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M E M O R A N D U M

FROM: Ellison Folk
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RE: Implications of *California Restaurant Association v. City of Berkeley* Ninth Circuit Decision

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In *California Restaurant Association v. City of Berkeley*, No. 21-16278, the Ninth Circuit Court of Appeals found Berkeley's natural gas ban preempted by the federal Energy Policy and Conservation Act (EPCA). This memo summarizes the key findings of the decision, discusses its immediate impact for local governments with similar ordinances, and addresses decarbonization efforts local governments might continue to pursue should the decision remain good law.

I. Summary of decision

The *CRA* decision arose from a challenge to Berkeley's 2019 ordinance banning fuel gas piping in new buildings. The ordinance prohibits piping in a building from the point of delivery at the gas meter. BMC 12.80.030(E). The ordinance contains two exemptions: one for buildings where it is not physically feasible to construct the building without natural gas infrastructure (including where compliance with the state Energy Code would be impossible for all-electric construction), and the second where use of natural gas would serve the public interest.

The ordinance does not purport to amend the state building standards or Energy Code (*see* BMC 12.80.020(C)), and instead it is codified in the Health and Safety section of the City's Municipal Code. BMC Title 12.80. In defending its ordinance, Berkeley stated its position that the ordinance is not a "building standard" within the meaning of the California Building Standards Code (Motion to Dismiss Complaint ("MTD") at 26-27). Nevertheless, in the event the ordinance were construed as a building standard, Berkeley made findings of local necessity for its ordinance, which it submitted to the California Building Standards Commission as required by Health & Safety Code Section 17958.7. MTD at 29.

The California Restaurant Association (CRA) sued Berkeley in federal court in 2019 over adoption of the ordinance. CRA argued that the ordinance was preempted by the federal Energy Policy and Conservation Act (EPCA) and by California law (the Building Standards Code and the Energy Code). In 2021, the federal district court dismissed CRA's suit, finding that EPCA did not preempt Berkeley's ordinance and declining to reach the state law claims.

The Ninth Circuit reversed the district court, concluding that EPCA preempts states and local governments from regulating the quantity of natural gas used by an appliance at the point of use. *California Restaurant Assn. v. City of Berkeley* ("*CRA*"), 65 F.4th 1045, 1050 (9th Cir. 2023). The court interpreted an express preemption clause in EPCA stating that once there is a federal energy conservation standard in place for a covered product, "no State regulation concerning the energy efficiency, [or] energy use . . . of such covered product shall be effective with respect to such product." 42 U.S.C. § 6297(c). The statute defines "energy use" as "the quantity of energy directly consumed" by an appliance at the point of use, where "energy" is defined as "electricity, or fossil fuels." *Id.* § 6291(3), (4). The court interpreted "energy use" to mean the quantity of *natural gas* consumed by the appliance at the point of use. *CRA*, 65 F.4th at 1050-51. It concluded that by requiring a quantity of "zero" natural gas at the point of use, Berkeley's ordinance regulated the "energy use" of appliances and therefore was preempted. *Id.* at 1051.

The court made several broad statements with potential relevance to other cities' approaches. First, it observed that "[a] regulation on 'energy use' fairly encompasses an ordinance that effectively eliminates the 'use' of an energy source." *Id.* at 1051. Second, it noted that "EPCA would no doubt preempt an ordinance that directly prohibits the use of covered natural gas appliances in new buildings." *Id.* at 1056. Relatedly, it observed that "EPCA preemption extends to regulations that address the products themselves *and the* on-site infrastructure for their use of natural gas." *Id.* at 1052. Third, it treated Berkeley's ordinance as a building code, despite Berkeley's contention before the district court that its ordinance was *not* a building standard. *See id.*

at 1052 ("EPCA preempts building codes, like Berkeley's ordinance, that function as 'energy use' regulations.").

The *CRA* decision is flawed in several respects. First, the court's purportedly "plain meaning" interpretation of EPCA's preemption provision actually required it to read beyond the plain language of the text. As noted, EPCA preempts a regulation "concerning the energy efficiency [or] energy use" of a covered product, where "energy use" is "the quantity of energy directly consumed by a consumer product at point of use." 42 U.S.C. §§ 6297(c), 6291(4). Crucially, "energy" is defined as "electricity, or fossil fuels." *Id.* § 6291(3). In order to reach its conclusion that the Berkeley ordinance regulated the energy use of appliances at the point of use, the court replaced "electricity, or fossil fuels," with "natural gas." *CRA*, 65 F.4th 1045, 1050-51 . The court's reading of the statute thus interjects a specific *type* of energy in place of both electricity and fossil fuels. By its plain language, EPCA preempts only regulations of the *quantity* of energy used by an appliance, not the type of energy used. The court implies that Berkeley's ban "lowers the 'quantity of energy' consumed to 'zero.'" *Id.* at 1051. Not so. Berkeley's ordinance only regulates the *type* of energy used by appliances, not the *quantity* of energy they use, because it still allows appliances to use any quantity of electricity.

The court also read "concerning" broadly, to include not just regulations that directly regulate energy use, but also regulations that *indirectly* regulate energy use of appliances. *CRA* at 1052 ("[B]y using the term 'concerning,' Congress meant to expand preemption beyond direct or facial regulations of covered appliances."). But Berkeley's ordinance did not even mention appliances or their energy use, but rather regulated the pipes in the building. Accordingly, the court's reading of "concerning" is arguably overbroad. Although there are cases emphasizing that the term should be read broadly, there is also support for a more narrow interpretation. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295, 353 (2007) (noting that reading the similar term "related to" too broadly in the context of fuel economy standards would "include virtually all state provisions with even a tangential connection to fuel economy.").

The court also ignored EPCA's statutory purpose and context. As outlined in *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, 835 F.Supp.2d 1133, 1137 (D.N.M. 2010), the National Appliance Energy Conservation Act, which amended EPCA in 1987, was adopted to address the "growing patchwork of differing State regulations which would increasingly complicate" the appliance manufacturers' design and production plans. In other words, the law was meant to ensure appliances need not be manufactured to meet varying energy efficiency standards. It was not concerned with ensuring that appliances that used any particular *type* of energy be permitted. Nor

did EPCA intend, as the Opinion suggests, to establish the *right* to use any an EPCA-covered product.

II. Next steps in the litigation

The opinion is not yet technically "final," but local governments within the Ninth Circuit must treat it as binding legal authority. The decision will become final when "mandate" issues, which means that the Ninth Circuit loses jurisdiction over the case, and it returns to the district court. If Berkeley had done nothing in response to the Ninth Circuit's decision, mandate would have issue on May 8th, 21 days after the decision was issued. Fed. R. App. P. 40(a), 41(b). However, Berkeley has sought an extension of its deadline to seek rehearing of the decision, so mandate will not issue until the potential rehearing petition is resolved.

Berkeley has the option to seek rehearing either by the three-judge panel that heard the case, or en banc rehearing by 11 Ninth Circuit judges. It is much more likely that Berkeley will seek rehearing en banc to avoid the same outcome from the same three-judge panel that just decided the case. Berkeley's deadline to file its petition is May 31.

If Berkeley does file a petition for rehearing en banc, the next steps are within the court's discretion. If the petition for rehearing is denied, the decision of the three-judge panel will become final. If the petition is granted, the 11-judge panel would rehear the case and issue a decision that affirms the current decision or vacates that decision and issues a new one. Unless the court summarily rejects the rehearing petition, it could take several months or even a year for the court to resolve the petition. The federal court is under no time limit to act on the petition or to issue a decision if it does grant rehearing.

Berkeley is under no obligation to act on the court's decision until the district court issues an order effectuating the appellate decision. *See, e.g.*, *Crickon v. United States*, No. 3:12-CV-0684-SI, 2013 WL 2359011, at *5 (D. Or. May 28, 2013) ("[T]he parties in the underlying action generally must wait for the district court order before there is any obligation to act on the mandate in the case giving rise to the mandate."). In other words, even after mandate issues on the Ninth Circuit's decision—either because a petition for rehearing failed or because the court reheard the case and affirmed the decision—Berkeley does not need to take action to conform to the court's decision until it is remanded to the district court and the district court issues an injunction or an order for Berkeley to conform. Of course, if the Ninth Circuit rehears the case and vacates the opinion, then Berkeley will similarly be under no obligation to conform to the decision.

III. Next steps for other local governments in the Ninth Circuit

Public agencies throughout the country have adopted a variety of different approaches to reducing or eliminating the use of natural gas in buildings. The *CRA* decision is not binding on jurisdictions located outside of the Ninth Circuit. For cities in the Ninth Circuit, other than Berkeley, the Ninth Circuit's decision is binding authority that they must follow, even during the period before mandate issues and the opinion is technically final. *In re Zermeno-Gomez*, 868 F.3d 1048, 1053 (9th Cir. 2017); *see also Mabry v. ConocoPhillips Co.*, No. 3:20-cv-00039-SLG, 2021 WL 2805358, at *5 n.44 (D. Alaska 2021) ("[P]ublished opinions by the Ninth Circuit constitute binding authority regardless of whether a mandate has issued." (citing *Zermeno-Gomez*)). As a result, regardless of what Berkeley decides to do next before the Ninth Circuit, including seeking rehearing en banc, all other jurisdictions within the Ninth Circuit should treat this decision as binding law unless and until it is vacated.

The CRA decision's broad reasoning could be read to mean that any state law that in effect precludes (or perhaps even that reduces) the use of natural gas (or theoretically other forms of energy) is preempted. However, despite its broad statements, the *CRA* decision only addressed one type of approach: a non-building code prohibition on gas infrastructure in new construction. Other approaches not addressed by the decision include air quality standards that regulate pollution emissions from appliances, reach codes that encourage all-electric construction (for example, electric-preferred ordinances), and policies that require reductions in greenhouse gas emissions or air pollution from new construction, but provide for flexibility on how to achieve those requirements. The decision also did not address EPCA's seven-factor test for prohibitions on natural gas that are explicitly adopted as a reach code or a building code. How future courts would apply the panel's reasoning in this case in the complex variety of contexts remains to be seen.

Cases stand only for the legal propositions they discuss and analyze. *Benas v. Baca*, No. 2:00-cv-11507-FMC, 2009 WL 4030526 (C.D. Cal. 2009) ("[C]ases do not stand for propositions they do not discuss."). Therefore, we believe that local governments that have not adopted Berkeley's approach—a non-building code ban on gas infrastructure—have a defensible position that their regulations remain valid. However, local governments with ordinances like Berkeley's, including non-building code bans on natural gas infrastructure and all-electric requirements, should consider pausing or staying enforcement of their ordinances, regardless of what Berkeley does next in the litigation. Continuing to enforce such an ordinance could risk an as-applied challenge, meaning a challenge to the ordinance as it is applied to a particular permit applicant. Until Berkeley's potential rehearing petition is resolved and the *CRA* decision becomes final, we believe it would be premature to repeal such an ordinance outright. The decision could still be vacated following a rehearing petition. Accordingly, a

temporary stay or suspension of the ordinance until the decision is rendered final, or it is vacated, will give municipalities flexibility to react to the various possible outcomes of the litigation.

However, local governments must continue to enforce all other state and local building code requirements. All requirements related to municipal buildings are unaffected by this ruling because they involve public agency decisions about their own operations. Local governments may also continue to enforce portions of their all-electric or gas ban ordinance that did not directly ban the use of gas infrastructure or appliances, such as electric-ready requirements or measures that favor electrification. The *CRA* decision did not discuss or implicate such measures. And, local governments generally have broad enforcement discretion. Accordingly, cities may continue to enforce these requirements.

Other agencies that prohibited gas appliances or infrastructure via a building code-based ordinance (also known as a reach code, under either Part 6 or Part 11 of California's Title 24), may want to take a "wait and see" approach before suspending enforcement of their ordinances. These ordinances should be subject to EPCA's seven-factor test for an exemption from preemption, which was not addressed by the *CRA* court.

Ultimately, any individual agency's determination about how to proceed will require an analysis of its regulations and risk tolerance.

IV. Other Approaches to Building Decarbonization.

The following discussion addresses how agencies can continue to advance a decarbonization agenda even if the *CRA* decision is not overturned. Because the decision focused on its view that EPCA preempts Berkeley's regulation, it did not address these options or decide their legality.

A. Local governments can pursue an air emissions standard

As an alternative to the legislative options expressly requiring electric appliances or prohibiting or precluding gas, local governments could instead set an emissions limit for buildings. New York City has taken this approach by setting a limit for on-site GHG emissions for buildings over 25,000 square feet. *See* 2019 N.Y.C. Local Law No. 97.

Local governments in California are authorized to impose such limits. *See* Health & Safety Code § 39002 (recognizing the right of "local and regional authorities" to "establish stricter standards than those set by law or by the state board for nonvehicular sources"). Additionally, state greenhouse gas regulations and plans developed by the State Air Resources Board pursuant to the California Global Warming Solutions Act of

2006, or AB 32, encourage local governments to take voluntary efforts to achieve the state's greenhouse gas reduction goals. *See* California's 2022 Climate Change Scoping Plan, Appendix D, at 3 (noting that "[l]ocal government efforts to reduce greenhouse gas (GHG) emissions within their jurisdiction are critical to achieving the State's long-term climate goals").

In addition to the police power authority of local agencies, air districts throughout the state have historically required furnaces and water heaters to achieve low-NOx emissions standards. In 2023, BAAQMD set a zero-NOx standard for furnaces and water heaters, which can currently be met only with electric appliances. *See* BAAQMD Rules 9-4, 9-6. Thus, by setting a NOx limit low enough, regulations on appliance air emissions can severely curtail, if not eliminate, the use of natural gas appliances.

Although the decision's broad language provides cause for concern, the *CRA* decision did not specifically address whether air quality regulations would be preempted by EPCA. Applying the EPCA preemption language to supersede longstanding state pollution control measures would be a jarring and problematic result, and we suspect that federal courts will refrain from applying the reasoning of *CRA* so broadly (even assuming it survives further appellate review). We believe some of the broader language in the decision should not be applied expansively because it did not address the authority of either local governments or air districts to address air pollution impacts, and that air quality regulators should continue to enforce their statutes and rules.

B. Localities could encourage all-electric buildings as a CEQA mitigation measure

After the *CRA* decision, imposing a CEQA mitigation measure that *requires* buildings to be built all-electric is not a feasible path. CEQA requires that only legally feasible mitigation measures be considered. *See City of Marina v. Board of Trustees of Cal. State Univ.*, 39 Cal.4th 341, 356 (2006) (noting that CEQA considers "'legal' factors" in determining whether a mitigation measure is feasible) (citing CEQA Guidelines § 15364; Pub. Res. Code § 21081(a)(3)); *see also* CEQA Guidelines § 15126.4(a)(5) (if a mitigation measure cannot be legally imposed, it need not be proposed or analyzed). A requirement to build all-electric that was not found in a building code would likely be preempted after *CRA*, as it would not fall under the EPCA exemption from preemption.

However, CEQA requires public agencies to analyze and mitigate the GHG impacts of a project. 14 C.C.R. § 15126.4(c) ("[L]ead agencies shall consider feasible means . . . of mitigating the significant effects of greenhouse gas emissions."). Thus, environmental review should identify the GHG emissions that would result from a project and propose feasible mitigation measures. These measures could include changes to the

project to reduce its emissions or the requirement to acquire offsets. *See id.* § 15126.4(c)(2), (3) (measures to mitigate GHG effects may include "[r]eductions in emissions resulting from a project through implementation of project features, [or] project design" and "[o]ff-site measures, including offsets that are not otherwise required, to mitigate a project's emissions").

A well-designed offset program, focused on local measures that provide co-benefits in terms of reducing air pollution, as well as GHG emissions, is an option available to address a project's GHG emissions. As an alternative to offsets, a public agency could include, but not require, the option to build all-electric as a measure to mitigate GHG emissions. For example, mitigation options could include GHG offsets *or* building all-electric. In such a case, the agency would not be *requiring* a building to be all-electric, but would be giving the builder the option to choose to build all-electric.

Agencies could facilitate this approach by adopting general plan policies that condition the issuance of permits for new construction, including building permits, on the requirement that they reduce greenhouse gas and air pollution emissions.

C. Local governments could adopt a reach code incentivizing electric appliances that comports with EPCA's criteria for building code regulations

Following the *CRA* decision, local governments are still authorized to adopt electric-preferred reach codes for residential buildings, as long as they meet EPCA's requirements for regulations adopted in building codes for new buildings. A reach code is a modification to the state Energy Code (Part 6 of Title 24) or to CALGreen (Part 11 of Title 24). Local governments are authorized to enforce their own "energy conservation or energy insulation standards" in such a reach code if they find that their standards will be cost effective and the CEC finds that the local standards will require buildings to achieve the same energy reductions as permitted by the CEC's own rules and regulations. Pub. Res. Code § 25402.1(h)(2); 2022 Title 24, Part 1, § 10-106(a)2.

An electric-preferred reach code is tied to the state energy standards' compliance pathways. The state standards include two general compliance pathways: a prescriptive pathway, which provides a set of approved options for builders to use, and a performance pathway, which provides an overall energy budget a builder must meet. An electric-preferred reach code would set a higher energy budget in the performance path for mixed-fuel buildings than for electric buildings, thereby incentivizing electric buildings.

The *CRA* decision does not directly support a preemption challenge to an electric-preferred ordinance. The decision's scope is limited to regulations that "prohibit"

or "prevent" the use of covered appliances. *CRA*, 65 F.4th at 1051, 1052. Accordingly, if a reach code strongly encourages use of electric appliances, rather than prohibiting use of gas, it would not fall directly within the scope of the court's holding. Additionally, the *CRA* court was deciding whether the gas ban was a regulation concerning "energy use [or] energy efficiency" of appliances in the first instance, whereas an electric-preferred reach code is more clearly a regulation of the energy efficiency of appliances. As such, to avoid preemption, an all-electric reach code needs to satisfy EPCA's seven criteria for an exemption from preemption. While there is a strong argument that an electric-preferred reach code would satisfy these criteria, a challenger may nonetheless allege that such a code conflicts with one or more of these criteria. Although a detailed analysis of the seven EPCA criteria is beyond the scope of this memo, we note that numerous local governments have adopted such an approach and not been challenged.

Moreover, local governments with an electric preferred ordinance are not requiring builders to use more efficient appliances than EPCA mandates because they have the option to build all-electric. Although one federal district court rejected the argument that the existence of a non-preempted compliance path could save a preempted compliance path (*Albuquerque*, 835 F.Supp.2d 1133, 1136), that interpretation conflicts with the plain language of EPCA's provision outlining the exemption from preemption, which applies to a "code" overall. 42 U.S.C. § 6297(f)(3). And, the Ninth Circuit arguably rejected the *Albuquerque* court's approach when it held that the Washington state code did not "require" the use of federally preempted appliances when it merely included the option to use such appliances. *Building Industry Ass'n of Washington v. Washington State Bldg. Code Council*, 683 F.3d 1144 (9th Cir. 2012). Accordingly, local governments have a credible response to such a challenge.