

**RS 4. A. 1/2/24
Presentation**

Legal Pathways for Local Governments to Regulate Natural Gas in Oregon

Agenda

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- ❑ Authority
- ❑ Barriers – The Layer Cake
 - ❑ Franchise agreements / licensing ordinances
 - ❑ Uniform Building Code
 - ❑ *California Restaurant Ass'n v. Berkeley*(EPCA)
- ❑ Potential Pathways to Regulate Natural Gas

General Principles of Local Authority in Oregon

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Oregon Constitution allows cities and counties to govern by *home rule*.

Home rule authority grants local governments the authority to exercise “police powers.”

Two Questions:

- (1) whether the local law is authorized and permissible under the locality’s charter and more broadly under principles of home rule in Oregon; and
- (2) whether the local law is *preempted* by state and/or federal law.

General Principles of Preemption in Oregon

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Express preemption occurs when the state legislature “clearly” and “unambiguously” expresses its intent to preempt local policymaking on a particular subject.

Implied preemption occurs when the two laws are in conflict such that they cannot operate concurrently. In other words, the local law is preempted when the operation of the local law makes it impossible to comply with a state statute.

Courts generally start analysis by assuming that local enactments function consistently **with state laws**.

Uniform Building Code

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State ex rel Haley v. Troutdale, 218 Or. 203, 576 P.2d 1238 (1978)

ORS 456.775(1) provided:

“The state building code shall be applicable and uniform throughout this state and in all municipalities therein, and no municipality shall enact or enforce any ordinance, rule or regulation **in conflict** therewith.”

Troutdale could adopt more stringent building code provisions so long as they were compatible with the state code.

The next session, the Oregon legislature amended the law

Now ORS 455.020(1) provides:

“The state building code shall be applicable and uniform ... and no municipality shall enact or enforce any ordinance, rule or regulation **relating to the same matters encompassed by the state building code but which provides different requirements** unless authorized by the Director of the Department of Consumer and Business Services.”

Energy Policy and Conservation Act (EPCA)

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EPCA preempts any state or local regulation “concerning the energy efficiency, energy use, or water use of [a] covered product.”

Building code exception in 42 U.S.C. § 6297(f)(3).

California Restaurant Assoc v. Berkeley

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“EPCA is concerned with the end-user’s ability to use installed covered products at their intended final destinations.”

“EPCA preempts Berkeley’s regulation here because it prohibits the installation of necessary natural gas infrastructure on premises where covered natural gas appliances are used.”

“A regulation on ‘energy use’ fairly encompasses an ordinance that effectively eliminates the ‘use’ of an energy source.”

“States and localities can’t skirt the text of broad preemption provisions by doing *indirectly* what Congress says they can’t do *directly*.”

Strategies for Local Governments

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- ❑ Prohibition of fossil fuel piping in ROW
- ❑ Building Code Local Amendment
- ❑ Licensing Programs
- ❑ Building Performance Standards
- ❑ Voluntary Zoning Incentives

- ❑ **Building Emissions Ordinance**

Emissions Ordinances

City could adopt an ordinance regulating residential building emissions.

- ❑ Modeled after NY City's CO₂ building emissions ordinance and SCAQMD and BAAQMD NOx appliance standards
- ❑ Set limits on the pollutant(s)--e.g. a "budget"
- ❑ Triggered if a building would emit or have the potential to emit (through the operation or installation of any appliance, equipment or process) one or more named pollutants
- ❑ Make ordinance applicable to a specified kind of "covered building"

Concept Ordinance

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One

Notice of construction if “covered building” would emit or have the potential to emit NO_x (the sum of nitric oxide and nitrogen dioxide).

Two

The building shall not emit or have the potential to emit through the operation or installation of any appliance, equipment or process, NO_x emissions that exceed the regulated amount. Refer to EPA’s existing emissions rate calculations.

Three

Within 30 days of construction completion, a report must be filed listing the appliances and equipment installed in the building that emit or have the potential to emit NO_x.

Preemption Analysis

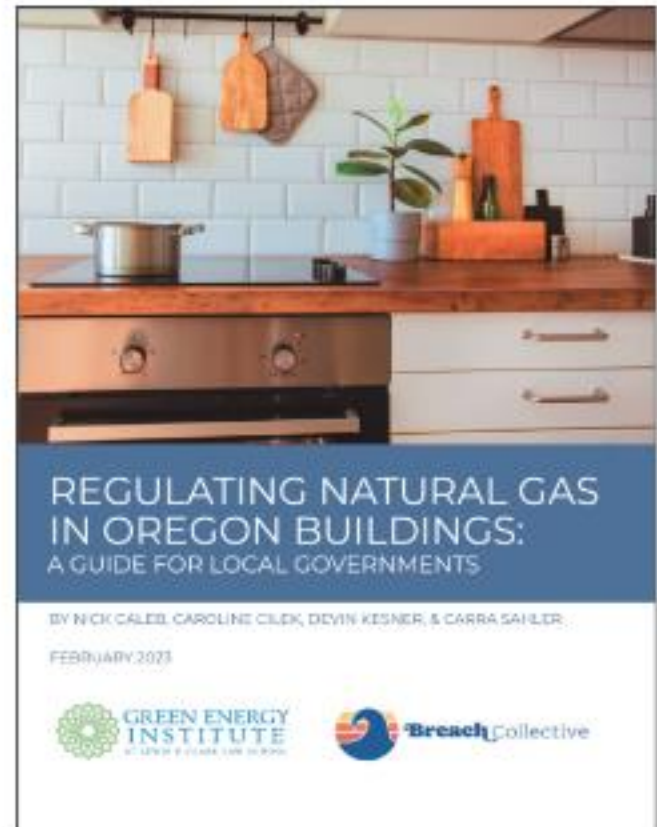
- ❑ Does the City's charter permit the adoption of such a regulation?
- ❑ Does any existing ordinance preclude the adoption of such a regulation?
- ❑ Does state law preclude the regulation?
- ❑ Does federal law preclude the regulation?
 - Clean Air Act
 - EPCA (as interpreted by the Ninth Circuit)

Contact Information

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