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Energy Policy and Conservation Act/Berkeley, California, Building Code: Federal Appellate Court Addresses Preemption Issue

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The United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) addressed in an April 17th Opinion a challenge to a Berkeley, California, building code provision that prohibited the installation of natural gas piping within newly constructed buildings. See *California Restaurant Association v. City of Berkeley*, No. 21-16278.

The question addressed was whether the federal Energy Policy and Conservation Act (“EPCA”) preempted state and local regulations (such as the Berkeley building code) that had the effect of preventing the use of natural gas appliances.

The Berkeley, California, City Council in 2019 adopted an ordinance titled:

Prohibition of Natural Gas Infrastructure in Buildings (“Ordinance”)

The *Ordinance* is stated to have prohibited (with certain exceptions) natural gas infrastructure in newly constructed buildings.

The term “natural gas infrastructure” was defined to include:

... fuel gas piping, other than service pipe, in or in connection with the 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.

The term “newly constructed building” was defined to include:

... a building that has never before been used or occupied for any purposes.

The stated purpose of the *Ordinance* was to:

... eliminate obsolete natural gas infrastructure and associated greenhouse gas emissions in new buildings where all-electric infrastructure can be most practicably integrated, thereby reducing the environmental and health hazards produced by the consumption and transportation of natural gas.

The *Ordinance* stated that it was:

... in no way to be construed ... as requiring the use or installation of any specific appliance or system as a condition of approval.

The California Restaurant Association (“CRA”) filed an action in the United States District Court arguing that the EPCA and California law preempted the *Ordinance*.

The United States District Court held that the Ordinance does not facially regulate or mandate any particular type of product or appliance and held that the EPCA does not preempt it.

CRA appealed to the Ninth Circuit.

The Ninth Circuit agreed that by completely prohibiting the installation of natural gas piping within newly constructed buildings that Berkeley had:

. . . waded into a domain preempted by Congress.

The EPCA was stated to expressly preempt:

. . . state and local regulations concerning the energy use of many natural gas appliances, including those used in household and restaurant kitchens.

The Ninth Circuit noted that the Berkeley Ordinance did not directly ban appliances in new buildings. Regardless, it viewed the Ordinance as preempted because it prohibited natural gas piping into such buildings which rendered the gas appliances useless. It held that the EPCA preempted state and local regulations concerning the energy use of natural gas appliances which prohibits natural gas piping into new buildings, thereby preventing such appliances from using natural gas.

A copy of the Opinion can be downloaded [here](#).