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VIA EMAIL

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Re: Impact of *Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094 (9th Cir. 2024) on Ordinance No. 3338

Dear Mr. Shen:

We write on behalf of the California Restaurant Association, as our firm has been asked to review the validity and enforceability of the City of Alameda's all-electric ordinance (No. 3338) (the "Ordinance") in light of the recent Ninth Circuit decision in *California Restaurant Ass'n v. City of Berkeley*, 89 F.4th 1094 (9th Cir. Jan. 2, 2024), which held that Berkeley's similar ordinance was preempted by federal law.

Upon reviewing the Ordinance, we have concluded it is functionally indistinguishable from Berkeley's and is therefore preempted. It does not appear that the City has taken steps to repeal or suspend enforcement of the Ordinance. We would prefer to resolve this issue informally and amicably and thus are reaching out to see whether further discussion would be helpful in resolving this situation short of an adversarial process.

The City's Ordinance adopts the 2022 California Green Building Standards Code with certain amendments. One of those amendments is the all-electric requirement set out in Section 13-10.3 of the Alameda Municipal Code, which requires that all newly constructed residential and nonresidential buildings be "all electric" or that they "contain[] no combustion equipment or plumbing for combustion equipment serving space heating (including fireplaces), water heating (including pools and spas), cooking appliances (including barbecues), and clothes drying, within the building or building property lines, and instead use[] electric heating appliances for service." Alameda Municipal Code, Chapter XIII (Building and Housing), Article I (Uniform Codes Relating To Building, Housing And Technical Codes), Sec. 13-10.3, Chapters 2 (Definitions), 4 (Residential Mandatory Measures) and 5 (Nonresidential Mandatory Measures). "Combustion equipment" is in turn defined as "[a]ny equipment or appliance used for space heating, water heating, cooking, clothes drying and/or lighting that uses fuel gas." *Id.* at Sec. 13.-10.3 Chapter 2 (Definitions).

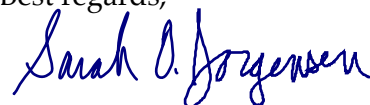
Yibin Shen
May 2, 2024
Page 2 of 2

The Ordinance is invalid and is not enforceable because it is preempted by federal law. Binding Ninth Circuit precedent compels that conclusion. In *California Restaurant Ass'n*, the Ninth Circuit held that the City of Berkeley's ban on natural gas infrastructure in new buildings was preempted by the federal Energy Policy and Conservation Act ("EPCA"), §§ 6201-6422. EPCA sets national energy policy, including federal energy conservation standards for residential and commercial appliances. To avoid a patchwork of conflicting state and local regulations, EPCA expressly preempts any state or local regulation "concerning the energy efficiency, energy use, or water use of" a covered appliance. 42 U.S.C. § 6297(c). As the Ninth Circuit explained, EPCA reaches building code provisions and preempts ordinances that, like Berkeley's, prevent the use of gas by covered appliances; although Berkeley banned gas piping instead of gas appliances, a local government cannot do "indirectly what Congress says [it] can't do directly." *Cal. Rest.*, 89 F.4th at 1106-07. The City's Ordinance, like Berkeley's ban, has the effect of preventing appliances from using gas. And like Berkeley's, the Ordinance does not qualify for any exception to preemption. In short, the Ordinance is indistinguishable from Berkeley's ban under the Ninth Circuit's reasoning and is therefore preempted.

Several other counties and cities have acknowledged this reality and repealed or suspended their gas bans as the law requires. Because continuing to enforce the Ordinance is unlawful, we request that the City Council repeal or suspend enforcement of the Ordinance, make a public announcement of that decision, and direct relevant officials not to apply the Ordinance to building permit applications.

We kindly request a response by May 23, 2024. If it would be helpful, we are happy to meet with you to discuss this matter.

Best regards,



Sarah O. Jorgensen

cc (via email): Alameda City Council (CITYCOUNCIL-List@alamedaca.gov)