



## City Council Agenda Report

**Meeting Date:** September 10, 2024

**Prepared By:** Nick Zornes

**Approved By:** Jolie Houston

### **Subject: Resolution Suspending Enforcement of Los Altos Reach Codes**

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#### **COUNCIL PRIORITY AREA**

- Business Communities
- Circulation Safety and Efficiency
- Environmental Sustainability
- Housing
- Neighborhood Safety Infrastructure
- General Government

#### **RECOMMENDATION**

Adopt a Resolution of the City Council of the City of Los Altos suspending enforcement of the City of Los Altos Municipal Code, local laws and regulations imposing all-electric requirements for new construction or otherwise prohibiting use or installation of gas appliances contained within City of Los Altos Municipal Code Title 12 and find that this action is exempt from environmental review pursuant to Section 15061 of the State Guidelines implementing the California Environmental Quality Act of 1970.

#### **FISCAL IMPACT**

There is no fiscal impact to the City of Los Altos for the preparation of this report and resolution. However, should the City of Los Altos not suspend the enforcement of Reach Codes as described within the Draft Resolution the City is susceptible to legal challenge given the United States Court of Appeals for the Ninth Circuit conclusion in the California Restaurant Association v. City of Berkeley, 89 F.4th 1094 (9th Cir. 2024) case.

#### **ENVIRONMENTAL REVIEW**

This Ordinance is exempt from environmental review pursuant to Section 15061 of the State Guidelines implementing the California Environmental Quality Act of 1970.

#### **PREVIOUS COUNCIL CONSIDERATION**

November 29, 2022, City Council adoption of the existing Title 12 regulations.

#### **BACKGROUND**

On November 29, 2022, the City Council adopted the existing Title 12 regulations which, among other things, established the City’s Reach Codes with various requirements for electrification of development within the City. In general, the enactment of Title 12, the exiting building code

regulations within the City go above and beyond in various areas to further require additional electrification greater than the standard requirements established in the 2022 California Building Codes (CBC 2022).

The City Council adopted these all-electric building requirements in accordance with the City’s sustainability goals and policy plans, and by recommendation of the Los Altos Environmental Commission. The City drafted the existing regulations contained within Title 12, based on the 2020 Los Altos Reach Codes which were previously in effect, and the new 2022 California Building Codes. Initially the City planned to go beyond the existing regulations in place today dependent upon a comprehensive Cost Effectiveness Analysis from Silicon Valley Clean Energy (SVCE) however, the comprehensive Analysis was never produced and subsequently the United States Court of Appeals for the Ninth Circuit concluded Reach Codes to prohibit the use of gas fuel is preempted under the Federal Energy Policy and Conservation Act (EPCA).

**LEGAL CHALLENGE TO REACH CODES**

In July 2019, the City of Berkeley City Council adopted Ordinance No. 7,672—Prohibition of Natural Gas Infrastructure in New Buildings, which, subject to some exceptions, prohibited natural gas infrastructure in newly constructed buildings in the City of Berkeley. By its own terms, the ordinance sought to “eliminate obsolete natural gas infrastructure and associated greenhouse gas emissions in new buildings thereby reducing the environmental and health hazards produced by the consumption and transportation of natural gas.” In November 2019, the California Restaurant Association (CRA), an association of restaurant owners and chefs, filed a lawsuit in the United States District Court for the Northern District of California (“District Court”) against the City of Berkeley alleging that Berkeley’s ordinance banning natural gas infrastructure in new buildings is unenforceable because it is preempted by EPCA.

The District Court dismissed the lawsuit based on its finding that the EPCA did not preempt Berkeley’s ordinance banning natural gas infrastructure in new buildings because the ordinance did not directly regulate or mandate any particular type of product or appliance and its impact on consumer products was at best indirect. The CRA appealed the District Court’s ruling to the United States Court of Appeals for the Ninth Circuit, and the Ninth Circuit Court of Appeals reversed the District Court’s ruling and held that Berkeley’s ordinance is preempted by the EPCA.

In its decision, the Ninth Circuit Court of Appeals concluded that the EPCA expressly preempts state and local regulations, including building codes, concerning the energy use of covered natural gas appliances, and that the EPCA preemption applies to regulations addressing the appliances themselves and building codes that concern the use of natural gas. The Ninth Circuit Court of Appeals stated further that “by enacting [the] EPCA, Congress ensured that states and localities could not prevent consumers from using covered products in their homes, kitchens, and businesses.”

As a result of the Ninth Circuit Court of Appeals’ decision, the City of Berkeley settled the lawsuit, has repealed their gas ban ordinance, and decided not to seek further review of the decision by the U.S. Supreme Court due to the potential effects that could be rendered by the high court which would extend beyond the Ninth Circuit.

**ANALYSIS**

The Los Altos Municipal Code sections 12.22.010 and 12.22.020 expressly regulate or impose all-electric requirements on new construction of single-family residences, multi-family residences, with exceptions for cooking and fireplaces, and for non-profit restaurants. Therefore, under the Ninth Circuit Court of Appeals decision in the Berkeley case, these code sections as adopted today are preempted by the EPCA.

**DISCUSSION**

As mentioned above, the existing Los Altos Municipal Code Title 12 leaves the City of Los Altos susceptible to legal challenge given the conclusion of the Ninth Circuit Court of Appeals.

On July 29, 2024, the City of Los Altos received a letter from the law firm which represents the California Restaurant Association which is the group who formally challenged the City of Berkeley gas ban ordinance. Upon review of the Los Altos Municipal Code Title 12 it was found that the City of Los Altos ordinance is functionally indistinguishable from Berkeley’s Ordinance and is therefore preempted. The letter further requests the City of Los Altos to informally and amicably resolve this issue, which is why the draft resolution to suspend the all-electric requirements is before the City Council.

On August 14, 2024, the Los Altos Environmental Commission Electrification Sub-Committee presented recommendations to the Commission on methods to accelerate building electrification. Among other recommendations, the Environmental Commission Sub-Committee recognized that the 2022 Reach Codes are not enforceable due to the Ninth Circuit Court of Appeals conclusion. Furthermore, beyond other methods of accelerating electrification which will be covered in another item before the City Council the Environmental Commission unanimously recommends waiting for the New California Building Codes in 2025 before making further regulatory changes at the local level. By virtue of the Environmental Commission recommendations a formal suspension of the 2022 Reach Codes is consistent with local electrification policy recommendations of the community representatives.

**ATTACHMENTS**

- 1. Draft Resolution**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LOS ALTOS  
SUSPENDING ENFORCEMENT OF THE CITY OF LOS ALTOS MUNICIPAL CODE,  
LOCAL LAWS AND REGULATIONS IMPOSING ALL-ELECTRIC REQUIREMENTS  
FOR NEW CONSTRUCTION OR OTHERWISE PROHIBITING USE OR  
INSTALLATION OF GAS APPLIANCES CONTAINED WITHIN CITY OF LOS  
ALTOS MUNICIPAL CODE TITLE 12**

**WHEREAS**, on November 29, 2022, the City Council adopted Ordinance No. 2022-487 which, among other things, established the City’s first all-electric requirements for new construction; and

**WHEREAS**, subject to few exceptions, Los Altos Municipal Code (LAMC) Sections 12.22.010 and 12.22.020, enacted by and through Ordinance No. 2022-487, impose all-electric requirements on new construction of single-family residences, multi-family residences, with exceptions for cooking and fireplaces, and for non-profit restaurants. Opportunities to apply for exceptions were also available for non-residential buildings, laboratories and public buildings; and

**WHEREAS**, since the enactment of LAMC Sections 12.22.010 and 12.22.020, the United States Court of Appeals for the Ninth Circuit concluded in *California Restaurant Association v. City of Berkley*, 89 F.4<sup>th</sup> 1094 (9<sup>th</sup> Cir. 2024) that the Energy Policy and Conservation Act (42 U.S.C. §6297(c)), expressly preempts State and local regulations, including building codes, concerning the energy use of covered natural gas appliances and stated that the Energy Policy and Conservation Act preemption applies to regulations addressing the appliances themselves and building codes that concern the use of natural gas; and

**WHEREAS**, because LAMC Sections 12.22.010 and 12.22.020 expressly regulate the use of gas appliances covered by the Energy Policy and Conservation Act, the City Council finds that suspending enforcement of these LAMC Sections and any local regulations implementing these LAMC Sections or otherwise prohibiting use or installation of gas appliances contained within Title 12 is necessary in light of the Ninth Circuit Court of Appeals decision in the *California Restaurant Association* case.

**NOW, THEREFORE, BE IT RESOLVED**, that the City Council of the City of Los Altos does hereby ordain as follows:

**SECTION 1. SUSPENSION OF CERTAIN LAMC SECTIONS.** The City Council suspends enforcement of the LAMC Title 12 and any local laws and regulations imposing all-electric requirements or otherwise prohibiting use or installation of gas appliances, including, but not limited to, LAMC Sections 12.22.010 and 12.22.020.

This suspension shall apply to all applications for building permits or other development project entitlements including, without limitation, pending applications, new applications, requests for modification of pending applications, and requests for modification of previously issued permits or entitlements.

**SECTION 2. CONSTITUTIONALITY; AMBIGUITIES.** If any section, subsection, sentence, clause, or phrase of this Resolution is for any reason held to be invalid or unconstitutional,

such decision shall not affect the validity of the remaining portions hereof. Any ambiguities in the Los Altos Municipal Code created by this Resolution shall be resolved by the Director of Development Services, in their reasonable discretion, after consulting the City Attorney.

**SECTION 3. EFFECTIVE DATE.** This Resolution shall become effective immediately upon adoption.

**I HEREBY CERTIFY** that the foregoing is a true and correct copy of a Resolution passed and adopted by the City Council of the City of Los Altos at a meeting thereof on the 10<sup>th</sup> day of September 2024 by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

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Jonathan D. Weinberg, MAYOR

Attest:

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Melissa Thurman, CITY CLERK