

## 2.11 Moratorium on Natural Gas Infrastructure Prohibition Ordinance.

### **Recommendation:**

Approve an ordinance amending Chapter 17.845 of Title 17 (*Prohibition of Natural Gas Infrastructure in Newly Constructed Buildings*), Section 17.845.010, of the San José Municipal Code to implement a moratorium on further City enforcement of Chapter 17.845 until local control over natural gas infrastructure is clarified or authorized.

CEQA: Not a Project, File No. PP17-008, General Procedure and Policy Making resulting in no changes to the physical environment. (Environmental Services/Planning, Building, and Code Enforcement)



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Kerrie Romanow  
Chris Burton

**SUBJECT:** Moratorium on Natural  
Gas Infrastructure  
Prohibition Ordinance

**DATE:** July 22, 2024

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Approved  Date: 8/1/24

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**COUNCIL DISTRICT:** Citywide

**RECOMMENDATION**

Approve an ordinance amending Chapter 17.845 of Title 17 (*Prohibition of Natural Gas Infrastructure in Newly Constructed Buildings*), Section 17.845.010, of the San José Municipal Code to implement a moratorium on further City enforcement of Chapter 17.845 until local control over natural gas infrastructure is clarified or authorized.

**SUMMARY AND OUTCOME**

In September 2019, the City adopted its first building “reach code” that included provisions to incentivize all-electric new construction. The City Council readopted similar provisions in September 2023 that went into effect as of October 1, 2023. In October 2019, City Council also adopted Chapter 17.845, *Prohibition of Natural Gas Infrastructure in New Single-Family, Low-Rise Residential Buildings, and Detached Accessory Dwelling Units* that was extended in December 2020 to all newly constructed buildings in San José, with limited exemptions, effective August 1, 2021. These increased building standards help reduce community-wide greenhouse gas emissions in line with the City’s Climate Smart San José plan and carbon neutrality by 2030 goals, provide financial benefits related to lower-cost electric construction, and support public health by decreasing air pollution emissions and exposure.

Recent federal legal decisions question the City’s ability to enforce its Natural Gas Infrastructure Prohibition Ordinance. The City’s building reach code, which was a backstop to the City’s Natural Gas Infrastructure Prohibition Ordinance, remains in place and enforceable. The City’s building reach code will continue to strongly incentivize the construction of all-electric buildings in San José. The proposed amendment will acknowledge the current legal direction and allow the City to enforce the City Council-approved ordinance if the current legal decision is overturned without requiring further City Council action.

## **BACKGROUND**

Every three years, the State of California updates its Technical Codes, including California Building Energy Efficiency Standards and the California Green Building Standards Code. Local jurisdictions may adopt and enforce “reach codes” to require development projects to exceed minimum state standards based upon geographical, topographical, or local climatic conditions. In September 2019, the City adopted its first building “reach code” that included provisions to incentivize all-electric new construction. The City Council readopted similar provisions in September 2023 that went into effect as of October 1, 2023.

In October 2019, City Council also adopted a separate Natural Gas Infrastructure Prohibition Ordinance that was extended in December 2020 to all newly constructed buildings in San José, with limited exemptions. The ordinance went into effect as of August 1, 2021. The Natural Gas Infrastructure Prohibition Ordinance essentially required, with limited exceptions, that all new building construction in San José be all-electric.

In *California Restaurant Association v. City of Berkeley*, 89 F.4<sup>th</sup> 1094 (9<sup>th</sup> Cir., 2023, as amended), the Ninth Circuit Court of Appeal held that the Energy Policy and Conservation Act expressly preempted the City of Berkeley’s ordinance banning the installation of natural gas piping in newly constructed buildings.

The City disagrees with the court ruling that the Energy Policy and Conservation Act, which provides federal control over the energy use of appliances, preempts a natural gas infrastructure ban. However, in light of the *Berkeley* decision, enforcement of the Natural Gas Infrastructure Prohibition in Chapter 17.845 is challenging. To provide clarification for the public, the proposed ordinance provides that when the law is settled that local control over natural gas infrastructure is permissible, the City will resume enforcement of Chapter 17.845.

## **ANALYSIS**

The *California Restaurant Association v. City of Berkeley* case is now final. Under the proposed ordinance, the City will resume enforcement of Chapter 17.845, *Prohibition of Natural Gas Infrastructure in Newly Constructed Buildings*, once the law is clarified that local control may be exercised over natural gas infrastructure.

Even without the enforcement of the City’s Natural Gas Infrastructure Prohibition Ordinance, the City’s building reach code, which was a backstop to the City’s Natural Gas Infrastructure Prohibition Ordinance, continues to be enforced. The building reach code strongly incentivizes all-electric new construction by requiring increased source energy compliance margins when the building is modeled in state-approved building modeling software. A source energy compliance margin reflects the baseline carbon

emission of a building as if it used carbon or traditional fuel. Compliance margins are calculated on the emission savings from that baseline so a higher source energy compliance margin equates to a more efficient building, which can most easily be met by all-electric building design.

Given how the reach code is structured, it will only affect the space and water-heating components of a building and will not hinder other end uses, process loads, or on-site generation. This means that the City's current reach code would not hinder the ability to build new natural gas distributed energy resources, such as natural gas fuel cells. Staff will continue to monitor and evaluate the impact of its building reach code for new construction to determine if additional City action is needed to support the City's building electrification goals.

### **Climate Smart San José Analysis**

The proposed ordinance update will reduce the City's ability to ensure that there is no new natural gas infrastructure associated with new construction in San José, thereby hindering the City's efforts to facilitate the energy efficiency of new homes and commercial buildings in alignment with Climate Smart San José goals.

### **EVALUATION AND FOLLOW-UP**

Staff will provide progress updates to City Council on Climate Smart San José activities, including the reach code, on a semi-annual basis.

### **COORDINATION**

This memorandum has been coordinated with the City Attorney's Office and the City Manager's Budget Office.

### **PUBLIC OUTREACH**

This memorandum will be posted on the City's Council Agenda website for the August 13, 2024 City Council meeting.

### **COMMISSION RECOMMENDATION AND INPUT**

No commission recommendation or input is associated with this action.

HONORABLE MAYOR AND CITY COUNCIL

July 22, 2024

**Subject: Moratorium on Natural Gas Infrastructure Prohibition Ordinance**

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**CEQA**

Not a Project, File No. PP17-008, General Procedure and Policy Making resulting in no changes to the physical environment.

**PUBLIC SUBSIDY REPORTING**

This item does not include a public subsidy as defined in section 53083 or 53083.1 of the California Government Code or the City's Open Government Resolution.

/s/

Kerrie Romanow  
Director, Environmental Services

/s/

Chris Burton  
Director, Planning, Building,  
and Code Enforcement

For questions, please contact Julie Benabente, Deputy Director, Environmental Services Department, at [Julie.Benabente@sanjoseca.gov](mailto:Julie.Benabente@sanjoseca.gov).

ORDINANCE NO. \_\_\_\_\_

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING CHAPTER 17.845 (*PROHIBITION OF NATURAL GAS INFRASTRUCTURE IN NEWLY CONSTRUCTED BUILDINGS*) OF TITLE 17 OF THE SAN JOSE MUNICIPAL CODE TO IMPLEMENT A MORATORIUM UNTIL LOCAL CONTROL OVER NATURAL GAS INFRASTRUCTURE IS CLARIFIED OR AUTHORIZED**

**WHEREAS**, pursuant to Sections 17922, 17958, 17958.5 and 17958.7 of the California Health and Safety Code, the City of San José (“City”) may adopt the provisions of the Green Building Standards Code and Building Efficiency Energy Standards with certain amendments to those provisions which are reasonably necessary to protect the health, welfare and safety of the citizens of San José because of local climatic, geological and topographical conditions; and

**WHEREAS**, the City Council affirms the findings in the Resolution for the Declaration of the Climate Emergency within the City and the City Council adopts and incorporates those findings into this Ordinance; and

**WHEREAS**, the City Council affirms the findings made in prior actions relating to Prohibition of Natural Gas Infrastructure including those contained in Kerrie Romanow and Rosalynn Hughey’s Memorandum dated August 21, 2019 and October 8, 2019, and the staff presentations including those at the September 17, 2019, October 29, 2019 and November 17, 2020 City Council meetings and incorporates them into this Ordinance; and

**WHEREAS**, the City remains committed to reducing the use of fossil fuels in buildings and decreasing the reliance on natural gas as set forth in the Climate Smart San José and Pathway to Carbon Neutrality by 2023; and

**WHEREAS**, this Ordinance was found to be categorically exempt from environmental review, per the provisions of the California Environmental Quality Act (CEQA) of 1970, as amended, 14 California Code of Regulations Section 15308, and Title 21 of the San José Municipal Code, under File Number ER20-202; and

**WHEREAS**, the City Council of the City of San José is the decision-making body for this Ordinance; and

**WHEREAS**, this Council has reviewed, considered, and approves the Statement of Exemption determination under CEQA prior to taking any approval actions on this Ordinance;

**NOW THEREFORE**, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Section 17.845.010 of Chapter 17.845 of Title 17 of the San José Municipal Code is amended to read as follows:

**17.845.010 Applicability**

- A. The requirements of this Chapter shall apply to the entitlement of or the processing of development applications for all Newly Constructed Buildings proposed to be located in whole or in part within the City.
- B. The requirements of this Chapter shall not apply to portable propane appliances for outdoor cooking and heating.
- C. This Chapter shall in no way be construed as amending Energy Code requirements under Title 24 of the California Code of Regulations, Part 6 or

Part 1, nor as requiring the use or installation of any specific appliance or system as a condition of approval.

D. The requirements of this Chapter shall be incorporated into conditions of approval for applications for permits under San José Municipal Code Titles 17 and 20.

E. This Chapter shall be operative at such time as the case law in *California Restaurant Association v. City of Berkeley*, 89 F.4<sup>th</sup> 1094 (9<sup>th</sup> Cir., 2023, as amended) is overturned or disapproved by a court of competent jurisdiction, or modified by the legislature to authorize local control of natural gas infrastructure; or the Energy Policy and Conservation Act (42 USC §6297) or other similar legislation is clarified or modified by the legislature or voters to authorize local control of natural gas infrastructure.

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PASSED FOR PUBLICATION of title this \_\_\_\_\_ day of \_\_\_\_\_, 2024, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

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MATT MAHAN  
Mayor

ATTEST:

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TONI J. TABER, CMC  
City Clerk