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Ninth Circuit Cans Berkeley Gas Ban Under Federal Law: K&L Gates

On 17 April 2023, in *California Restaurant Association v. City of Berkeley*, the Ninth Circuit struck down a local ordinance banning natural gas piping in newly constructed buildings, concluding that federal law preempts the ordinance. This decision may have significant implications for similar state and local regulations, especially those in California and Washington. Building owners and operators, utilities, and other stakeholders impacted by natural gas “bans” or electrification mandates should consider whether their state or local regulation is affected.

California Restaurant Association v. City of Berkeley

In July 2019, the City of Berkeley, California (Berkeley or the City) adopted Ordinance No. 7,672-N.S., titled “Prohibition of Natural Gas Infrastructure in New Buildings” (Ordinance). The Ordinance amends the Berkeley Municipal Code to prohibit natural gas infrastructure in new buildings.² Natural gas infrastructure is defined as “fuel gas piping, other than service pipe, in or in connection with a building, structure, or within the property lines of premises, extending from the point of delivery at the gas meter.”³ By prohibiting natural gas piping in newly constructed buildings, Berkeley sought 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.”⁴

In November 2019, the California Restaurant Association (CRA) sued Berkeley in the U.S. District Court for the Northern District of California, arguing among other things that the federal Energy Policy and Conservation Act (EPCA)⁵ preempted the Ordinance. EPCA is a federal statute that regulates the energy efficiency of several consumer products, including water heaters; furnaces; stoves; and heating, ventilation, and air conditioning systems (together, covered products). EPCA does not cover piping, however. EPCA preempts state and local regulations concerning the energy efficiency, energy use, or water use of any covered product that has a federal energy conservation standard.⁶

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