



**Department:** Administration  
**Cost Center:** 1005  
**For Agenda of:** 4/18/2023  
**Placement:** Consent  
**Estimated Time:** N/A

**FROM:** Christine Dietrick, City Attorney  
**Prepared By:** Chris Read, Sustainability Manager

**SUBJECT:** ADOPT A RESOLUTION AUTHORIZING THE CITY MANAGER AND THE COMMUNITY DEVELOPMENT DIRECTOR TO ADMINISTRATIVELY SUSPEND ENFORCEMENT OF SAN LUIS OBISPO MUNICIPAL CODE CHAPTER 8.11, CONSISTENT WITH, AND ONLY AS REQUIRED BY, THE DECISION OF THE NINTH CIRCUIT COURT OF APPEAL RULING IN *CALIFORNIA RESTAURANT ASSOCIATION V. CITY OF BERKELEY* AND ANY SUBSEQUENT JUDICIAL PROCEEDING OR ORDER OF THE COURT RELATED TO THE TIMING AND APPLICATION OF THE RULING

## RECOMMENDATION

1. Approve by a two-thirds vote of the Council the late placement of this item on the amended public agenda for a vote based on findings, pursuant to Government Code Section 54954.2(b)(2), that:
  - a. There is a need to take immediate action to authorize the City Manager and Community Development Director to implement administrative measures currently necessary, or as subsequently may become necessary in response to subsequent judicial actions, to comply with the ruling of the Ninth Circuit Court of Appeal in *California Restaurant Association v. City of Berkeley (Case No. 21-16278)*; and
  - b. The need for action came to the attention of the City when the ruling was filed on April 17, 2023, subsequent to the agenda being posted as specified in subdivision Section 54954.2 (a).
2. Adopt a Draft Resolution entitled, "A Resolution of the City Council of the City of San Luis Obispo, California, authorizing the City Manager and the Community Development Director to administratively suspend enforcement of San Luis Obispo Municipal Code Chapter 8.11, consistent with, and only as required by, the decision of the Ninth Circuit Court of Appeal Ruling in *California Restaurant Association v. City of Berkeley* and any subsequent judicial proceeding or order of the Court related to the timing and application of the ruling."

## POLICY CONTEXT

Resolution [11159 \(2020 Series\)](#) adopts the Climate Action Plan for Community Recovery, includes the goal of carbon neutrality by 2035, and includes a building sector goal of zero operational greenhouse gas (GHG) emissions from new buildings.

## DISCUSSION

### Background

On August 19, 2020, Council approved the [City's Climate Action Plan for Community Recovery](#), and adopted [Resolution 11159 \(2020 Series\)](#), which includes the goal of carbon neutrality by 2035 and a building sector goal of zero operational greenhouse gas (GHG) emissions from new buildings.

To achieve City Council's adopted goals for emissions reductions in existing buildings, on June 16, 2020, Council unanimously approved the Clean Energy Choice Program for New Buildings (Program). The Program provided local amendments to the California Energy Code incentivizing all-electric new buildings. The Program concluded on December 31, 2022.

On July 19, 2022, City Council adopted Ordinance No. 1717 updating the Clean Energy Program for New Buildings to protect public health and safety by requiring all new buildings to be all-electric in Title 8 (Health and Safety) of the Municipal Code, similar to the approach taken by several other California cities. The ordinance went into effect on January 1, 2023.

### New Court Ruling

On April 17, 2023, the 9th Circuit District Court of Appeals made a ruling in the case of *California Restaurant Association v. City of Berkeley*. The Ninth Circuit found that the City of Berkeley's ban on installation of natural gas infrastructure was pre-empted by the federal Energy Policy and Conservation Act (EPCA), holding that EPCA does not permit localities to prohibit (indirectly or directly) use of natural gas appliances covered by EPCA. City staff are evaluating the potential implications of this ruling for existing City policy and are monitoring the next steps that will be taken by the City of Berkeley to determine whether a stay of the order will be sought and whether a petition for *en banc* review will be filed and granted.

In order to provide time for evaluation of the applicability of this particular court ruling before additional building permits are issued, staff recommends authorizing the City Manager and Community Development Director to temporarily suspend enforcement of Chapter 8.11 (All-Electric New Buildings), in consultation with the City Attorney as necessary to comply with the ruling and/or any subsequent judicial proceedings or orders that may be or become binding upon other cities. It is recommended that the City Council provide discretion to the appropriate staff to implement this suspension only to the extent necessary to comply with legal obligations. At this time, the next steps in the litigation and the binding nature of the ruling on parties beyond the immediate case participants is unclear. Nevertheless, the recommendation to authorize suspension of implementation of the ordinance is appropriate and prudent under the currently fluid circumstances.

Impact on Current Development Applications

The Community Development Department has not issued any permits for new buildings subject to Chapter 8.11, which went into effect on January 1, 2023. However, staff is currently reviewing applications for 75 building permits subject to Chapter 8.11 all-electric requirements. 60 of these permits belong to the San Luis Ranch or Avila Ranch developments, which are subject to all-electric requirements through pre-existing, negotiated development agreements.

The remaining 15 building permit applications are for 13 new ADUs, one new multifamily building (a 4-plex), and one new commercial building (a gas station). Suspension of enforcement for Chapter 8.11 would allow current applicants to resubmit the same projects with a mixed-fuel design, should they so choose. All applications pay a plan check fee at the time of submission prior to reviews beginning to ensure cost recovery for services. Under the current structure, these applications are not eligible for a refund of plan check fees since the review process has started. Eight of these applications (Six ADUs, one Multifamily, and one Commercial) have already been reviewed by a consultant, and as a result, the city has incurred roughly \$30,000 in costs for consultants performing the plan check. The remaining seven ADU applications are being reviewed in-house by the Building and Safety team.

Suspension of enforcement of Chapter 8.11 would also allow future permit applications for new mixed-fuel buildings to start the review process. However, should the decision be stayed or overturned by the full panel of the Ninth Circuit, and Chapter 8.11 continue to be implemented, or at some point reinstated following a suspension, building permits for non-vested projects would be processed based on rules in place at the time of building permit issuance.

**Previous Council or Advisory Body Action**

July 19, 2022 – City Council adopted the Clean Energy Program for New Buildings 2022 Program Update.

**Public Engagement**

Public comment on this item can be provided to the City Council through written correspondence prior to the meeting and through agenda comments at the meeting.

**CONCURRENCE**

The City Attorney’s Office concurs with this report.

**ENVIRONMENTAL REVIEW**

The California Environmental Quality Act does not apply to the recommended action in this report because the action does not constitute a “Project” under CEQA Guidelines Sec. 15378.

**FISCAL IMPACT**

Budgeted: No  
 Funding Identified: No

Budget Year: 2022-23

**Fiscal Analysis:**

<b>Funding Sources</b>	<b>Total Budget Available</b>	<b>Current Funding Request</b>	<b>Remaining Balance</b>	<b>Annual Ongoing Cost</b>
General Fund	\$0	\$0	\$0	\$0
State				
Federal				
Fees				
Other:				
<b>Total</b>	<b>\$0</b>	<b>\$0</b>	<b>\$0</b>	<b>\$0</b>

Suspending enforcement of Chapter 8.11 will result in an additional administrative burden, which can be supported by existing departmental staff time.

**ALTERNATIVES**

*Given limited situational clarity and information, and pending prospective additional judicial proceedings, it is staff's assessment that no reasonable alternatives exist in the near-term. Staff will return to Council to present additional information when available.*

**ATTACHMENTS**

- A - Draft Resolution authorizing suspension of enforcement of Chapter 8.11 (All-Electric New Buildings)
- B - Ninth Circuit Ruling filed April 17, 2023

RESOLUTION NO. \_\_\_\_\_ (2023 SERIES)

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN LUIS OBISPO AUTHORIZING THE CITY MANAGER AND THE COMMUNITY DEVELOPMENT DIRECTOR TO ADMINISTRATIVELY SUSPEND ENFORCEMENT OF SAN LUIS OBISPO MUNICIPAL CODE CHAPTER 8.11, CONSISTENT WITH, AND ONLY AS REQUIRED BY, THE DECISION OF THE NINTH CIRCUIT COURT OF APPEAL RULING IN CALIFORNIA RESTAURANT ASSOCIATION V. CITY OF BERKELEY AND ANY SUBSEQUENT JUDICIAL PROCEEDING OR ORDER OF THE COURT RELATED TO THE TIMING AND APPLICATION OF THE RULING**

**WHEREAS**, on July 19, 2022, City Council adopted Ordinance 1717 (2022 Series), now codified as City of San Luis Obispo Municipal Code Chapter 8.11 (All-Electric New Buildings); and

**WHEREAS**, on April 17, 2023 a three-judge panel of the Ninth Circuit Court of Appeal issued a decision holding that an ordinance of the City of Berkeley with similar objectives as the City's ordinance is preempted by the Energy Policy and Conservation Act of 1975; and

**WHEREAS**, it has been reported that the City of Berkely may seek *en banc* review and that the binding nature of the case on parties other than the litigants has not been finally resolved.

**NOW, THEREFORE, BE IT RESOLVED** by the Council of the City of San Luis Obispo as follows:

**SECTION 1. Authorization to Suspended Enforcement.** The City Manager and the Community Development Director shall be authorized to suspend enforcement of City of San Luis Obispo Municipal Code Chapter 8.11, consistent with, and only as required by, the decision of the Ninth Circuit Court of Appeal Ruling in California Restaurant Association v. City of Berkeley and any subsequent judicial proceeding and/or order of the Court related to the timing and application of the ruling.

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**SECTION 2. Notice.** Any action by the authorized officials suspending enforcement of Chapter 8.11 shall be in writing made publicly available for review and posted to the City’s website, and shall also be provided to affected development applicants in the City at the time of application, or as otherwise necessary to provide direct notice to applicants regarding the impacts of such actions on the processing of their applications.

Upon motion of Council Member \_\_\_\_\_, seconded by Council Member \_\_\_\_\_, and on the following roll call vote:

- AYES:
- NOES:
- ABSENT:

The foregoing resolution was adopted this \_\_\_\_\_ day of \_\_\_\_\_ 2023.

\_\_\_\_\_  
Mayor Erica A. Stewart

ATTEST:

\_\_\_\_\_  
Teresa Purrington  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
J. Christine Dietrick  
City Attorney

**IN WITNESS WHEREOF**, I have hereunto set my hand and affixed the official seal of the City of San Luis Obispo, California, on \_\_\_\_\_.

\_\_\_\_\_  
Teresa Purrington  
City Clerk

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