure wasn’t a viable option or something being considered by any cities.

Additionally, Judge O’Scannlain in a concurring opinion seems troubled by the assumption contained in the majority opinion that the presumption against preemption is negated by express preemption language in a statute. *Id* at p. 32-34. He goes on to reference “conflicting lines of cases” at the Supreme Court level when it comes to deciding when to apply the presumption against preemption. *Id*. He ultimately determines that in the 9<sup>th</sup> Circuit at least, “I am bound to hold that the presumption against preemption does not apply to the express-preemption provision before us today.” *Id*. One can infer that without this presumption he may have dissented from the majority opinion. <sup>3</sup>

Potential Options available to Ann Arbor:

Ann Arbor is considering possible ways that it could enact a natural gas ban on newly constructed buildings. Passing an ordinance like Berkley’s was already going to come under scrutiny as being preempted by State law which prescribes the building codes for cities in Michigan without explicitly allowing cities to amend it. Federal preemption by EPCA as espoused in the 9<sup>th</sup> Circuit opinion provides an additional line of attack against any local ordinance in Ann Arbor that is structured similarly to Berkely’s. This is not to say that this approach is impossible, but it probably faces the greatest risk of being invalidated by a court challenge.

A more viable approach would be to use Ann Arbor’s Zoning authority to ban natural gas-based appliances in new construction. This is different than the Berkeley Ordinance which used the city’s inherent police powers to prohibit natural gas infrastructure (although the court described it as a building code). However, it’s unclear

---

<sup>3</sup> Further research of 6<sup>th</sup> Circuit precedent regarding the presumption against preemption is warranted.

*Legal Disclaimer: The information contained in this document is provided for informational purposes only and should not be construed as legal advice on any subject matter.*

how a court would view a Zoning regulation with respect to EPCA preemption. Applying the logic of the 9<sup>th</sup> Circuit, the argument could be made that a Zoning regulation banning natural gas use would also be preempted because it would prevent the use of appliances certified by the DOE in a similar way to the Berkeley ordinance. On the other hand, the Berkeley ban specifically banned the natural gas piping necessary to deliver natural gas which is more directly tied to the appliance. A zoning regulation could be structured in a way that would be even further removed from a regulation on the gas appliances themselves. Also, zoning regulations unlike building code regulations are not specifically mentioned in EPCA.

Another possibility may be to structure a Zoning regulation that complies with the building code exception spelled out in § 6297(f)(3) (see footnote 2). While this section of EPCA specifically refers to building codes, zoning and building codes often go hand in hand when approving a new construction project.<sup>4</sup> While not a total ban on natural gas connections, a regulation could be drafted that favors all electric developments while leaving open an avenue for natural gas if other strict energy efficiency measures are taken to offset the gas use. Hopefully, this could be structured in such a way that most developers would find it easier and more affordable to simply choose the all-electric option.

One last potential option is suggested by the 9<sup>th</sup> Circuit's opinion and stems from local authority over natural gas distribution. In response to another argument in defense of the Ordinance, "Berkeley finally contends that preemption here would mean that the City must affirmatively make natural gas available everywhere." *Cal. Rest. Ass'n.*, No. 21-1678 at p. 9. In rejecting this argument, the Court stated that our "holding doesn't touch on whether the City has any obligation to maintain or expand the availability of a utility's delivery of gas to meters." *Id.* This notion was further expounded in Judge Baker's concurring opinion where he writes that, "Nor is there any indication from its text or structure that EPCA speaks to the distribution of natural gas. If a state or local government terminates existing gas utility service or declines to extend such service, EPCA likely has no application." *Id.* at p. 42. This would require further research, but there may be a way to restrict new natural gas infrastructure as part of the ongoing negotiation with DTE about renewing their franchise rights.

---

<sup>4</sup> Further research would be needed to determine the viability of using this exception in the zoning context as opposed to a building code regulation.