



Office of the City Attorney

CONSENT CALENDAR

May 14, 2024

To: Honorable Mayor and Members of the City Council

From: Farimah Faiz Brown, City Attorney  
Lauren Packard, Deputy City Attorney

Subject: Repeal of Berkeley Municipal Code Chapter 12.80

RECOMMENDATION

Adopt first reading of an ordinance repealing Chapter 12.80 to the Berkeley Municipal Code (BMC), which bans natural gas infrastructure in new construction. In *California Restaurant Association v. City of Berkeley*, the 9th Circuit Court of Appeals found this ordinance unlawful. Repeal is required by the parties' settlement agreement and would resolve the litigation.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

In 2019, the California Restaurant Association sued to invalidate BMC Chapter 12.80. (*California Restaurant Association v. City of Berkeley* (N.D. Cal. 2021) 547 F.Supp.3d 878, *rev'd and remanded* (9th Cir. 2023) 65 F.4th 1045, and *rev'd and remanded* (9th Cir. 2024) 89 F.4th 1094.) While the trial court ruled in the City's favor, on April 17, 2023, a three-judge panel of the Ninth Circuit held that the BMC Chapter 12.80 was unlawful because it was preempted by the federal Energy Policy and Conservation Act. (*California Restaurant Association v. City of Berkeley* (9th Cir. 2023) 65 F.4th 1045.) On January 2, the Ninth Circuit denied the City's petition for a rehearing en banc. (*California Restaurant Association v. City of Berkeley* (9th Cir. 2024) 89 F.4th 1094.)

In Closed Session on February 5, 2024, City Council authorized the City Attorney to settle the underlying trial court litigation. On March 18, 2024, the California Restaurant Association and the City filed a notice with a court that a settlement agreement had been reached.

BACKGROUND

In 2019, the City unanimously adopted Ordinance 7672-N.S (the Ordinance). This groundbreaking ordinance added Chapter 12.80 to Title 12 of the Berkeley Municipal Code (BMC), which contains the City's health and safety measures. The Ordinance prohibited all "natural gas infrastructure" in newly constructed buildings, effective

January 1, 2020.” This Ordinance was an ambitious, first-of-its kind measure to address the public health, environmental, and climate harms stemming from natural gas combustion in buildings.

In 2019, the California Restaurant Association (CRA) challenged the City’s natural gas infrastructure ban in federal court. The District Court dismissed the case at an early stage, rejecting CRA’s claim that the Energy Policy and Conservation Act (EPCA) preempted the Ordinance. (*California Restaurant Association v. City of Berkeley* (N.D. Cal. 2021) 547 F.Supp.3d 878, *rev’d and remanded* (9th Cir. 2023) 65 F.4th 1045, and *rev’d and remanded* (9th Cir. 2024) 89 F.4th 1094.) The court did not reach CRA’s state-law preemption claims. Rather, the court dismissed these claims “without prejudice,” meaning that they can be refiled in state court.

On April 17, 2023, a three-judge panel of the Ninth Circuit overturned the District Court’s decision, holding that the Ordinance was “preempted” (rendered unenforceable) under EPCA, a federal act from the 1970s that sets energy conservation standards for certain residential and commercial appliances and also authorizes the federal Department of Energy to set energy conservation standards for these appliances. (*California Restaurant Association v. City of Berkeley* (9th Cir. 2023) 65 F.4th 1045, 1054; 42 U.S.C. § 6291 *et seq.*) EPCA includes an express preemption provision which provides that once a federal energy conservation standard for an appliance is in place, no state or local “regulation concerning energy efficiency [or] energy use” of such an appliance may be enforced. (42 U.S.C. § 6297(c).) The Court concluded that because the Ordinance sets a “quantity” of natural gas—zero—that lawfully can be consumed by covered appliances at their “point of use” in buildings—that it ran afoul of EPCA.

The City, joined by many legal experts and prominent amici curiae such as the federal government, a coalition of states, New York’s utility regulator, and a group of law professors from across the country, strongly disagreed with this reasoning. On May 31, the City filed a petition for rehearing by 11 randomly-selected Ninth Circuit judges (rehearing *en banc*), arguing that the 3-judge panel had fundamentally misread EPCA. On January 2, 2024, the court denied the City’s petition for a rehearing *en banc*, and slightly narrowed the scope of the panel’s opinion, but did not change its holding that BMC 12.80 is unlawful. Faced with no viable path for further defense of the Ordinance, the City Council authorized settlement of the litigation. A condition of settlement is that the City shall not enforce the Ordinance and that City Council shall consider an ordinance repealing it. If the City does not repeal the Ordinance, the District Court will issue a judgment against the City.

#### ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

Permitting natural gas infrastructure in new buildings will allow the release of natural gas-related greenhouse gases from new buildings and in the course of supplying natural gas to those buildings.

Repeal of BMC 12.80

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RATIONALE FOR RECOMMENDATION

The City has agreed not to enforce the Ordinance as a condition of settlement of the *California Restaurant Association* litigation. Repealing the Ordinance would resolve the litigation.

CONTACT PERSON

Farimah Faiz Brown, City Attorney, 510-981-6998

Attachments:

1: Ordinance

ORDINANCE NO XX,XXX-N.S.

ORDINANCE REPEALING BERKELEY MUNICIPAL CODE CHAPTER 12.80  
(PROHIBITION ON NATURAL GAS INFRASTRUCTURE IN NEW BUILDINGS)

BE IT ORDAINED, by the City Council of Berkeley, as follows:

Section 1. That Berkeley Municipal Code Chapter 12.80 is hereby repealed.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King, Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.