



**CITY OF PALO ALTO  
CITY COUNCIL  
Special Meeting  
Monday, February 26, 2024  
Council Chambers & Hybrid  
5:30 PM**

<b>Agenda Item</b>
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14. Adoption of a Resolution Suspending Enforcement of Municipal Code Sections 16.14.090, 16.14.110 and 16.14.300 Requiring All-electric Construction and Direction to Staff to Commence Work on Local Amendments to the California Energy Code Establishing a One Margin Standard. CEQA Status – Not a Project. *Presentation, Public Comments*





## City Council Staff Report

**From: City Manager**

**Report Type: ACTION ITEMS**

**Lead Department: Planning and Development Services**

**Meeting Date: February 26, 2024**

Report #:2402-2644

### **TITLE**

Adoption of a Resolution Suspending Enforcement of Municipal Code Sections 16.14.090, 16.14.110 and 16.14.300 Requiring All-electric Construction and Direction to Staff to Commence Work on Local Amendments to the California Energy Code Establishing a One Margin Standard. CEQA Status – Not a Project.

### **RECOMMENDATION**

Staff recommends that Council:

1. Consider adopting a Resolution (Attachment A) suspending enforcement of Municipal Code sections 16.14.090, 16.14.110 and 16.14.300, which require new residential and non-residential buildings to be all electric, in light of the decision of the U.S. Court of Appeals for the Ninth Circuit in California Restaurant Association v. City of Berkeley; and,
2. Direct staff to return to Council with amendments to the California Energy Code as codified in Title 16 of the Palo Alto Municipal Code Building Regulations establishing a “One Margin” standard, which would allow for installation of natural gas plumbing while imposing more stringent energy efficiency and all-electric readiness requirements to all new buildings, which incentivizes the additional efficiency and lower emissions of all-electric equipment using clean electricity.

### **EXECUTIVE SUMMARY**

In the last five years, more than seventy U.S. cities and states have adopted regulations requiring or strongly incentivizing new building construction to be all electric. The first of these laws was passed in August 2019, in the City of Berkeley. In response to a court challenge the Ninth Circuit Court of Appeals found that Berkeley’s gas infrastructure ban is invalid because it is preempted by the federal Energy Policy and Conservation Act (EPCA). That decision is the final opinion of the



Ninth Circuit<sup>1</sup> and applies throughout the Ninth Circuit’s jurisdictional area, which includes California and many other western states. Moreover, the Ninth Circuit found that EPCA preemption applies to state and local building codes.

In support of its 80-by-30 and carbon neutrality goals, in November 2022 Palo Alto adopted a set of policies requiring that new construction and substantial remodels utilize all-electric design, effective January 2023.<sup>2</sup> In light of the Ninth Circuit decision, staff proposes that Council consider two parallel paths forward.

First, staff recommends that Council consider a temporary moratorium on enforcement of Palo Alto’s current all-electric requirement. For Council’s consideration, staff has prepared a Resolution (Attachment A) establishing a moratorium on enforcement of Municipal Code sections 16.14.090, 16.14.110, and 16.14.300 effective on adoption through December 31, 2024, or until further Council action, likely on adoption of an alternative electrification program. If adopted by Council, the Resolution would apply to pending and future development applications, including retrofits to add gas to already-constructed buildings, and to requests to modify previously-issued permits.

Second, staff recommends Council direction to pursue a replacement Reach Code. For a replacement Reach Code, staff is aware of various options being considered by other agencies and by environmental advocacy groups. Of these alternatives the codes most likely to conform to the EPCA-preemption standards set by the court in its decision is the “One-Margin” code. Staff believes timeliness is critical in adopting this code. Work for the 2026-2028 code cycle begins next year in 2025, so any replacement code the City adopts in 2024 will only be in effect for just over a year. Rather than considering and researching a variety of policy options, staff recommends Council provide direction to proceed with development of a One Margin code.

## **BACKGROUND**

### **Cities, Counties and States Adopt Building Electrification Requirements**

In the last five years, more than seventy U.S. cities and states have adopted regulations requiring or strongly incentivizing new building construction to be all electric. The first of these laws was passed in August 2019, in the City of Berkeley. Since then, dozens of cities and counties throughout the U.S., and several states, including Palo Alto, adopted all electric requirements for new buildings. The laws differ in a number of respects, including the type of regulation used (e.g. building code or health and safety regulation) and whether exceptions are made for certain uses

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<sup>1</sup> *Cal. Rest. Assoc. v. City of Berkeley*, 89 F.4<sup>th</sup> 1094 (9<sup>th</sup> Cir. 2024). The denial of *en banc* review includes a lengthy dissent from the denial, signed by 11 of the 50 active judges who participated in consideration of the petition for rehearing. While a dissent has no force of law, the dissenting judges explained in detail why they believe the original three-judge panel misinterpreted EPCA and reached the wrong result, in order “to urge any future court that interprets the Energy Policy and Conservation Act not to repeat the panel opinion’s mistakes.” *Id.* at p. 1119.

<sup>2</sup> <https://portal.laserfiche.com/Portal/DocView.aspx?id=59084&repo=r-704298fc>



or building types or can be requested based on feasibility or hardship. Lawsuits have been filed challenging many of these laws.

### **Palo Alto's All-Electric New Building Requirement**

In support of its 80-by-30 and carbon neutrality goals, in November 2022 Palo Alto adopted a set of policies requiring that new construction and substantial remodels utilize all-electric design, effective January 2023.<sup>3</sup> There is no provision for exceptions. The City implemented this all-electric policy through local amendments to the California Green Building Code. These amendments can be found in:

- PAMC Section 16.14.090 (for residential uses) – requiring “full electrification” for new buildings, substantial remodels, and new outdoor appliances/equipment such as grills, firepits, swimming pool heaters, and similar equipment. The Code prohibits plumbing for natural gas in addition to gas appliances. “Full electrification” is defined as “[a] building or parcel of land whose sole source of energy is electricity and contains no combustion equipment or plumbing for combustion equipment.”
- PAMC Section 16.14.110 (for residential uses) – requiring that Heat Pump Water Heaters be utilized for all existing structures replacing or adding a water heater.
- PAMC Section 16.14.300 (for non-residential uses) - requiring “full electrification” for new buildings, substantial remodels, and new outdoor appliances/equipment. The Code prohibits plumbing for natural gas in addition to gas appliances. “Full electrification” is defined as “[a] building or parcel of land whose sole source of energy is electricity and contains no combustion equipment or plumbing for combustion equipment.”

Note that the base California Energy Code (CEC) already includes several measures that effectively require heat pump space conditioning and water heating in Palo Alto's climate zone. Heat pumps are required for both space heating and water heating in new single-family homes, and for space heating only in new multifamily residences and most commercial uses. While the base CEC allows a developer to show that an alternative approach is just as energy-efficient as heat pump space and water heating, the vast majority of developers use the pre-approved path.

The City's local codes go further than the base California Energy Code by: (1) requiring electrification without allowing a theoretical alternative, (2) requiring electric appliances for cooking and accessory uses in new single-family homes, (3) requiring heat pump water heaters for new multifamily and commercial projects; and (4) requiring heat pumps when replacing a water heater.

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<sup>3</sup> <https://portal.laserfiche.com/Portal/DocView.aspx?id=59084&repo=r-704298fc>



## Legal Challenges to Local and State Building Electrification Laws

In adopting its all-electric requirement, Berkeley invoked its general police power to amend its Health and Safety Code to prohibit gas piping in new building construction.<sup>4</sup> In November 2019, the California Restaurant Association (“CRA”) sued Berkeley, alleging, among other things, that Berkeley’s gas infrastructure ban is invalid because it is preempted by the federal Energy Policy and Conservation Act (EPCA).

CRA is an association of restaurant owners and chefs, purportedly including members that seek to open or relocate a restaurant in a new building in Berkeley but for the ban on natural gas.<sup>5</sup> CRA has publicly stated that it believes other cities’ regulations would be similarly preempted by EPCA but sued Berkeley because it was the first city to adopt a local gas ban for new construction.

The federal trial court dismissed the suit, holding that EPCA preemption is limited to ordinances that directly regulate covered appliances.<sup>6</sup> CRA appealed to the Ninth Circuit. The U.S. Department of Justice and Department of Energy weighed in, and amicus briefs were filed by numerous state Attorneys General, associations of cities and counties, academics and interest groups.

On April 17, 2023, the Ninth Circuit issued a decision holding Berkeley’s regulation invalid because it is preempted by EPCA.<sup>7</sup> Berkeley sought rehearing from a larger *en banc* panel of Ninth Circuit judges. On January 2, 2024, the Ninth Circuit denied the request for *en banc* rehearing, with 39 of the 50 non-recused active judges declining to review the matter. The decision of the original three-judge Ninth Circuit panel was reissued with minor amendments that do not change the substance or reasoning of the opinion. That decision is the final opinion of the Ninth Circuit.<sup>8</sup> The Ninth Circuit decision applies throughout the Ninth Circuit’s jurisdictional area, which includes California and many other western states.<sup>9</sup>

Berkeley has 90 days from the denial of rehearing *en banc* to ask the U.S. Supreme Court to hear the case (approximately April 1, 2024). If Berkeley requests review, the Supreme Court has discretion whether to accept the case, and there is no specific time for the Court’s response. In practice, the Court accepts only a small fraction of the review petitions it receives. Berkeley has not announced whether it will seek Supreme Court review.

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<sup>4</sup> Berkeley Municipal Code, Chapter 12.80.

<sup>5</sup> *Cal. Rest. Assoc. v. City of Berkeley*, 547 F. Supp. 3d 878, 882 (N.D. Cal. 2021).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Cal. Rest. Assoc. v. City of Berkeley*, 65 F.4th 1045 (9th Cir. 2023).

<sup>8</sup> *Cal. Rest. Assoc. v. City of Berkeley*, 89 F.4th 1094 (9th Cir. 2024). The denial of *en banc* review includes a lengthy dissent from the denial, signed by 11 of the 50 active judges who participated in consideration of the petition for rehearing. While a dissent has no force of law, the dissenting judges explained in detail why they believe the original three-judge panel misinterpreted EPCA and reached the wrong result, in order “to urge any future court that interprets the Energy Policy and Conservation Act not to repeat the panel opinion’s mistakes.” *Id.* at p. 1119.

<sup>9</sup> The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Northern Mariana Islands.



Outside of the Ninth Circuit, legal challenges have been filed against electrification requirements in New York City and the State of New York.

### **The Ninth Circuit's decision in *California Restaurant Association v. City of Berkeley***

The initial issue in *CRA v. City of Berkeley* is whether CRA has sufficient standing to challenge Berkeley's regulation. To establish associational standing, an organization must demonstrate that (1) at least one of its members has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely, not merely speculative, that the injury will be redressed by a favorable decision.<sup>10</sup> Because the case came to the Ninth Circuit on appeal from an order granting a motion to dismiss—a preliminary motion that requires the court to assume the truth of facts pled in a complaint—the Ninth Circuit held that CRA's bare assertion that one or more of its members would open a restaurant in a new building Berkeley but for the all-electric ordinance was sufficient to establish standing, even without identifying an affected member, a specific location, or a plan or timeframe for opening a restaurant.<sup>11</sup>

After finding sufficient standing, the Circuit turned its focus to the Energy Policy and Conservation Act (EPCA). Congress adopted EPCA in 1975, in response to the OPEC oil embargo in 1973-74 that plunged the U.S. into a recession. The primary goals of EPCA were to increase energy production and supply, establish the Strategic Petroleum Reserve, reduce energy demand and require energy efficiency, and bolster the authority of the President and executive agencies to respond to disruptions in energy supply. Among other programs, EPCA established the Energy Conservation Program for Consumer Products, which gives the Department of Energy (DOE) the "authority to develop, revise, and implement minimum energy conservation standards for appliances and equipment."<sup>12</sup> As currently implemented, DOE enforces test procedures and minimum standards for more than 60 products covering residential, commercial and industrial, lighting, and plumbing applications. By its terms, EPCA implements a national energy policy and expressly preempts state and local regulations concerning the energy efficiency, energy use, and energy conservation standards for covered products.<sup>13</sup>

In *CRA v. City of Berkeley*, the Ninth Circuit held that the EPCA preempts Berkeley's ordinance because by banning gas piping in new construction Berkeley effectively rendered gas appliances useless even though gas service is available, thereby impermissibly regulating energy use by covered products. The court characterized Berkeley's regulation as an attempt to circumvent

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<sup>10</sup> *Cal. Rest. Assoc. v. City of Berkeley*, 89 F.4<sup>th</sup> at p. 1099, citing *Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 878 (9<sup>th</sup> Cir. 2013).

<sup>11</sup> *Id.*, p. 1100.

<sup>12</sup> 42 U.S.C. §§ 6291–6309.

<sup>13</sup> EPCA includes the following definitions: "Energy efficiency" means "the ratio of the useful output of services from a consumer product to the energy use of such product..." 42 U.S. Code § 6291(5). "Energy use" means "the quantity of energy directly consumed by a consumer product at point of use..." 42 U.S. Code § 6291(4). And "energy conservation standard" is defined, among other things, as "a performance standard which prescribes a minimum level of energy efficiency or a maximum quantity of energy use." 42 U.S. Code § 6291(6).



EPCA preemption by doing indirectly what Congress has said may not be done directly: “Berkeley can’t evade preemption by merely moving up one step in the energy chain and banning natural gas piping within those buildings. Otherwise, the ability to use covered products is ‘meaningless’ if consumers can’t access the natural gas available at the meter on the premises.”<sup>14</sup>

While the trial court had determined that the EPCA does not preempt Berkeley’s ordinance because the ordinance does not directly regulate either the energy use or energy efficiency of covered products<sup>15</sup>, the Ninth Circuit found that EPCA preemption is not limited to facial regulations of consumer products but rather reaches regulations that “concern” covered products (i.e., banning delivery of natural gas to appliances “concerns” the energy use of covered products).<sup>16</sup> The Ninth Circuit concluded that a regulation that imposes a total ban on natural gas is not exempt from the EPCA just because it lowers energy use to zero.<sup>17</sup>

Moreover, the Ninth Circuit found that EPCA preemption reaches state and local building codes since there would otherwise be no need for EPCA’s building code exemption.<sup>18</sup> The Circuit noted that there is “no doubt Berkeley’s ban, if adopted by States and localities throughout the country, would significantly burden the sale of covered products on a national basis.”<sup>19</sup>

Finally, in a tangential discussion that may become relevant to future electrification initiatives, the Circuit determined that its interpretation of EPCA does not conflict with the Natural Gas Act, which prevents the Federal Energy Regulatory Commission (“FERC”) from regulating local distribution of gas. While the trial court reasoned that an expansive interpretation of the EPCA would sweep into areas that the Natural Gas Act allocates to state and local government, requiring localities to continue providing natural gas in all but the rarest of circumstances<sup>20</sup>, the Ninth Circuit stated that finding EPCA preemption in this context does not necessarily require Berkeley to affirmatively make natural gas available everywhere. Rather, the Ninth Circuit stated that its decision is limited: the EPCA prevents Berkeley from banning gas piping from the point of delivery at the meter within new construction buildings. The Circuit stated that its holding does not address the question of whether Berkeley has any obligation to maintain or expand the availability of a utility’s delivery of gas to meters<sup>21</sup>, effectively leaving that question open for now.

## ANALYSIS

Staff proposes that Council consider two parallel paths forward. First, staff recommends that Council consider a temporary moratorium on enforcement of Palo Alto’s current all-electric requirement. As proposed, the moratorium would be in place until Council adopts replacement

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<sup>14</sup> *Cal. Rest. Assoc. v. City of Berkeley*, 89 F.4<sup>th</sup> at p. 1107.

<sup>15</sup> *Cal. Rest. Assoc. v. City of Berkeley*, 547 F. Supp. 3d 878, 891-892 (N.D. Cal. 2021).

<sup>16</sup> *Cal. Rest. Assoc. v. City of Berkeley*, 89 F.4<sup>th</sup> at p. 1103-1105.

<sup>17</sup> *Id.*, p. 1102.

<sup>18</sup> *Id.*, p. 1101.

<sup>19</sup> *Id.*, p. 1104 (internal quotations omitted).

<sup>20</sup> *Cal. Rest. Assoc. v. City of Berkeley*, 547 F. Supp. 3d 878, 891 (N.D. Cal. 2021).

<sup>21</sup> *Id.*, p. 1106.



reach code provisions—called One Margin—that staff, with Council direction, will bring forward as soon as possible. Second, staff seeks Council’s endorsement to pursue development of the One Margin program as the quickest way to implement strong incentives for new building electrification. Staff will continue to evaluate potential regulatory approaches for the Council to consider with the next cycle of Building Code regulations that are slated to come to Council in 2025, for 2026-2028.

### **Moratorium on Enforcement of PAMC Sections 16.14.090, 16.14.110, and 16.14.300**

Although Berkeley implemented its gas ban within its Health and Safety Code and Palo Alto implemented its gas ban as a local amendment to the California Building Standards Code, both ordinances prohibit installation of natural gas plumbing in new building construction, which the Ninth Circuit found to be preempted by the EPCA. Given this similarity, the City of Palo Alto faces legal risk if it were to continue enforcement of its blanket prohibition on natural gas plumbing in new buildings.

Following the Ninth Circuit’s April 2023 opinion in *CRA v. Berkeley*, state and local government agencies within the western region covered by the Circuit that have regulations prohibiting the installation or use of gas have repealed their regulations, suspended enforcement, or initiated substantial changes to the regulations.<sup>22</sup> Staff is not aware of a jurisdiction with a regulation similar to Palo Alto’s that is continuing active enforcement.

With the law in the Ninth Circuit settled (unless and until Berkeley asks and the U.S. Supreme Court accepts review of the matter and issues a stay of enforcement), project applicants are requesting clarification with respect to the all-electric requirement. Development Center staff have received inquiries or applications from approximately one dozen applicants seeking permission to install gas infrastructure to varying extents. This includes a number of applicants seeking to revise previously-approved permits to add gas infrastructure.

For Council’s consideration, staff has prepared a Resolution (Attachment A) establishing a moratorium on enforcement of Municipal Code sections 16.14.090, 16.14.110, and 16.14.300 effective on adoption through December 31, 2024, or until further Council action, likely on adoption of an alternative electrification program. If adopted by Council, the Resolution would apply to pending and future development applications, including retrofits to add gas to already-constructed buildings, and to requests to modify previously-issued permits.

### **Develop a One Margin Reach Code**

Following a moratorium, the City’s building code requirements would revert to the 2022 version of the California Code of Regulations, Title 24 Part 6 (California Energy Code) until a substitute is adopted by local ordinance. The current California Energy Code permits the construction of

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<sup>22</sup> This includes Washington state; the City of Eugene, Oregon; and the California Cities of Encinitas, Brisbane, San Luis Obispo, Sacramento, Santa Cruz, Menlo Park and San Jose.



mixed-fuel buildings but requires them to be highly energy efficient and electrification ready, i.e. constructed with the electric infrastructure (space in the electric panel and electric circuits) to accommodate future electric appliances. In practice, the California Energy Code is an “electric preferred” code, with mixed-fuel allowed but compliance being easier with all-electric equipment since it is difficult to comply with the California Energy Code without installing electric heat pump space and water heating systems.

In staff’s experience, most inquiries about constructing a mixed-fuel home relate to gas-fueled stoves, barbecue grills, outdoor fire pits, and fireplaces rather than space and water heating and it seems likely that new construction under the California Energy Code will follow this pattern. Moreover, because space and water heating account for the majority of GHG emissions from a building (as much as 80% to 90%), it is possible that reverting to mixed-fuel buildings will not result in significant increases in GHG emissions in the short term. The City can focus on outreach and technical assistance to encourage voluntary electrification in the short term to help mitigate GHG emissions from mixed-fuel buildings.

Local governments and environmental advocacy groups have identified three alternatives to all-electric requirements. They include:

- High-performance approach with additional efficiency requirements for new mixed-fuel buildings only (All-Electric Preferred reach code)
- High-performance approach with additional efficiency requirements for all new buildings (One Margin reach code)
- Emissions limit approach with local air quality requirements for nitrous oxides (NOx) or other greenhouse gases

Of these, the approach most likely to conform to the Ninth Circuit’s ruling in *CRA v. City of Berkeley* is the “One-Margin” reach code. The decision specifically acknowledges an exception within EPCA that allows for reach codes, provided they satisfy seven requirements.<sup>23</sup> The One-

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<sup>23</sup> 42 USC 6297 (3)“... [A] regulation or other requirement contained in a State or local building code for new construction concerning the energy efficiency or energy use of such covered product is not superseded by this part if the code complies with all of the following requirements:

(A) The code permits a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective.

(B) The code does not require that the covered product have an energy efficiency exceeding the applicable energy conservation standard established in or prescribed under section 6295 of this title, except that the required efficiency may exceed such standard up to the level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d).

(C) The credit to the energy consumption or conservation objective allowed by the code for installing covered products having energy efficiencies exceeding such energy conservation standard established in or prescribed under section 6295 of this title or the efficiency level required in a State regulation referred to in subparagraph (B) is on a one-for-one equivalent energy use or equivalent cost basis.

(D) If the code uses one or more baseline building designs against which all submitted building designs are to be evaluated and such baseline building designs contain a covered product subject to an energy conservation standard established in or prescribed under section 6295 of this title, the baseline building designs are based on



Margin reach code applies additional efficiency requirements to all new buildings, but takes into account energy use at the source, which favors the additional efficiency and lower emissions of all-electric equipment using clean electricity. It uses standard energy modeling practices to set its requirements rather than novel approaches like local air-quality standards. It does not discriminate between gas and electric appliances like an “Electric-preferred” code.

Given the significantly higher efficiency of electric heat pump equipment compared to gas equipment, it is easier to comply with the One Margin code with an all-electric design. In fact, the standards being established by most One-Margin codes currently being developed are high enough that while an all-electric home can meet them with thoughtful efficiency measures, a mixed-fuel home would require the highest level of efficiency and the addition of on-site solar and storage to meet the standards.

To date, the Cities of San Luis Obispo, San Jose, and Santa Cruz have also adopted One Margin reach codes. Those Cities also had ordinances prohibiting natural gas infrastructure in new construction. Staff expects it could bring a reach code amendment to Council as quickly as feasible later this year. The reach code amendment process also involves approval by State agencies. After the reach code amendment is adopted by Council, it needs to be submitted to the California Energy Commission (CEC). The CEC will verify that the reach code is at least as stringent as the base requirement of the California Energy Code and demonstrates cost effectiveness, and will then post the reach code for public comments for 60 days. Following the public comment period, CEC Commissioners will vote on the reach code at their business meeting. A final step includes the filing of the reach code with the California Building Standards Commission (BSC). Using the experience of San Luis Obispo, San Jose, and Santa Cruz as a guide, staff estimates the additional approvals will take four to five months.

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the efficiency level for such covered product which meets but does not exceed such standard or the efficiency level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d).

**(E)** If the code sets forth one or more optional combinations of items which meet the energy consumption or conservation objective, for every combination which includes a covered product the efficiency of which exceeds either standard or level referred to in subparagraph (D), there also shall be at least one combination which includes such covered product the efficiency of which does not exceed such standard or level by more than 5 percent, except that at least one combination shall include such covered product the efficiency of which meets but does not exceed such standard.

**(F)** The energy consumption or conservation objective is specified in terms of an estimated total consumption of energy (which may be calculated from energy loss- or gain-based codes) utilizing an equivalent amount of energy (which may be specified in units of energy or its equivalent cost).

**(G)** The estimated energy use of any covered product permitted or required in the code, or used in calculating the objective, is determined using the applicable test procedures prescribed under section 6293 of this title, except that the State may permit the estimated energy use calculation to be adjusted to reflect the conditions of the areas where the code is being applied if such adjustment is based on the use of the applicable test procedures prescribed under section 6293 of this title or other technically accurate documented procedure.



Thus, if the City were to pursue the One Margin reach code amendment, then time is of the essence. Because staff will begin it work on comprehensive building code updates for the 2026-2028 code cycle early next year, any replacement code the City adopts in the interim will be in effect for approximately one year. Rather than considering and researching a variety of policy options, staff recommends Council provide direction to proceed with development of a One Margin code. Staff would aim for fall of this year for adoption if possible. Staff will continue to track other approaches by state or local agencies, and if they appear viable staff can present them as policy options as part of the work on the updates for the 2026-2028 code cycle.

#### **FISCAL/RESOURCE IMPACT**

Staff expects that this effort will require up to 1.5 FTE of staff time combined for five to eight months and additional consulting costs to complete the One Margin code if Council directs staff to proceed. This effort will involve staff from both the Planning and Development Services (PDS) and Utilities Departments. Re-prioritization of work will impact other efforts, including Sustainability and Climate Action Plan (S/CAP) programs and studies and advancing the seismic upgrade ordinance.

If a Budget Amendment Ordinance is required it will follow in a separate report. Amendments or new contracts with consultants will likely be required (contract expenses are not expected to exceed \$500,000), and these will require Council approvals and may require sole source exemptions to the Purchasing Code due to the speed at which this project needs to move to fulfill Council environmental policy objectives.

#### **STAKEHOLDER ENGAGEMENT**

If directed to proceed with the One Margin code staff will develop a stakeholder engagement plan to share the draft code with key stakeholders including the developer, architecture, environmental, and contractor communities.

#### **ENVIRONMENTAL REVIEW**

Council action on this item is not a project as defined by CEQA because temporary moratorium and development of an alternate reach code is a general policy making activity. CEQA Guidelines section 15378(b)(2).

#### **ATTACHMENTS**

Attachment A: Resolution Suspending Enforcement of Municipal Code sections 16.14.090, 16.14.110 and 16.14.300.

#### **APPROVED BY:**

Jonathan Lait, Director of Planning and Development Services



NOT YET APPROVED

Resolution No. \_\_\_\_\_

Resolution of the Council of the City of Palo Alto  
Establishing a Temporary Moratorium on Enforcement of Palo Alto Municipal Code  
Sections 16.14.090, 16.14.110 and 16.14.300 (Requiring Full Electrification for New and  
Substantially Remodeled Residential and Commercial Buildings)

R E C I T A L S

A. On November 14, 2022, the Palo Alto City Council adopted an ordinance amending Title 16 of the Palo Alto Municipal Code, Chapter 14, by adding Sections 16.14.090, 16.14.110 and 16.14.300 (the “Electrification Requirements”) to support progress towards the City’s 80-by-30 carbon reduction goal by promoting electrification of new residential and commercial construction and substantial remodels.

B. The Electrification Requirements prohibit installation of combustion equipment or plumbing for combustion equipment in new residential and non-residential buildings, in substantial remodels of residential and non-residential buildings, and with respect to new outdoor appliances and equipment such as grills, firepits, swimming pool heaters, and similar equipment. The Electrification Requirements also require use of heat pump water heaters for all existing structures replacing or adding a water heater. The Electrification Requirements became effective January 1, 2023.

C. In the case of *California Restaurant Association v. City of Berkeley*, 89 F.4th 1094 (9th Cir. 2024), the United States Court of Appeals for the Ninth Circuit held that the state and local governments may not prohibit installation of gas piping in new construction because such regulations are preempted by the Energy Policy and Conservation Act (EPCA), 42 U.S. Code sect. 6201 *et. seq.*

D. The Palo Alto Council finds that suspending enforcement of the Electrification Requirements is appropriate at this time, pending potential further developments including, but not limited to, final resolution of *California Restaurant Association v. City of Berkeley* litigation or amendments to the EPCA and any rules promulgated thereunder.

NOW, THEREFORE, the Council of the City of Palo Alto does hereby RESOLVE as follows:

SECTION 1. Enforcement of Palo Alto Municipal Code Sections 16.14.090, 16.14.110 and 16.14.300 is suspended. This moratorium on enforcement is effective immediately on adoption of this Resolution and shall remain in place until repealed by Council or December 31, 2024, whichever is sooner. This moratorium on enforcement shall apply to all applications for building permits or other development project entitlements including, without limitation, currently-pending applications, new applications filed after adoption of this Resolution, requests for



NOT YET APPROVED

modification of pending applications, and applications for modification of previously-issued permits or entitlements.

INTRODUCED AND PASSED:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

ATTEST:

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City Clerk

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Mayor

APPROVED AS TO FORM:

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City Manager or Designee

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City Attorney

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Director of Planning and Development  
Services



The background of the slide is a photograph of a modern building's exterior. Large, three-dimensional white letters spell out 'CITY' and 'PALO ALTO' on the building's facade. The image is partially covered by a green geometric overlay on the right side.

# Item 14 – Resolution Suspending Reach Code Enforcement City Council





## Background

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- Since 2019 more than 70 US cities/states have adopted incentives or requirements for all-electric construction
- The City adopted its Reach Code Nov 2022, effective Jan 2023
  - Requires all-electric design for new buildings with no exceptions
  - Applies to some types of remodels
- City's existing code exceeds the State's Code, which:
  - Requires significant energy efficiency, making it far easier to comply with heat pump space and water heating
  - Mixed-fuel homes would require large solar and storage systems
  - Requires electrification readiness for mixed-fuel homes





# Legal Challenges to Building Electrification Laws

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- *California Restaurant Association v. City of Berkeley*
  - Challenge to Berkeley's ban on gas piping in new construction
  - Final 9<sup>th</sup> Circuit decision (1/2/2024) invalidated Berkeley's ban
  - Berkeley has 90 days to seek review in the U.S. Supreme Court
- Implications for Reach Codes in 9<sup>th</sup> Circuit Jurisdiction
  - 9<sup>th</sup> Circuit held that Federal Energy Policy and Conservation Act (EPCA) preempts state and local regulations for covered products
  - All-electric codes are very likely preempted
- Project applicants in Palo Alto are requesting clarification of the City's regulations





## Other Cities Actions

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- At least seven cities have suspended enforcement of their all-electric Reach Codes
  - Staff is not aware of any jurisdiction continuing enforcement
- Some cities have adopted alternatives
  - Zero NOx Code (Town of Los Altos Hills)
    - Uses State code section authorizing local agencies to establish air pollution standards stricter than State/Federal standards
  - One Margin Code (San Luis Obispo, Santa Cruz, San Jose)
    - Applies a single efficiency standard to all-electric and mixed-fuel buildings
    - Takes source energy into account (easier to meet with all-electric design)





## Staff Recommendation

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- Staff recommends suspending enforcement of Palo Alto's all-electric Reach Code
- Once enforcement is suspended, new construction would be subject to the State's Code
- Staff also recommends Council direct staff to pursue the One Margin Code approach for fall adoption
  - Staff evaluating resources required
- This code would apply through the end of 2025, when the 2026 – 2028 code cycle begins
- Staff can evaluate alternatives to the One Margin code when developing recommendations for the 2026-2028 code cycle





CITY OF  
**PALO  
ALTO**



**From:** [David Coale](#)  
**To:** [Council, City](#); [Shikada, Ed](#); [Abendschein, Jonathan](#); [Lait, Jonathan](#); [Eggleston, Brad](#)  
**Subject:** Suspension of all electric code  
**Date:** Monday, February 26, 2024 9:02:21 AM

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Dear Mayor and Council members,

It is too bad that Palo Alto is suspending it's all electric code for what is a technicality in the law suit brought against Berkeley for their ban of gas piping in new buildings. Berkeley is correct in calling out the health issues with gas use in buildings. The BAAQMD has passed a ruling that new appliances should produce zero Nox starting in 2027<sup>1</sup>, due to health issues with the combustion of natural gas. This rule however did not address gas cooktops in that BAAQMD does not address indoor air quality. This is, in my mind, another unfortunate technicality as gas cooktops produce much worse air quality and potential health issues (<https://www.mothersoutfront.org/news/gas-stoves-health-and-air-quality-impacts-and-solutions/>)<sup>2</sup> than the other gas appliances in the home.

With Staff's recommendations, Palo Alto will have three different sets of rules for gas use in the home within a year's time frame. Another unfortunate outcome of a technicality where no other city, accepting Berkeley, has had a problem with their gas bans. It would be best to just keep the codes the way they are until the change is ready to be put in place, reducing extra work and confusion of having three different rules.

In any event, the Development Center should be reminding all applicants that are looking to install gas cooktops, that according to real estate law, any item or condition that might affect the cost of a home upon sale, must be disclosed to the buyer. This would include gas cooktops as multiple studies have found that childhood asthma rates are 20% higher in homes with gas cooktops<sup>3</sup>.

Sincerely,

David Coale

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<sup>1</sup> FAQ on BAAQMD ruling for zero Nox appliances:  
[https://www.baaqmd.gov/~media/dotgov/files/rules/reg-9-rule-4-nitrogen-oxides-from-fan-type-residential-central-furnaces/2021-amendments/documents/20230522\\_faq\\_appliance-rules\\_final-pdf.pdf?rev=b425fe938f644fa7839f8d938cad41fd](https://www.baaqmd.gov/~media/dotgov/files/rules/reg-9-rule-4-nitrogen-oxides-from-fan-type-residential-central-furnaces/2021-amendments/documents/20230522_faq_appliance-rules_final-pdf.pdf?rev=b425fe938f644fa7839f8d938cad41fd)

<sup>2</sup> Study by Physicians for Social Responsibility, Rocky Mountain Institute, Sierra Club and Mothers Out Front. Many references cited in the appendix of this report.

<https://www.mothersoutfront.org/news/gas-stoves-health-and-air-quality-impacts-and-solutions/>



<sup>3</sup> Population Attributable Fraction of Gas Stoves and Childhood Asthma in the United States:

<https://www.mdpi.com/1660-4601/20/1/75>



**From:** [Andrea Eckstein Gara](#)  
**To:** [Council, City](#)  
**Cc:** [Hilary Glann](#); [aashton@gmail.com](mailto:aashton@gmail.com)  
**Subject:** Comment RE: Item 14, Feb. 26 Council Regular Meeting  
**Date:** Friday, February 23, 2024 5:39:30 PM

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Palo Alto City Council Members,

We, as environmentally concerned community groups, have been watching developments after the Berkeley 9th Circuit Court of Appeals decision closely. While we acknowledge that the city has an incentive to be conservative and avoid lawsuits, we also know that we cannot allow the chilling effect of this case to slow our response to climate change. Our S/CAP goals remain in place, and 2030 is not far away. Scientists have confirmed this past year that 2030 is indeed the date by which steep emissions cuts must be made.

We were also disheartened to see recently that Palo Alto did not meet a number of our climate goals for the past year, putting our 80 x 30 goal further in jeopardy. As Council considers One Margin as the model to replace our all-electric reach codes, here are some other steps that we would like to see taken:

1.  
The Berkeley decision focused on *EPCA covered indoor appliances*. **The city should continue to enforce parts of the reach codes that are not affected by the ruling, for example gas lines to outdoor appliances, such as fire pits and BBQs.**
2.  
We all know that, despite this set-back, electrification is coming due to state and regional regulations, such as BAAQMD and CARB rules on NOX-emitting appliance sales. **The city should continue to enforce and expand electrification readiness in remodels and new construction.**
3.  
Studies have shown that building electric-only multi-family homes is less expensive than dual-fuel homes. **The city needs to encourage developers, through incentives and through a streamlined permitting process, to build all multi-family homes with only electric power.** This could be done by utilizing bonus FAR or other development incentives if projects agree to electrification. This could apply to the approximately 2,000 Builders Remedy units that have been submitted to the city.
4.  
We are now entering a window of backsliding on our electrification goals, as new construction will continue without electrification mandates. The city should **enact One**



**Margin quickly to contain the damage.**

5.

Nevertheless, damage will be done as some residents are likely to opt for dual-fuel new construction. The city should consider **other steps that could be taken to make up for this S/CAP set-back.**

- a. Create near-term incentive (rebate) for replacement of older gas furnaces with heat pump HVAC systems, followed by development of a heat pump HVAC program modeled on the HPWH program.
- b. Fast-track action on other S/CAP goals, such as building housing near transit, increasing allowable density near transit, increasing the number of bike lanes/facilities and pedestrian connections within the city, charging for parking, and requiring unbundled parking at new developments, etc.
- c. Widen Tier 1 electricity pricing to cover more electric consumption, so that whole home electrification + EV ownership is not penalized.
- d. Continue appealing to the State for a legislative fix to the Berkeley setback.
- e. Lean into the pollution arguments against burning fossil fuels: ramp up the public awareness campaign about health dangers of burning methane gas inside the home, and in the community.
- f. f) Develop a public awareness campaign on how to use batteries large and small (including using the batteries in electric vehicles) to provide power to a home during an outage and/or develop a battery/backup strategy at different substations to keep a low level of power available at all Palo Alto homes.

Finally, the Berkeley decision does not address the gas distribution system, so **the ruling has no bearing on setting a gas sunset date.** Here is a quote from the [9th circuit opinion](#):

“...our holding here has nothing to say about a State or local government regulation of a utility’s distribution of natural gas to premises where covered products might be used.” (end quote)

**A gas sunset date, which is specified in our S/CAP goals, should be set quickly** for ease of planning and to accelerate the switch to electric buildings, getting us back on track



to meet our sustainability pledges.

Thank you,  
350 SV Palo Alto  
Palo Alto Forward



**From:** [bretande@pacbell.net](mailto:bretande@pacbell.net)  
**To:** [Council, City](#)  
**Subject:** Temporary Moratorium on Reach Code Enforcement, Feb 26 Council Agenda item 14  
**Date:** Friday, February 23, 2024 9:17:47 AM

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**Subject:** Temporary Moratorium on Reach Code Enforcement, [Feb 26 Council Agenda item 14](#)

Honorable Council Members and City Staff,

City staff is to present its proposal for a temporary moratorium on reach code enforcement at the next Council meeting. Their idea to switch to implement a One Margin reach code as soon as possible looks like a good way to minimize the duration of the suspension and avoid continued litigation risks.

We recommend the following actions to minimize the risk of backsliding on our new building electrification efforts.

- Consider implementing a “stranded gas asset” fee to pay for the permitting, installation and eventual decommissioning of new stranded gas assets that will unnecessarily burden existing gas customers. The state base code already requires mixed fuel buildings to be all-electric as the switch to electric appliances is inevitable while we transition away from gas.
- Clearly communicate that the suspension is temporary and limited. The suspension of the reach code is a temporary measure to avoid the risk of litigation created by a surprise court ruling. It also appears that the suspension should only apply to the extension of gas piping from existing meters to points within the new building. The staff report indicates that the city is under no obligation to continue or expand service to gas meters or to connect new gas meters:
  - From the Staff Report, p6: “Rather, the Ninth Circuit stated that its decision is limited: the EPCA prevents Berkeley from banning gas piping from the point of delivery at the meter within new construction buildings. The Circuit stated that its holding does not address the question of whether Berkeley has any obligation to maintain or expand the availability of a utility’s delivery of gas to meters effectively leaving that question open for now.”
- Use the announcement of the moratorium as an opportunity to reiterate the benefits of the city’s electrification investments in our community.
  - The city is establishing all-electric building codes in order to meet the



changing needs and desires of the Palo Alto community

- CPAU is helping customers avoid further investment in obsolete gas equipment and go all-electric in the interest of safety, health, efficiency, reliability, resiliency and economic savings. At the planning stage, a notice regarding the more serious indoor health risks of gas stoves ([reference link](#)) may additionally help people to avoid them in the first place.
- CPAU is investing over \$300M to maintain and modernize our electric grid to support a complete electric transition for all buildings, new and existing, by 2030.
- The most important steps for CPAU and building owners to take now is to avoid the installation of obsolete gas infrastructure that burdens us with extra costs and locks in damaging climate-harming carbon pollution for years.

Thank you for considering our perspective.

Carbon Free Palo Alto



**From:** [Ryan Palmer](#)  
**To:** [Council, City](#)  
**Cc:** [Chris Wade](#); [John Beard](#); [Lait, Jonathan](#); [Yang, Albert](#)  
**Subject:** Comment Letter // February 26, 2024 Meeting - Agenda Item 14 (Suspension of All-Electric Code Sections)  
**Date:** Thursday, February 22, 2024 1:18:00 PM  
**Attachments:** [CRW Comment Letter re Gas Ban Moratorium \(02-22-24\) \(01342810xA4507\).PDF](#)

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Good Afternoon – please see the attached comment letter from Christine R. Wade regarding the above referenced subject matter. Let us know if you have any questions or have trouble opening the attached.

Thank you,

**RYAN PALMER** | *PARALEGAL* | **SSL LAW FIRM LLP** | 505 Montgomery Street, Suite 620 | San Francisco, CA 94111 |  
Direct: 415.243.2680 | Cell: 415.652.0503 | Fax: 415.814.6401 | Email: [ryan@sslfirm.com](mailto:ryan@sslfirm.com)

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February 22, 2024

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***VIA EMAIL ONLY***

City Council  
CITY OF PALO ALTO  
Office of the City Clerk – City Hall, 7th Floor  
250 Hamilton Avenue  
Palo Alto, CA 94301  
[City.Council@cityofpaloalto.org](mailto:City.Council@cityofpaloalto.org)

***RE: FEBRUARY 26, 2024 MEETING, AGENDA ITEM 14;  
SUSPENSION OF ALL-ELECTRIC CODE SECTIONS***

Dear City Council Members,

We write on behalf of the owner of residential real property at 1325 Parkinson Avenue, Palo Alto, California 94303 in support of City staff's recommendation on Agenda Item 14<sup>1</sup> for the City Council to adopt a resolution suspending enforcement of Municipal Code sections 16.14.090, 16.14.110, and 16.14.300 ("**All-Electric Requirements**").

And, as discussed further below, we also write to confirm our understanding of the impact of the draft resolution, if adopted as is, on previously-issued building permits that required the removal of a property's gas connection and meter and with which the property owner has already complied.

**I. Recent federal case law compels the City to suspend enforcement of the All-Electric Requirements.**

We believe that the draft resolution is not only consistent with the recent decision by the United States Court of Appeals for the Ninth Circuit in *California Restaurant Association v. City of Berkeley*,<sup>2</sup> it is compelled by it due to the similarity between Berkeley's prohibition and the City's All-Electric Requirements.

Like Berkeley's prohibition on "natural gas infrastructure" (i.e., "fuel gas piping"), Palo Alto's All-Electric Requirements prohibit plumbing for combustion equipment in newly

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<sup>1</sup> Item 14 of the February 26, 2024 agenda: "Adoption of a Resolution Suspending Enforcement of Municipal Code Sections 16.14.090, 16.14.110 and 16.14.300 Requiring All-electric Construction and Direction to Staff to Commence Work on Local Amendments to the California Energy Code Establishing a One Margin Standard. CEQA Status – Not a Project."

<sup>2</sup> Case No. 21-16278, filed on April 17, 2023, as amended January 2, 2024 ("*CRA v. Berkeley*").



constructed buildings. (The All-Electric Requirements also prohibit such plumbing for existing buildings undergoing alterations or additions.) The *CRA v. Berkeley* court reasoned that the Berkeley prohibition was a building code that prohibits consumers from using natural gas-powered appliances. The All-Electric Requirements cannot be reasonably distinguished from the Berkeley prohibition—both concern gas piping and both can be considered “building codes” as discussed in *CRA v. Berkeley*.

Like City staff, we believe that “[g]iven this similarity, the City of Palo Alto faces legal risk if it were to continue enforcement of its blanket prohibition on natural gas plumbing in new buildings.” (City Council Staff Report for Item 14.)

## **II. Impact on previously-issued building permits.**

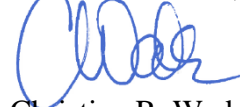
The draft resolution states, “This moratorium on enforcement shall apply to all applications for building permits or other development project entitlements including, without limitation, currently pending applications, new applications filed after adoption of this Resolution, requests for modification of pending applications, and applications of previously-issued permits or entitlements.” (Section 1.)

Our understanding is that the resolution would allow for property owners with previously-issued building permits for alterations or additions to their homes to re-install gas piping (and meters, etc.) for gas-powered appliances, even if they had previously removed such piping in accordance with their permits. We believe our position is supported by the Ninth Circuit’s decision in *CRA v. Berkeley*, and by City staff.<sup>3</sup>

We ask that the Counsel and/or staff confirm our understanding and comment on the steps such owners should take to reinstall gas piping.

Very truly yours,

SSL LAW FIRM, LLP



Christine R. Wade

cc: Client  
Jonathan Lait ([jonathan.lait@cityofpaloalto.org](mailto:jonathan.lait@cityofpaloalto.org))  
Albert Yang ([Albert.Yang@CityofPaloAlto.org](mailto:Albert.Yang@CityofPaloAlto.org))  
[all via email]

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<sup>3</sup> As stated in the City Council Staff Report, “If adopted by Council, the Resolution would apply to pending and future development applications, including retrofits to add gas to already-constructed buildings, and to requests to modify previously-issued permits.”