

MEMORANDUM

RE: Building Decarbonization: Legal Opportunities and Hurdles
for Local Governments

Executive Summary

This memorandum assesses the legal framework within which local governments can decarbonize new and existing residential and commercial buildings in California. Local governments' options to decarbonize development include legislative options, GHG mitigation fee requirements, and CEQA mitigation. Each of these options presents unique opportunities and obstacles, which are discussed in detail below. Our key findings are:

- Local jurisdictions may adopt a prohibition on the issuance of building permits for the installation of gas piping and valves between the meter and the appliance in new buildings and require capping of existing gas fixtures affected by a building permit. This prohibition should be based on local conditions, but jurisdictions do not need to show that these conditions are unique to them.
- It may be possible to adopt ordinances prohibiting natural gas appliances without requiring local changes to state energy efficiency standards as long as the ordinances do not set efficiency or conservation standards that are different from the state standards. Such ordinances may, however, require a local change to the California Energy Commission's energy standards under the provisions of state law applicable to building standards in Title 24.
- Federal appliance energy standards may have posed challenges to the adoption of local codes designed to achieve greater energy efficiency than state standards. However, electrification ordinances are not designed to impose greater efficiency standards than state law, and thus should not trigger federal preemption.

- Other options to incentivize or require new buildings to be built without on-site fossil fuel combustion and to transition existing buildings include establishing pollution emissions limits or fees, and imposing mitigation measures under the California Environmental Quality Act (“CEQA”).
- Regulation of existing buildings typically is possible through emissions limits or requirements to modify gas infrastructure or appliances when building remodels occur. Other triggering events requiring upgrades may be possible. However, to the extent such requirements implicate state building standards, local agencies need to make the findings required by state law that such requirements are justified by local conditions.

Analysis

I. Local Jurisdictions May Adopt Changes or Additions to Prohibit Gas Infrastructure in New Buildings Based on Local Conditions.

A. State Building Code Requirements.

Local governments have broad police power to make and enforce within their limits “all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Cal. Const. art. XI, § 7. However, local government authority to regulate building standards is limited by the requirement that all cities and counties adopt the state’s minimum building standards and other regulations contained in Title 24 of the California Code of Regulations (“Title 24”). Health & Safety Code §§ 17910 et seq., 17922, 17958. The state’s building standards and other rules and regulations contained in Title 24 are based on uniform or international codes. Health & Safety. Code § 17922.

Title 24 is also referred to as the California Building Standards Code. Title 24 undergoes review and revision every three years. The most recent update was issued in 2016 and is currently in effect (“2016 Title 24”); the next update was released in 2019 and will be effective in 2020 (“2019 Title 24”).

State law defines a “building standard” as “any rule, regulation, order, or other requirement . . . that specifically regulates, requires, or forbids the method of use, properties, performance, or types of materials used in the construction, alteration, improvement, repair, or rehabilitation of a building, structure, factory-built housing, or other improvement to real property, including fixtures therein, and as determined by the commission.” Health & Safety Code §§ 17920(c), 18909.

Notwithstanding the general requirement for cities and counties to adopt the building standards and other rules and regulations in Title 24, cities and counties may “amend, add, or repeal ordinances or regulations” addressing the same standards in the California Building Standards Code or the other regulations adopted pursuant to Section 17922. Health & Safety Code § 17958; *see also id.* at § 18941.5(b). To make these changes, the local jurisdiction must find that such local modifications “**are reasonably necessary because of local climatic, geological, or topographical conditions.**” Health & Safety Code §§ 17958, 17958.5, 17958.7 (emphasis added). The local government’s finding must be filed with the California Building Standards Commission (“CBSC”). *Id.* at § 17958.7(a). A local government may “prohibit the use of . . . materials, appliances, installations, devices, arrangements, or methods of construction” otherwise permitted by the Department of Housing and Community Development in alterations and repairs of existing buildings if it makes the findings that such modifications are justified by local climatic, geological, or topological conditions *Id.* at §§ 17922(f), 17958.5.

A local government may modify the state building codes based on local conditions even when these conditions do not deviate from the prevailing statewide conditions. *ABS Institute v. City of Lancaster* (1994) 24 Cal.App.4th 285, 294. In *ABS Institute*, the court upheld a city ordinance prohibiting the use of a certain type of pipe based on local concern for seismic and fire safety, water quality and solid waste, and conditions in the desert environment. *Id.* at 290-91. The court found that a city need not “establish that it has a peculiar, unusual or other deviant condition in order to justify a modification of a uniform code.” *Id.* at 294; *see also Building Industry Association v. City of Livermore* (1996) 45 Cal.App.4th 719, 727 (upholding a local ordinance requiring that new residential buildings have fire sprinkler systems due to local concerns about “dry, hot, windy summers in the City” leading to fires).

B. Local Ordinance Banning Gas Infrastructure in Buildings.

Local governments can adopt an ordinance prohibiting the issuance of building permits for the installation or retrofit of natural gas infrastructure in or around the building between the utility meter and gas burning appliances. Items within a local government’s explicit permitting authority include the hard piping, flexible piping, shut-off valves and fittings that accommodate gas appliances in permitted new construction and permitted retrofits. The local jurisdiction’s permitting responsibility and authority is described in 2016 Title 24, Part 4, Chapter 13, § 1302.2, providing “[p]iping system requirements” for fuel gas piping, including “design, materials, components, fabrications, assembly, installation, testing, inspection, operation, and maintenance.”

Before adopting a prohibition on gas infrastructure in new buildings, a local jurisdiction likely must make required findings that the deviation from the state Building Standards Code is reasonably necessary due to local climatic, geologic, or

topographic conditions. Regarding natural gas piping, appropriate justifications could include local earthquake hazards (geological) and local climate change related hazards (climatic). Although there is no case law directly addressing natural gas infrastructure, California case law provides examples of such local changes to building standards being upheld due to local climate, geological and topographical conditions. *City of Livermore*, 45 Cal.App.4th at 727 (upholding a local ordinance requiring that all buildings have fire sprinklers in response to local climate conditions); *City of Lancaster*, 24 Cal.App.4th at 294 (proximity to a fault line was part of the justification for a ban on certain types of pipes).

II. Local Governments May Adopt A Requirement to Use All-Electric Appliances.

Another legislative option is an ordinance requiring that all appliances¹ in a building be electric, or alternatively, that a building not use natural gas appliances. The first option would result in no appliances using natural gas, propane, or other fuel-gases; the second would provide the option to use propane in certain areas if needed. Either approach could potentially be used for existing development since it would not necessarily need to be tied to infrastructure in new buildings or alterations or repairs of existing buildings. For ease, we will refer to the two options together as requiring all-electric appliances. Such a requirement raises two issues: whether it must be adopted as a modification of the energy efficiency standards set forth by the California Energy Commission (or “CEC”) and whether it is a modification of a building standard.

The Public Resources Code requires the California Energy Commission to promulgate regulations for energy “efficiency” and energy “conservation design standards” for new residential and nonresidential buildings. Pub. Res. Code § 25402(a)(1), 25402(b)(1). The CEC’s energy standards are “performance standards” that are provided in terms of energy consumption per gross square foot of floorspace, but they may also include devices, systems, and techniques required to conserve energy. *Id.* The energy standards are also found in Title 24; in particular, Parts 6 (the Energy Code) and associated administrative regulations from Part 1 together form the Building Energy Efficiency Standards (the “Energy Standards”). The Energy Standards provide two general compliance pathways: a prescriptive pathway, which provides a set of approved options for builders to use, and a performance pathway, which provides an overall energy budget a builder must meet.

¹ We will refer generically to “appliances” as a shorthand for the following non-inclusive list of systems in buildings that are frequently powered by natural gas: water-heating, space-conditioning, cooking, and clothes-drying.

Every city and county is required to enforce the CEC's rules and regulations adopted pursuant to section 25402. Pub. Res. Code § 25402.1(g). However, a local jurisdiction may choose to enforce its own "energy conservation or energy insulation standards" (i.e., "Reach" codes) if it finds that its standards will be cost effective and the CEC finds that the local standards will require buildings to achieve the same energy reductions permitted by the CEC's own rules and regulations. *Id.* at § 25402.1(h)(2); 2019 Title 24, Part 1, § 10-106(a)2.

Read together, Public Resources Code sections 25402 and 25402.1 delegate to the CEC the authority to adopt "efficiency" and "conservation design standards" and authorize local jurisdictions to act within that sphere to enact "energy conservation and energy insulation standards" when they can make specific findings. Although neither term is defined in this chapter of the Public Resources Code (*see* Pub. Res. Code Div. 15, Ch. 2), a common-sense argument may be made that a requirement to use all electric appliances is neither an energy conservation nor an energy insulation standard. Instead, the purpose of such a requirement is to reduce greenhouse gas emissions, and to avoid the safety and health impacts associated with natural gas combustion and leaks.

Although local agencies must enforce the efficiency standards adopted by the CEC—i.e., they cannot allow for less efficient buildings than specified by the Energy Standards—nothing in the Public Resources Code delegation of authority to the Energy Commission preempts local jurisdiction over traditional police power issues, such as public health and safety.² Moreover, it is possible to comply with a requirement for all-electric appliances and the CEC's Energy Standards, which include both prescriptive and performance pathways for electric appliances (as of the 2019 standards). Thus, an argument may be made that an all-electric requirement does not require CEC approval, since it does not fall within the CEC's delegated realm of authority, and it is not one of the two types of local standards that expressly require CEC approval.

If a jurisdiction does, nevertheless, elect to adopt an all-electric ordinance as a Reach code, it should consider the full range of costs associated with natural gas appliances in making its finding of cost-effectiveness. CEC regulations simply require the local agency to make a finding of cost-effectiveness; they do not provide for review of that finding. Title 24, Part 1, § 10-106(a)(1). Therefore, local jurisdictions have considerable discretion to assess the costs of an all-electric ordinance, including avoided

² CEC regulations provide that any local ordinance related to energy requires CEC approval. *See* Tit. 24, Part 11, § 101.7.1(4) (requiring a local jurisdiction to obtain CEC approval "for any energy-related ordinance"). This statement of the CEC's jurisdiction appears too broad, but according to this interpretation, if an ordinance requiring electric appliances is considered an "energy related ordinance," it would need to go through the CEC process for approval of local deviations from statewide Energy Standards.

costs from extensions of the gas mains and service lines, the costs of gas piping in buildings, and the environmental and health costs of natural gas. *See e.g.*, Pub. Res. Code § 25000.1(c) (“In calculating the cost effectiveness of energy resources, including conservation and load management options, the commission shall include a value for any costs and benefits to the environment, including air quality.”)

Regardless of whether a local government seeks CEC approval of its all-electric requirement as a Reach code, an argument could be made that an all-electric standard is a modification of the CEC’s Energy Standards to the extent they are considered “building standards.” For instance, the CEC’s Energy Standards permit, but do not require, the use of propane and natural gas appliances. Therefore, it could be argued that a requirement for all-electric appliances is a change to these standards because it would explicitly prohibit the use of appliances otherwise allowed by the Energy Standards.

As discussed above, local jurisdictions may make changes to building standards based on local conditions. The CEC submits its Energy Standards to the State Building Standards Commission and appears to consider them to be building standards. *See* CBSC Approved Standards (Dec. 2018), *available at* <https://www.dgs.ca.gov/BSC/Rulemaking/18-Month-Code-Adoption-Cycles---Triennial-and-Intervening/2018-Triennial-Code-Adoption-Cycle/approved-standards-for-Dec-2018-Com-mgt>; *see also* Pub. Res. Code § 25402.2 (“[a]ny standard adopted by the [CEC] pursuant to Sections 25402 and 25402.1, which is a building standard” as that term is defined in statute, “shall be submitted to the State Building Standards Commission pursuant to, and is governed by, the State Building Standards Law (Part 2.5 . . . of Division 13 of the Health and Safety Code).” Health and Safety Code section 18941.5(b) recognizes that local jurisdictions may “establish more restrictive building standards, including, but not limited to, green building standards, reasonably necessary because of local climatic, geological, or topographical conditions.” Therefore, a requirement for all-electric appliances may need to go through the process for adopting modifications to state building standards discussed in section I above.

III. Consideration of Federal Appliance Standards.

A final consideration for local ordinances prohibiting gas appliances or infrastructure is the confluence of state energy efficiency requirements and federal appliance efficiency law. Federal law expressly preempts state laws requiring that certain appliances be more efficient than federal standards. *See* Energy Policy and Conservation Act, 42 U.S.C. § 6295 et seq.; *id.* at § 6316(b)(2)(A) (“A standard prescribed or established under section 6313(a) of this title shall . . . supersede any State or local regulation concerning the energy efficiency or energy use of a product for which a standard is prescribed pursuant to such section.”)

Neither an all-electric appliance requirement nor a prohibition on gas infrastructure is designed to regulate the energy efficiency or amount of energy used by an appliance. For example, local air districts have regulated NOx emissions from hot water heaters. *See e.g.* http://www.baaqmd.gov/~media/files/compliance-and-enforcement/advisories/combustion-equipment/adv_011708_9-6.pdf. Moreover, the 2019 Energy Standards appear to include viable compliance methods for all-electric construction, via prescriptive or performance compliance pathways. *See e.g.*, 2019 Residential Compliance Manual at §§ 5.4.1, 5.5.2. Where market forces incentivize the choice of more efficient appliances than federal standards require, no federal preemption concern arises. *See Building Industry Ass’n of Washington v. Washington State Bldg. Code Council* (9th Cir. 2012) 683 F.3d 1144, 1145 (where cost considerations outside of a building code “force [consumers] to select higher efficiency options” no preemption occurs.)

Therefore, as long as local ordinances do not require the use of appliances that are more efficient than federal standards, no preemption issue should arise—even if consumers or homebuilders find that the most economical way to meet the CEC’s energy efficiency standards and comply with the local ordinance is through the use of more efficient appliances than required by federal law.

IV. Legislative Options That Do Not Involve Modification of State Building Code or Energy Standards.

Other options are available that would not require a change to state building codes or energy standards. Some of these options, however, may not provide a direct route to regulating gas infrastructure across the board.

A. Local Ordinance Setting Emissions Limit for Buildings.

As an alternative to the legislative options expressly requiring electric appliances or prohibiting or precluding gas, local governments could instead set an emissions limit for buildings. New York City recently proposed to set a limit for on-site GHG emissions for buildings over 25,000 square feet. *See New York City Council Bill Int. 1253*. An emissions limit would be neither a building standard nor an energy standard and therefore would not be limited by the preemptive effect of state law discussed above. Additionally, an emissions limit could be applied to existing development. *See, e.g., New York City Council Bill Int. 1253* (applying to existing and new buildings).

Local governments in California are authorized to impose such limits. *See Health & Safety Code § 39002* (recognizing the right of “local and regional authorities” to “establish stricter standards than those set by law or by the state board for nonvehicular sources”). Additionally, state greenhouse gas regulations and plans developed by the

State Air Resources Board pursuant to the California Global Warming Solutions Act of 2006, or AB 32, encourage local governments to take voluntary efforts to achieve the state's greenhouse gas reduction goals. *See* California's 2017 Climate Change Scoping Plan at 19 (encouraging local governments "to reduce GHG emissions beyond those required by the State," and citing the potential for local governments to utilize "municipal code changes, zoning changes, or policy directions" to "promote the deployment of renewable, zero emission, and low carbon technologies").

An emissions limit could be set low enough to preclude the use of some or all natural gas. One implementation option would be to allow building owners to demonstrate compliance by not installing gas infrastructure (in new buildings) or by capping existing gas piping for existing buildings. This option would obviate the need to conduct emissions testing and reporting and would simplify administration.

Lastly, an emissions limit would also have the added benefit of reducing exposures to harmful air pollutants emitted by natural gas combustion, including formaldehyde and nitrogen dioxide. The burning of gas stoves has been documented to have profound indoor air quality impacts and expose millions of Californians to harmful levels of indoor air pollution. <https://newscenter.lbl.gov/2013/07/23/kitchens-can-produce-hazardous-levels-of-indoor-pollutants/> This memo does not include a comprehensive assessment of local government authority to regulate indoor air quality, but indoor air quality is not directly regulated by the California Air Resources Board or local air districts. Although the CEC has adopted some indoor ventilation requirements as part of the Energy Standards, it does not comprehensively regulate indoor air pollution. In addition to their authority under the Health and Safety Code section 39002, local governments have broad police power authority to regulate to protect public health and should consider regulatory efforts to reduce exposures to harmful air pollution from gas appliances.

B. Greenhouse Gas Mitigation Fee on Natural Gas.

Local governments might implement a GHG mitigation fee on the emissions from natural gas appliances or on buildings that burn natural gas. Regulatory fees are generally permitted under the Mitigation Fee Act (Gov. Code § 66000 et seq.). Although Proposition 26 severely curtailed the use of regulatory fees, it explicitly exempted charges "imposed for a specific benefit conferred" and charges "imposed as a condition of property development." Cal. Const. art. XIII C § 1(e)(1), (7).

Under the exception for charges imposed as a condition of property development, local jurisdiction can impose a fee on gas appliances or gas infrastructure in new development. *See 616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621, 630 (noting that "[c]ourts have held that fees like the ones here, which

are a condition of property development, are not special taxes.”) Such a fee would likely not be deemed a tax, and could be passed via a majority vote of the city or county’s legislative body. However, before adopting the fee, the local government must demonstrate that the fee will offset the impact of new development and the amount of the fee must be reasonably related to the cost of offsetting that impact. Gov. Code § 66001(a)(3), (b).

The concepts behind applying a fee on natural gas emissions from existing buildings have not been tested in court and would require the jurisdiction to carefully document the basis upon which it has developed the fee. One option would be to argue that a fee on natural gas appliances fits into the exception for charges imposed for a specific privilege granted to the payor. In this case, the privilege granted would be the ability to use natural gas as a fuel. As the exception notes, the charge must not exceed the “reasonable costs to the local government” of granting the privilege. Cal. Const. art. XIII C § 1(e)1. A local government would need to identify the costs of supporting the natural gas system, such as the costs of inspections, emergency services, and permitting of infrastructure in buildings. In addition, the local government would need to document the costs of addressing climate change in its jurisdiction and prorate that cost to the portion that is attributable to the gas system. Finally, the local government would need to show that the amount of the fee does not exceed this cost.

Local governments could also establish or partner with a third party to collect the fees associated with the use of natural gas, rather than collecting the fees themselves. Doing so would align with one court’s reasoning that where a fee is not remitted to the local government, it is not a tax. *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310. This court was persuaded by the fact that taxes under Prop. 26 are “limited to charges payable to, or for the benefit of, a local government.” *Id.* at 1329. Thus, where the local government does not receive or benefit from the charges, such a program might be outside the realm of a tax.

As one potential strategy to implement this concept, sellers of natural gas appliances would be required to collect a surcharge on gas appliances sold. The seller would then pay out the funds collected via the surcharge as rebates to buyers of electric appliances. Sellers could retain a small percent of the surcharges to cover the cost of implementing the program, or even for purposes of promoting sales of electric appliances.

Because each of these options for a fee on existing buildings would be an innovative use of the exceptions to Proposition 26, we recommend careful consideration and documentation before adoption. As an alternative, of course, agencies or members of the public could adopt new fees on existing development with a vote of the people.

C. CEQA Mitigation Options to Address the Impacts of Natural Gas.

A city or county could also use CEQA as a tool to require that any future construction resulting in significant GHG impacts be built without gas infrastructure and use all-electric appliances. CEQA applies to every discretionary decision by a public agency that could lead to a reasonably foreseeable change in the environment. Pub. Res. Code §§ 21065, 21068. Public agencies may not approve a project if feasible alternatives or mitigation measures are available that would “substantially lessen” the project’s significant environmental impacts. Pub. Res. Code § 21002. A project’s greenhouse gas emissions may result in a significant environmental impact. *Association of Irrigated Residents v. Kern County Bd. of Supervisors* (2017) 17 Cal.App.5th 708, 733-34. Thus, where a public agency finds that a development project has a significant environmental impact due to its greenhouse gas emissions, it may consider requiring that the development or any future build out be all-electric and/or be built without natural gas infrastructure.

For example, the City of Hayward recently proposed to mitigate the GHG impacts of its downtown specific plan by requiring that “[p]rior to the issuance of building permits for new development projects in the Specific Plan Area,” the applicant shall show that all multifamily residential buildings will be “all electric, meaning that electricity is the only permanent source of energy for water-heating, mechanical and heating, ventilation, and air conditioning, . . . cooking, and clothes-drying and there is no gas meter connection.” Hayward Downtown Specific Plan and Associated Zoning Code Update Draft EIR at 4.6-40, available at <https://www.hayward-ca.gov/downtown-specific-plan/draft-eir>.

CEQA could be a powerful tool to address the potential impacts of new development. However, CEQA only applies where the public agency is making a discretionary decision. In many local jurisdictions, the issuance of a building permit is not considered a discretionary decision. Moreover, CEQA includes a number of exemptions for small developments, repairs and limited modifications of existing development, and minor alterations of land. Therefore, CEQA will be of limited use in requiring electrification of individual single-family homes or remodels of existing homes.

Public agencies can facilitate the use of CEQA to mitigate new project impacts through the adoption of policies in their general plans and CEQA guidelines that require consideration of electrification for new developments with significant GHG impacts. However, to the extent that these policies would establish mandatory electrification standards for all new development, it would be preferable to adopt them through the ordinance option discussed in section I above.

V. Applications to Existing Development

Existing buildings may represent more of a challenge for decarbonization efforts than new construction. However, local governments should nevertheless be able to require that existing buildings undergoing renovations or alterations switch to all electric appliances. Building owners must comply with the State Building Code and Energy Standards when conducting repairs, remodels, and alterations to existing buildings. Many jurisdictions require permits for replacing existing appliances, including hot water heaters and furnaces. Therefore, as with requirements imposed on new construction, local governments could enact stronger fuel-specific requirements than the state minimums.

For example, local jurisdictions could require that additions or alterations of existing buildings include the capping of gas infrastructure or electrical upgrades. Health & Safety Code § 17922(f) (authorizing local governments to prohibit materials, appliances, installations, devices, arrangements, or methods of construction in the alteration or repair of existing buildings by local ordinance); *id.* at § 17958.8 (recognizing local ordinances or regulations governing alterations and repair of existing buildings). Or, local jurisdictions could apply the requirement for electric appliances to existing buildings by requiring a building permit whenever these appliances are replaced.

State law also permits local jurisdictions to require building retrofits to address seismic safety where a building is identified “as being potentially hazardous to life . . . or . . . in a condition that substantially endangers the health and safety of residents” in the event of an earthquake. Health & Safety Code § 17980.1. To the extent that gas infrastructure in existing buildings could pose a threat to life in the event of an earthquake due to dislodged or broken gas piping, a local government could potentially require abatement of the threat or retrofitting to local seismic building standards. *Id.*; *see also id.* at § 19161 (providing a list of potentially hazardous building conditions).

As a final consideration for retrofits, Health and Safety Code § 17958.8 provides that local ordinances “governing alterations and repair of existing buildings shall permit the replacement, retention, and extension of original materials and the use of original methods of construction” for buildings or portions thereof, so long as those comply with the building codes in place at the time of initial construction. *See also* Cal. Bill Analysis, Senate Floor, 2003-2004 Regular Session, Assembly Bill 1034. Because this section is drafted narrowly in terms of materials and methods of construction, it does not appear to preclude a local government from requiring that the building overall, or the portion that is altered, meet certain standards about fuel types or appliances.

VI. Existing Franchise Agreements with Natural Gas Providers.

A franchise agreement is a contract between a utility and a local government granting the utility the right to use public rights-of-way; in the case of a gas company, the rights conferred typically include laying pipes and appurtenances under city streets. *See, e.g., Southern California Gas Co. v. City of Santa Ana* (9th Cir. 2003) 336 F.3d 885, 887, 889 (describing gas franchise agreement and determining it is a contract). Although franchise agreements are contracts, they are “contractual in the sense that the utility and the municipality enter into the relationship by mutual agreement. [citation omitted.] However, the contract is required to contain the provisions dictated by the Legislature.” *County of Sacramento v. Pac. Gas & Elec. Co.* (1987) 193 Cal.App.3d 300, 308 fn.5.

The state Government Code authorizes cities and counties to grant franchises. *See* Gov. Code §§ 39732, 26001. Two state laws govern franchise agreements, the Broughton Act of 1905 (Cal. Pub. Util. Code §§ 6001-6017) and the Franchise Act of 1937 (Cal. Pub. Util. Code §§ 6201-6302). A city may grant a franchise under either statute; both provide conditions that apply to all franchises granted pursuant to their terms. Pub. Util. Code §§ 6001, 6202, 6204. Both also provide that local governments granting a franchise may impose additional terms not in conflict with state law that are in the public interest. *Id.* at §§ 6002, 6203. However, a city’s franchise agreement does not authorize a city to regulate utilities; only the PUC may exercise that power. *See* Cal. Const. Art. XII, § 8. Nevertheless, if renegotiation of a franchise agreement occurred, a city or county could consider imposing additional terms that do not conflict with the statutes and that are in the public interest, and that might make it more difficult to lay pipes in certain areas.

Franchise agreements are not likely to offer many opportunities to prohibit gas infrastructure. Instead, utilities may argue that existing franchise agreements limit the ability of local governments regulate natural gas infrastructure. In evaluating this claim, it is important to bear in mind that a franchise agreement confers a specific right, the right to lay pipes or conduits under city streets. *Southern Pacific Pipe Lines v. City of Long Beach* (1988) 204 Cal.App.3d 660, 666 (“A franchise is a privilege conferred upon an individual or a corporation for use of a sovereign body’s property.”) Public agencies cannot substantially impair the rights granted by a franchise agreement unless the impairment is “both reasonable and necessary to fulfill an important public purpose, such that the impairment is justifiable.” *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d at 889-90. An “impairment of a public contract is substantial if it deprives a private party of an important right, . . . thwarts performance of an essential term, . . . defeats the expectations of the parties, . . . or alters a financial term.” *Id.* (citations omitted). The *Santa Ana* court concluded that an ordinance imposing fees for digging trenches impaired an existing franchise with a gas company because it required the company to pay for a

right it already possessed. *Id.* In *Southern California Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209, the court found that Vernon could not regulate the depth of pipelines under city streets because the right to lay pipes under city streets had already been granted without restriction. *Id.* at 219.

Case law addressing impairment of a franchise agreement focuses on actions that impose additional restrictions on rights already conferred under the agreement. A prohibition on gas infrastructure in new or remodeled buildings or a requirement to use all-electric appliances does not impose additional restrictions on the right typically granted by franchise agreements—the right to use public streets for the laying of pipe. Nothing in a typical franchise agreement guarantees the utility the right to a constant stream of customers and local governments are not obliged to guarantee the profits of a utility. However, local governments should examine the terms of their existing franchise agreements to ensure that efforts to curb natural gas will not substantially impair that agreement.

It would also be prudent to consider a phase-in of any restrictions on existing development to allow property owners and utilities to adjust to the new regulatory regime. Courts have long recognized amortization periods as valid ways to balance the competing interests of a landowner's property rights and a local agency's need to implement regulatory changes to benefit public health and welfare. *Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 460. In *Gage*, for instance, the court held that a five-year period to phase out an existing plumbing business was reasonable after the property had been re-zoned to a residential use that prohibited such businesses. *Id.* at 461; *see also United Bus. Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 180 (reasonable amortization period satisfies due process requirements).

Conclusions

Local governments have several potential options to address the use of natural gas in buildings, the strongest of which, as discussed here, likely include ordinances banning natural gas infrastructure in buildings or requiring all electric appliances. Local governments could argue that such efforts do not require approval from the CBSC and/or CEC, but it may be most prudent to make the requisite findings to justify such ordinances. Other legislative options, like emissions limits or GHG fees, are promising approaches that avoid the potential limits of building and energy standards, but require careful documentation and consideration before implementation. Finally, CEQA mitigation measures can address the impacts of development on a case-by-case basis. These recommendations may change as issues continue to be discussed by members of the decarbonization coalition.