Farimah F. Brown, City Attorney, SBN 201227
Christopher D. Jensen, Deputy City Attorney, SBN 235108
BERKELEY CITY ATTORNEY'S OFFICE
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704
Telephone: (510) 981-6998
Facsimile: (510) 981-6960
cjensen@cityofberkeley.info

Attorneys for Defendant CITY OF BERKELEY

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CALIFORNIA RESTAURANT ASSOCIATION,

Plaintiff,

v.

CITY OF BERKELEY,

Defendant.

No. 4:19-CV-07668-YGR

REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(1) AND 12(B)(6)

Judge: Hon. Yvonne Gonzalez Rogers
Date: March 10, 2020
Time: 2:00 p.m.
Location: Courtroom 1, Fourth Floor

TABLE OF CONTENTS

TABLE OF AUTHORTIES

Federal Cases

I. INTRODUCTION

The jurisdictional and standing requirements of Article III of the U.S. Constitution ensure that federal courts decide actual disputes, and that the parties to those dispute have an actual stake in the outcome. Federal courts do not settle hypothetical disputes, and they do not provide litigants with answers to abstract questions of law untethered to an actual injury. These requirements serve the salutary purpose of insulating the courts from abstract political disputes. While impact litigation is not uncommon, there must always be a real person who has suffered a real injury if a plaintiff seeks to bring a case in federal court.

Here, Plaintiff has failed to find such a person. In its rush to bring this politically motivated challenge to the City of Berkeley's first-in-the nation Ordinance regulating Natural Gas Infrastructure, Plaintiff has skipped the steps of a developing a record and identifying an individual who has been or is even likely to be injured by the Ordinance. The Court lacks jurisdiction, and Plaintiff lacks standing to litigate these hypothetical and speculative claims.

Plaintiff almost concedes as much, admitting that this case must be brought, if at all, as a facial challenge to the Ordinance. But Plaintiff utterly fails to grapple with the requirements of pleading facts that could establish the facial invalidity of the Ordinance. Plaintiff simply cannot show that there is "no set of circumstances exists" under which the Ordinance would be valid. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

Plaintiff also fails to respond convincingly to the City's motion to dismiss the Complaint on the merits. With respect to Plaintiff's federal preemption claim, Plaintiff makes no effort to explain how a local ordinance regulating Natural Gas Infrastructure could be construed to set energy efficiency standards for federally regulated appliances. The City's Ordinance does not regulate appliances, does not regulate energy efficiency, and is not preempted by federal law. Plaintiff's strained attempt to argue around the plain meaning of EPCA's preemption language demonstrates just how farfetched this argument is.

Plaintiff's Opposition also attempts to brush off developments that have occurred since the filing of the Complaint that vitiate Plaintiff's state law claims. Since the Complaint was filed, the City has filed its Natural Gas Infrastructure Ordinance with the state Building Standards

Commission, undermining Plaintiff's claims related to the Building Standards Code. More recently, the California Energy Commission has confirmed that the Ordinance is consistent with the California Energy Code, reaching the common sense conclusion that an Ordinance that does not regulate energy efficiency does not set energy efficiency standards. Common sense compels the Court to reach the same conclusion.

These recent developments simply confirm what was apparent from the outset of this litigation: that this case is a premature, politically motivated, and baseless attack on Berkeley's attempt to grapple with the environmental and economic costs of continuing to install Natural Gas Infrastructure that will become obsolete as the City, state, nation, and world make a necessary and inevitable transition away from the consumption of fossil fuels. Whether based on the Court lack of jurisdiction or on Plaintiff's failure to state a claim upon which relief may be granted, the Court's should' dismiss all of the claims for relief in Plaintiff's Complaint with prejudice and enter judgment in favor of the City.

II. ARGUMENT

A. Plaintiff's Affirmative Defense Does Not Confer Subject Matter Jurisdiction on the Court, and Plaintiff Lacks Standing to Assert a Claim for Injunctive Relief.

Plaintiff's EPCA defense does not create federal question jurisdiction. It is black-letter law that "[a] defense is not a part of a plaintiff's properly pleaded statement of [a] claim" for purposes of establishing jurisdiction. *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998). There is no general exemption from the well-pleaded complaint rule for a preemption defense, and in particular, a plaintiff cannot create federal jurisdiction by asserting an affirmative defense as a claim for declaratory relief. *See Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985). Plaintiff's argument therefore turns on the theory that the Complaint pleads a valid claim for injunctive relief. It does not, because Plaintiff lacks standing to seek injunctive relief.

"Standing must be shown with respect to each form of relief sought, whether it be injunctive relief, damages or civil penalties." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citing *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). "[V]ague assertions of future harm are insufficient because such 'some

day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury required to establish standing to sue for injunctive relief." *Barrilleaux v. Mendocino Cty.*, 2016 WL 4269328, at *2 (N.D. Cal. Aug. 15, 2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (original alterations and quotation marks omitted)).

Plaintiff's alleged injuries are a textbook example of "vague assertions of future harm." The fact that Plaintiff alleges that it has members that do business in Berkeley (Complaint ¶ 8) does not mean that any particular member is likely to be harmed by the Ordinance. Indeed, the hypothetical injury upon which Plaintiff must rely depends on (1) the existence of a hypothetical, unidentified member of Plaintiff's organization who wishes to do business in Berkeley; (2) that member's decision to open a restaurant in a Newly Constructed Building in Berkeley; (3) that member's decision to request authorization to install Natural Gas Infrastructure in the restaurant; (4) the denial of that request by the City's Zoning Adjustments Board ; and (5) the denial of an appeal of the Zoning Adjustments Board's decision to the City Council. Plaintiff has not and could not meet the burden of showing that its members have suffered an actual injury that gives Plaintiff standing to seek injunctive relief.

Cole v. Oroville Union School District, 228 F.3d 1092 (9th Cir.2000), illustrates the flaws in Plaintiff's jurisdictional arguments. In that case, high school students sought injunctive relief to force their school to accept sectarian speeches at graduation, alleging that the school's policy forbidding such speeches violated their First Amendment Rights. *Id.* at 1097. The Ninth Circuit held that the students lacked standing, observing that their alleged injury "depends on the highly speculative assumption that a student seeking to give a sectarian speech or prayer will be chosen as valedictorian or salutatorian, or will be elected by classmates to deliver an invocation." *Id.* at 1100.

Plaintiff's injunctive relief claim relies on a similarly speculative chain of assumptions: there is no evidence that any of Plaintiff's members have identified restaurant space in a Newly Constructed Building in Berkeley, that the building's landlord would agree to lease that space to the member, or that the member would seek to install Natural Gas Infrastructure for purposes of

cooking and be denied permission to do so. Article III does not permit a federal court to grant injunctive relief based on this type of hypothetical future injury.

Moreover, the fact that Plaintiff attempts to allege that it has members that may someday seek to open a restaurant in a Newly Constructed Building in Berkeley and may someday seek to use natural gas for cooking in that restaurant is not sufficient to establish standing. For example, in *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Administration*, 860 F.3d 1228 (9th Cir. 2017) ("*DEA*"), a civil rights organization and individual intervenors sought to challenge the DEA's practice of issuing administrative subpoenas without a court order. *Id.* at 1233-34. The individual intervenors each took federally controlled drugs under an Oregon state program, but the administrative subpoenas that had been issued by the DEA did not seek records related to any of the intervenors. *Id.* at 1233. The court held that the intervenors fear that the DEA might someday subpoena their protected health information was "speculative" and failed to qualify as "concrete, particularized, and actual or imminent" injury that would allow them to seek injunctive relief. *Id.* at 1234–35 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013)). The hypothetical future injury to Plaintiff's members alleged here is not meaningfully distinguishable from the hypothetical future injury alleged in *DEA.*

Shorn of its speculative claim for injunctive relief, the only relief that Plaintiff's Complaint seeks is to prematurely litigate an affirmative defense based on federal preemption. The Court has no jurisdiction over this hypothetical affirmative defense, and should dismiss the Complaint on that basis.

B. Plaintiff's Hypothetical and Unsubstantiated Assertions of Injury Do Not Meet Plaintiff's Burden to Establish Standing with Respect to Plaintiff's Remaining Claims.

Plaintiff also lacks standing to assert the remaining claims for relief in the Complaint. The characterization of the Complaint as a facial challenge does not relieve Plaintiff of its burden to establish the requirements for Article III standing. The Ninth Circuit has made clear that neither "the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement" of Article III. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (citing *San Diego County Gun Rights*

Comm. v. Reno, 98 F.3d 1121, 1126–27 (9th Cir.1996)).

The standing requirements for the type of pre-enforcement review that Plaintiff seeks here are strict. The Ninth Circuit has required evidence an objectively demonstrable fear of enforcement, including "a 'concrete plan' to violate the law in question" (*Thomas*, 220 F.3d at 113 (citation omitted)) or evidence of actual, concrete economic injury, such as interference with the continued operation of an existing business. *See, e.g.*, *National Audubon Society, Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002) (trappers that currently earn a living through trapping have standing to challenge California law banning them from doing so). As with any basis for standing, an alleged economic injury must be (a) concrete and particularized, (b) actual or imminent, and (c) not conjectural or hypothetical. *Cent. Arizona Water Conservation Dist. v. U.S. E.P.A.*, 990 F.2d 1531, 1537 (9th Cir. 1993) (citing *Lujan*, 504 U.S. at 560).

Here, Plaintiff does not allege that any of its members has a "concrete plan" to violate the Natural Gas Infrastructure Ordinance, and by definition, limitations on Natural Gas Infrastructure in Newly Constructed Buildings cannot cause injury in fact to any of Plaintiff's members who may be operating an existing restaurant in an existing building in Berkeley. Thus, Plaintiff has not shown that any of its members conceivably could have standing to challenge the Ordinance.

At best, Plaintiff could argue that one or more of its members may someday wish to open a restaurant and cook with gas in a Newly Constructed Building in Berkeley. This type of hypothetical injury is routinely rejected as a basis for establishing standing. For example, in *Longstreet Delicatessen, Fine Wines & Speciality Coffees, L.L.C. v. Jolly*, 2007 WL 2815022 (E.D. Cal. Sept. 25, 2007), a Virginia wine merchant challenged a California law restricting shipments of wine into the state. The plaintiffs did not allege that there was any actual shipment of wine into California. The court held that the wine merchant's "desire to ship and receive wine and a deterrence to do so based on California law" was not sufficient to allege "actual or imminent harm" for purposes of establishing standing. *Id.* at *17.

In contrast, the cases Plaintiff cites as examples of pre-enforcement standing involve plaintiffs who were already in violation of the legislation at issue (*California Tow Truck Ass'n v.*

City & Cty. of San Francisco, 693 F.3d 847 (9th Cir. 2012); *Yakima Valley Mem'l Hosp. v Washington State Dept. of Health*, 654 F.3d 919 (9th Cir. 2011)), or that involve First Amendment claims, which are subject to relaxed standing requirements (*Knox v. Brnovich*, 907 F.3d 1167 (9th Cir. 2018)). Significantly, the plaintiffs in these cases alleged actual, concrete impacts on existing business. Here, in contrast, the alleged injury is an entirely speculative injury to a future, unidentified restaurant operator who may or may not seek to open a restaurant in a Newly Constructed Building in Berkeley and may or may not be granted permission to do so under one of the exemptions in the Natural Gas Infrastructure Ordinance.

Moreover, the speculative and hypothetical nature of Plaintiff's alleged injury goes well beyond failing to name a particular member impacted by the Natural Gas Infrastructure Ordinance. *National Council of La Raza v. Cegasvke*, 800 F.3d 1032 (9th Cir. 2015), makes clear that the impact to an organization's members must be "relatively clear, rather than merely speculative," even if no particular member is named. *Id.* at 1041. And the contrast between allegations of past and ongoing injury in *National Council of La Raza* to the hypothetical and speculative risk of future injury here is stark. *See id.* at 1040 (noting that the plaintiffs in *National Council of La Raza* had alleged that they had "expended additional resources" and "changed their behavior" as a result of the allegedly unlawful conduct).[1]

The speculative injury alleged in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009)—which *National Council de la Raza* distinguishes—is much closer to the alleged injury in this case. In *Summers*, the Court held that a statement by a specific member of the plaintiff organization that he planned to visit "several unnamed national forests in the future" was not sufficient to confer standing on the organization to challenge regulations related to the Forest Services' nationwide environmental review process. *Id.* at 495–96. The Court observed that

[1] Similarly, the two cases cited by Plaintiff involving the classification of truck drivers as employees or independent contractors involved trade associations whose members would have been actively subject to ongoing regulation absent injunctive relief from the court. *See Cal. Trucking Ass'n v. Becerra*, 2020 WL 248993 (S.D. Cal. Jan. 16, 2020); *W. State Trucking Ass'n v. Schoorl*, 377 F. Supp. 3d 1056 (E.D. Cal. 2019). There is no allegation of such an immediate injury here.

"[a]ccepting an intention to visit the national forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact." *Id.* at 496.

Here, Plaintiff's alleged injury is at even more speculative than the injury alleged in *Summers*—there is no specifically identified member, and no allegation that any of Plaintiff's members intend to open a restaurant in a Newly Constructed Building in Berkeley. This type of speculative, hypothetical harm to a hypothetical person cannot meet Plaintiff's burden to plead and prove standing. The Court should dismiss all of Plaintiff's claims for relief on that basis.

C. Plaintiff Cannot Overcome the High Barrier for Maintaining a Facial Challenge to the Natural Gas Infrastructure Ordinance.

Plaintiffs does not dispute that an as-applied challenge to the Natural Gas Infrastructure Ordinance is unripe, and agrees with the City's characterization of the Complaint as a facial challenge to the Ordinance. That alone should require dismissal all of Plaintiff's claims.

Facial challenges to legislation "often rest on speculation" and for that reason are disfavored. *See, e.g.*, *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 962 (9th Cir. 2014). To prevail on a facial challenge, the plaintiff "must establish that no set of circumstances exists under which the Act would be valid." *Morrison v. Peterson*, 809 F.3d 1059, 1064 (9th Cir. 2015) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). In other words, the plaintiff must prove that "the law is unconstitutional [or otherwise unlawful] in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *Salerno*, 481 U.S. at 745). The Ninth Circuit applies this standard to facial challenges based on federal preemption. *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016); *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008).

Sprint is illustrative of the "unique burdens imposed on facial challenges." *See Puente Arizona*, 821 F.3d at 1103. The case involved a San Diego County ordinance regulating the placement of cellular sites based on aesthetics, feasibility, and other considerations. *Sprint*, 543 F.3d at 574-75. Permit applications were subject to a discretionary permitting process adjudicated by the county zoning board. *Id.* The plaintiff brought a facial challenge to the

ordinance, arguing that it was preempted by the Federal Telecommunications Act because it "effectively prohibited" the provision of cellular service. *Id.* at 580. The court rejected the facial challenge, concluding that the availability of a discretionary permitting process prevented the plaintiff from "meet[ing] its high burden of proving that no set of circumstances exists under which the Ordinance would be valid." *Id.* (citation, original alteration, and quotation marks omitted). The court contrasted the ordinance in question with a hypothetical ordinance that required wireless antennas to be located underground, which would render their operation infeasible in *all circumstances*. *Id.*

As discussed in the City's Memorandum, the Natural Gas Infrastructure Ordinance is enforced through a discretionary review process before the City's Zoning Adjustments Board. The general prohibition on Natural Gas Infrastructure in Newly Constructed Buildings is limited by two exceptions: a general discretionary exemption that applied when the installation of Natural Gas Infrastructure "serves the public interest," and an exemption that applies whenever it is not feasible to comply with the California Energy Code using all-electric construction. Request for Judicial Notice ("RJN"), Exh. 1 §§ 12.80.040.A.1, 12.80.050.A. With respect to the second exemption, Plaintiff does not contend that California Energy Code standards conflict with federal law, and as explained below, those state standards are developed based on and are consistent with federal minimum energy efficiency requirements. *See* Section II.D, *supra*. Thus, the Ordinance's "feasibility" exemption is specifically tailored to avoid conflict with state and federal energy efficiency standards, and allows the Ordinance, as applied, to avoid state and federal preemption.[2]

Set against this specifically crafted exemption is Plaintiff's broad-brush facial challenge to the Ordinance, which can charitably be described as alleging a hypothetical and indirect conflict between an Ordinance regulating where new natural gas piping is allowed and a federal

[2] Plaintiff's Complaint also clearly articulates a basis for asserting the public interest exemption in BMC § 12.80.050.A, alleging that the use of natural gas is necessary to cook "flame-seared meats" and "charred vegetables" and for cooking certain "international foods." Complaint ¶ 5. The availability of the public interest exemption provides an alternative ground for rejecting Plaintiff's facial challenge to the Ordinance.

statute that regulates the energy efficiency of household appliances. The Ordinance does not regulate energy efficiency and contains an exemption that is explicitly intended to (and in fact does) accommodate compliance with applicable federal and state standards. Given these provisions, it is impossible for Plaintiff to establish that "no set of circumstances exists under which the [Ordinance] would be valid." *See Salerno*, 481 U.S. at 745.

Thus, there is no basis to a facial challenge to the Ordinance, and Plaintiff concedes that an as-applied challenge is not ripe. Regardless of how Plaintiff's Complaint is characterized, the Complaint should be dismissed.

D. Plaintiff Fails to Present a Coherent Argument Explaining How Limits on Natural Gas Infrastructure Regulate Energy Efficiency or Energy Use Under EPCA.

The Energy Policy and Conservation Ac ("EPCA") sets "energy efficiency" or "energy use" standards for "covered products," which are commercial appliances such as air conditions, furnaces, and water heaters. *See* 42 U.S.C. §§ 6292, 6295, 6313. State or local legislation is only preempted if it "concerns" the energy efficiency or use of those covered products—*i.e.*, commercial appliances. *Id.* § 6297(c). Subject to certain exceptions, the Natural Gas Infrastructure Ordinance provides that "Natural Gas Infrastructure shall be prohibited in Newly Constructed Buildings." RJN, Exh. 1 § 12.80.040.A. "Natural Gas Infrastructure" is defined as "fuel gas piping, other than service pipe, in or in connection with a building, structure or within the property lines of premises, extending from the point of delivery at the gas meter as specified in the California Mechanical Code and Plumbing Code." *Id.* § 12.80.030.E.

Two things are conspicuously absent from the Ordinance: (1) any provision regulating energy use or energy efficiency; and (2) any provision relating to or even mentioning commercial appliances. Plaintiff nevertheless asserts that the Ordinance is preempted because it regulates energy use or energy efficiency of commercial appliances. The Court should reject this absurd, politically motivated argument and reach the common sense conclusion that an Ordinance that does not regulate energy efficiency or use in commercial appliance actually does not regulate energy efficiency or energy use in commercial appliances.

Plaintiff's Opposition simply collapses into nonsense under the stain of trying to argue

otherwise. Plaintiff states that because the Ordinance "bars the use of natural gas appliances by barring the use of natural gas pipelines [sic] in new construction," the "very subject" of the Ordinance is "energy use." Opp. at 19. There is not even an attempt to make a logical connection between regulating natural gas *piping* and regulating the energy used by commercial appliances.

Moreover, nothing in the plain meaning of EPCA requires a city to extend Natural Gas Infrastructure, nor does the statute preclude a city's exercise of its power to regulate building infrastructure to protect public health and safety. In fact, large areas of California (and the country) are not served by natural gas at all. Yet Plaintiff's arguments would effectively compel cities to allow the extension of natural gas service to these areas. EPCA is designed to avoid a patchwork of state efficiency standards for appliances; nothing in the statute evinces legislative intent to require local jurisdictions to permit the extension of natural gas service.

Plaintiff's out-of-context quote from *Building Industry Association of Washington v. Washington State Building Code Council*, 683 F.3d 1144 (9th Cir. 2012) ("*Washington*"), is misleading. In *Washington*, the Ninth Circuit observed that EPCA "provides that where a building code grants credits for *reducing energy use*, the code must give credit in proportion to energy use savings, without favoring certain options over others." *Id.* at 1151 (emphasis added). But unlike the Washington Building Code, the City's Ordinance does not regulate energy use.

Further, Plaintiff's suggestion that all-electric construction is exempt from energy efficiency standards (Opp. at 22) is simply incorrect. The City's Ordinance cannot and does not excuse the developer of Newly Constructed Building from complying with state Energy Code requirements, and in fact, the Ordinance expressly allows the installation of Natural Gas Infrastructure when all-electric construction cannot meet Energy Code requirements. RJN, Exh. 1 § 12.80.040.A.1.

Finally, Plaintiff simply ignores the fact that compliance with the California Energy Code can always be achieved using appliances that do not exceed federal energy efficiency standards. The Energy Commission assumes that appliances meet but *do not exceed* minimum federal standards in modeling the energy efficiency of Newly Constructed Buildings for purpose of developing the Energy Code. *See, e.g.*, RJN, Exh. 9 at 5-9 to 5-12 (noting, for example, that

Energy Commission regulations for water heaters "align with federal efficiency standards"). The Energy Commission will only approve an all-electric compliance pathway when the pathway meets state efficiency standards for new construction, based on the assumption that no appliance exceeds federal efficiency standards. *See, e.g.*, RJN, Exh. 4 at p. 92 of 319 (noting that space heating/cooling and water heating equipment efficiencies in Berkeley reach code "are equal to minimum federal appliance efficiency standards"). Thus, even setting aside fact that the Natural Gas Infrastructure Ordinance does not regulate energy efficiency or energy consumption, it ensures that a Newly Constructed Building can always comply with the Ordinance without installing any appliance that exceeds EPCA energy efficiency standards.

In any event, this lawsuit is a facial challenge. Thus, not only must Plaintiff show that "no set of circumstances exists" under which the Ordinance would be valid, *Salerno*, 481 U.S. at 745, Plaintiff must be able to do so based solely on the text of the Ordinance itself. *Calvary Chapel Bible Fellowship v. County of Riverside*, __ F.3d __, 2020 WL 547372, at *3 (9th Cir. Feb. 4, 2020) (facial challenge considers "only the text of the zoning ordinance, not its application"). The text of the Natural Gas Infrastructure Ordinance directly contradicts Plaintiff's assertion that the Ordinance regulates energy use or energy efficiency in covered products: the City is simply not regulating appliances. Accordingly, Plaintiff's claim for EPCA preemption fails as a matter of law, and should be dismissed with prejudice based on the plain meaning of the Natural Gas Infrastructure Ordinance.

E. The Natural Gas Infrastructure Ordinance Does Not Conflict with the California Energy Code.

Just as the Natural Gas Infrastructure Ordinance does not set energy efficiency or energy use standards under federal law, it does not set "energy conservation" or "energy insulation" standards under state law. The California Energy Code requires the Energy Commission to set "energy conservation" and "energy insulation" standards for Newly Constructed Buildings, as well as additions, alterations, or repairs to existing buildings. Pub. Res. Code §§ 25402, 25402.1(h)(2); RJN, Exh. 7 (24 Cal. Code Regs. § 10-106.) Under Public Resources Code § 25402.1(h)(2), a local jurisdiction may modify the state standards if it "files the basis of its

determination that the standards are cost effective with the commission and the commission finds that the standards will require the diminution of energy consumption levels permitted by the rules and regulations adopted pursuant to those sections." Pub. Res. Code § 25402.1(h)(2). The City followed that process in the adoption of its local "reach code" amendments to the Energy Code, which were approved by the Energy Commission on February 20, 2020. Supplemental Request for Judicial Notice ("Supp. RJN"), Exh. 1. In contrast, the City did not submit the Natural Gas Infrastructure Ordinance to the Energy Commission because the Ordinance regulates Natural Gas Infrastructure, not energy conservation or energy insulation. As such, the Ordinance does not amend the Energy Code, does need to be submitted to the Energy Commission for review, and is not preempted under state law.

The Energy Commission has recently confirmed the common-sense conclusion that limitations on Natural Gas Infrastructure are not energy efficiency regulations. On February 6, 2020, the Energy Commission wrote the City to confirm that "the City has authority under the California Constitution to prohibit installation of hazardous natural gas piping infrastructure when granting use permits for new buildings" and that the Natural Gas Infrastructure Ordinance "is not an energy efficiency standard subject to review by the CEC." Supp. RJN, Exh. 2 at 1-2.

In an attempt to distract the Court from this straightforward conclusion, Plaintiff's Opposition once again demonstrates an inability or unwillingness read the plain meaning of the Energy Code to mean what it says. The Energy Code does not regulate when natural gas is allowed, and it does not regulate the "use of an energy source." Opp. at 25. The Energy Code regulates energy efficiency. The Natural Gas Infrastructure Ordinance, on the other hand, does not. The Ordinance does not conflict with the Energy Code and is not preempted by state law.

F. The Natural Gas Infrastructure Ordinance Does Not Conflict with the California Building Standards Code.

Plaintiff's remaining state law claims for relief, relating to the Building Standards Code, are caught in a Catch-22. On the one hand, Plaintiff does not coherently respond to the argument that the City's police power includes the authority to decide whether it should allow the installation of soon-to-be obsolete Natural Gas Infrastructure in Newly Constructed Buildings.

On the other hand, Plaintiff does not dispute that the Natural Gas Infrastructure Ordinance and accompanying findings were filed with the Building Standards Commission, consistent with all requirements that would apply if the Ordinance were a building standard. Thus, the Ordinance is either enacted under the City's police power or is a duly adopted local building standard—either way, Plaintiff's claims fail, and Plaintiff is entitled to no relief from this Court.

With respect to the first argument, Plaintiff does not even attempt to distinguish the Natural Gas Infrastructure Ordinance from the myriad land use regulations that are indisputably subject to regulation under the City's police power. For example, the fact that a city zoning ordinance may prohibit commercial uses in residential zones does not mean that the City's zoning ordinance amends the provisions of the Building Standards Code that regulate commercial uses (*e.g.*, restaurants). Here, the provisions of the Building Standards Code that apply to Natural Gas Infrastructure will continue to apply where such Infrastructure is permitted, and will not apply where such Infrastructure is prohibited. There is no meaningful distinction between limitations on natural gas connections and other lawful limitations on new construction that are imposed by every city in the state.

Plaintiff also fails to explain how the Natural Gas Infrastructure Ordinance meets the definition of "building standard" in Health and Safety Code § 18909(a). The critical language of the statute defines a building standard as a requirement that "specifically regulates, requires, or forbids the method of use, properties, performance, or types of materials" used in construction. Cal. Health & Safety Code § 18909(a). The Complaint cites a laundry list of building standards governing natural gas installations (Complaint ¶ 71), but Plaintiff fails to explain how the Ordinance changes the "method of use, properties, performance, or types of materials" that are used to meet this standards. This is because, like all land use regulations, the Ordinance determines where Natural Gas Infrastructure is allowed, and not how Natural Gas Infrastructure is built. Such a regulation is well-within the City's police power to regulate.

And even setting aside this argument, Plaintiff's contention that the City should have filed the Ordinance with the Building Standards Commission is undermined by the fact that the City actually filed the Ordinance with the Building Standards Commission. RJN, Exh. 3; Supp.

RJN ¶ 3. Plaintiff nevertheless attempts to avoid the obvious conclusion that the City complied with building standards submission requirements with a hypertechnical argument accusing the City of failing to identify specific amendments. Opp. at 24.

This argument is contrary to both the purpose of allow local amendments to the Building Standards Code and a common sense interpretation of the Code. The "overriding statutory purpose" of allowing local amendments to the Building Standards Code is "to allow local entities the flexibility necessary to do something different than is required or permitted for the rest of the state." *California Apartment Ass'n v. City of Fremont*, 97 Cal. App. 4th 693, 701 (2002) (citation and internal quotation marks omitted). Here, the City followed the proper procedure for amending the Building Standards Code to account for these differences, taking into account the City's vulnerability to sea level rise and its elevated fire risk. RJN, Exh. 3 at pdf pp. 71-72.

Common sense also shows that "identifying" the provisions of the Building Standards Code that the Natural Gas Infrastructure Ordinance amends is both unnecessary and impossible. The Ordinance is an overlay that prohibits Natural Gas Infrastructure in certain buildings, but allows natural gas connections in others. The provisions of the Building Standards Code cited in Paragraph 71 of Plaintiff's Complaint continue to apply where Natural Gas Infrastructure is allowed, and therefore it would be inappropriate and misleading to change those provisions of the Code.[3]

Of course, the difficulty in applying the local amendment procedures in Health and Safety Code § 17958.7 to the Natural Gas Infrastructure Ordinance simply underscores the fact that the Ordinance should not be considered an amendment to Building Standards Code at all. But in any event, the City complied with the requirements for local amendments to the Code. Thus, Plaintiff is entitled to no relief from this Court, regardless of whether the Ordinance was adopted under the City's police power or pursuant to the local amendment procedures of the Building Standards Code.

[3] Plaintiff cites no authority that would require the City to include a building standards amendment in Title 19 of the Berkeley Municipal Code.

G. Events That Have Occurred After This Lawsuit Was Filed Demonstrate Why the Doctrine of Primary Jurisdiction Should Be Applied to Plaintiff's State Law Claims.

Events subsequent to the filing of this action have demonstrated why Plaintiff's lawsuit was premature, and why the prudential considerations embodied in the doctrine of primary jurisdiction warrant deferring to the jurisdiction of state agencies. Since Plaintiff's lawsuit was filed, the City has submitted the Natural Gas Infrastructure Ordinance to the Building Standards Commission, and the Commission accepted the Ordinance for filing the Ordinance consistent with its obligations under California Health & Safety Code § 17958.7. RJN, Exh. 3; Supp. RJN ¶ 3. In addition, the California Energy Commission has recently disclaimed any jurisdiction over the Natural Gas Infrastructure Ordinance, having reached the common-sense conclusion that the Ordinance is "not an energy efficiency standard subject to review by the CEC." Supp. RJN, Exh. 2 at 2. These post-filing developments effectively moot all of Plaintiff's state law claims, and highlight the concerns about deference to state interpretations of state law and comity between state and federal jurisdictions that counsel against the Court exercising jurisdiction over Plaintiff's state law claims.[4]

III. CONCLUSION

For the reasons stated above, the Court should dismiss all of Plaintiff's claims for relief with prejudice and enter judgment in favor of the City.

Dated: February 24, 2020

BERKELEY CITY ATTORNEY'S OFFICE

By: /s/Christopher D. Jensen
Farimah Brown
Christopher D. Jensen

Attorneys for Defendant City of Berkeley

[4] These same concerns also argue in favor of the Court declining to exercise jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367(c).