



REGULATING NATURAL GAS IN OREGON BUILDINGS: A GUIDE FOR LOCAL GOVERNMENTS

BY NICK CALEB, CAROLINE CILEK, DEVIN KESNER, & CARRA SAHLER

FEBRUARY 2023



Executive Summary

Oregon’s local governments can play an essential role in reducing greenhouse gas emissions by curbing natural gas (sometimes called fossil gas or methane) consumption in buildings. Across Oregon, cities and counties recognize the need to use local authority to plan for and mitigate the worst impacts of climate change. For example, the City of Salem’s Climate Action Plan aims to reduce Salem’s GHG emissions by fifty percent from 2016 and achieve carbon neutrality by 2050.¹

“This climate action plan has two overarching strategic goals: to reduce GHG emissions (mitigation) and to increase climate resilience (adaptation). Both goals must be accomplished through equitable processes so that residents who are most vulnerable to climate-related hazards are engaged in planning processes, protected from severe impacts, and are able to access resources and opportunities to better prepare for climate change.”

CITY OF SALEM, CLIMATE ACTION PLAN 8 (2021).

Some local governments have moved beyond action plans and elected to take concrete steps to reduce GHG emissions. One effective strategy is to lower or eliminate natural gas use in buildings since natural gas is primarily methane. Policymakers and scientists view addressing methane, which has over 80 times the climate warming power of carbon dioxide over a twenty-year period, as the low-hanging fruit of available climate actions.² Eliminating or reducing natural gas

use in new and existing buildings will help local governments achieve their climate goals and deliver climate resilience and economic benefits to residents, especially to environmental justice communities most affected by air pollution, erratic natural gas costs, and climate impacts.

Some Oregon local governments are taking action to address natural gas. In February 2023, the Eugene City Council adopted an ordinance prohibiting fossil fuels in new residential buildings three stories or fewer.³ The Milwaukie City Council has similarly directed city staff to develop code changes or take other actions to prohibit new buildings from using natural gas and other fossil fuels after March 1, 2024.⁴ Finally, Multnomah County issued a report detailing the negative health consequences of natural gas use in homes, especially for cooking.⁵ Based on its report, the Multnomah County Health Department recommends that residents replace gas ranges with electric appliances.⁶

Oregon’s local governments need legal strategies to regulate natural gas in buildings. *Regulating Natural Gas in Oregon Buildings: A Guide for Local Governments* offers a variety of options for local governments in Oregon to prevent new emissions from gas in the absence of, or in addition to, state action. The *Guide* aims to assist city planners, local government leaders, and the public understand the available strategies to address natural gas use in buildings. First, the *Guide* establishes the sources and constraints of local government authority in Oregon, specifically focusing on preemption principles at the federal and state levels. Next, the *Guide*

identifies and explains ten legal strategies to tackle gas use in Oregon buildings. Several approaches explain how to regulate new natural gas service lines, while others address existing gas use in buildings. Providing multiple strategies recognizes that some policies may be more feasible than others, due to franchise agreement terms, local code provisions, or the administrative capacity to meet statutory criteria.

The *Guide* identifies the relative legal feasibility of ten strategies to regulate gas in the “distribution system.” Green strategies have the strongest legal certainty, meaning the likelihood of encountering legal

barriers is low. The green strategies include policies that contain a process or authority codified in Oregon law, that have been enacted by other local governments in the United States (U.S.), or where a local government in Oregon has adopted a similar strategy. Yellow strategies are achievable, but local governments should proceed deliberately to avoid legal conflict with the natural gas utility over franchise or license terms, or violating existing statutes. Red strategies would likely be counterproductive to local efforts restricting natural gas expansion due to Oregon’s statutory requirements.

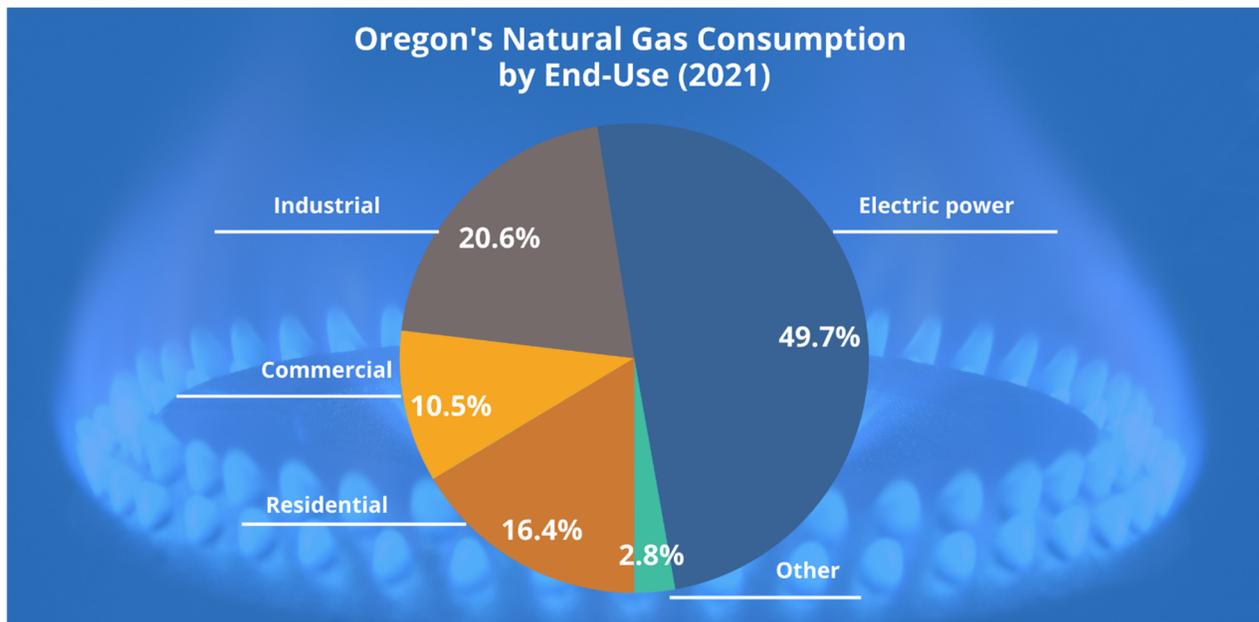


Figure 1. Gas volumes delivered to consumers in 2021. In 2021, the legislature directed retail electricity providers and electricity service suppliers (“electric power” above) operating in Oregon to reduce their baseline emissions by 80% by 2030, 90% by 2035, and 100% by 2040, which means natural gas will represent a declining source of electric power in the next twenty years. The electricity sector is not subject to Oregon’s Climate Protection Program (CPP), an economy-wide cap on GHG emissions from fossil fuels sold in Oregon, but the natural gas utilities must comply with the program. The CPP requires the aggregate reduction of emissions by 50% by 2035, and 90% by 2050. The CPP does not direct any specific actions to reduce emissions. To comply with the law, natural gas utilities are exploring renewable natural gas (captured biogas), hydrogen, and synthetic methane, as well as more efficient gas appliances.

U.S. Energy Info. Admin., *Natural Gas Consumption by End Use*, Natural Gas (2021), https://www.eia.gov/dnav/ng/ng_cons_sum_dcu_SOR_a.htm (last visited Feb. 10, 2023); OR. REV. STAT. § 469A.410 (2021); OR. ADMIN. R. § 340-271-9000(2), tbl. 2 (2023).
Gas flame © Pixabay / Piktochart.

Strategies with Legal Feasibility

- **Franchise agreements** are negotiated contracts between a natural gas utility and a local government that provide the utility with the use of the public streets, sidewalks, and highways (known as the “right-of-way”) to install, maintain and operate natural gas infrastructure. Local governments may use franchise agreement negotiations to limit or prohibit new gas infrastructure. However, existing or traditional franchise agreements will likely be a barrier to employing other legal strategies explored in the *Guide*. A **licensing program** could provide more flexibility to regulate gas.
- A **local amendment** is a process available to local governments seeking to electrify structures by imposing “different requirements” from the construction standards in Oregon’s building code. To obtain a local amendment, a local government must follow a regulatory process, including holding meetings and submitting required materials to the Oregon Building Codes Division (BCD), which will either approve or deny the request.
- Local governments in Oregon can utilize their land use and zoning authority to offer **voluntary zoning and process-related incentives** in exchange for developers providing all-electric buildings. Because developers voluntarily meet these incentives, there are no state law preemption or franchise agreement concerns.
- A **building performance standard** sets performance targets for existing buildings to meet over time. Local governments can adopt performance standards addressing energy use, carbon emissions, or public health impacts that result in eliminating or reducing natural gas. Building performance standards may also influence new building construction since once the buildings are occupied they will be subject to the performance standards.
- County governing bodies have authority over **county health regulations protecting indoor and outdoor air quality**. Pursuant to county police powers, counties can enact ordinances that protect indoor and outdoor air quality. Several Oregon counties have utilized this authority to regulate the use of tobacco products indoors and outdoors based on adverse health impacts. Given the broad authority afforded to Oregon’s county public health authorities, a county government may explore rules and ordinances to restrict or mitigate the public health impact of ambient air pollution from gas-fueled appliances.



Figure 2. Compared to traditional electric or gas cooktops, induction cooktops are more efficient and offer additional features. An induction stovetop purchase price is higher than natural gas or electric stovetops. However, energy savings can make up for the additional cost.

Kitchen Appliances, ENERGY.GOV, <https://www.energy.gov/energysaver/kitchen-appliances> (last visited Feb. 9, 2023).
© Moose / Adobe Stock File #266852449.

Strategies with Some Legal Uncertainty

- **Public health and safety ordinances, and land use codes**, offer local governments promising avenues to restrict new gas infrastructure. Specifically, according to the state constitution, local charters, and state statutes, local governments can regulate for public health and safety, and they hold land use authority outside Oregon’s building code; local governments may invoke these authorities separately or in conjunction with each other. Local governments must ensure that any regulation does not impose a “different requirement” from any requirement in the state’s uniform building code, that such actions do not violate any terms of a franchise agreement or license with a gas utility, and that they make appropriate updates to their comprehensive plans.
- Local governments in Oregon can utilize their land use and zoning authority to establish **overlay and floating zoning districts** that require new and substantially improved buildings to be gas-free. Like any local land use ordinance, an ordinance establishing an overlay that limits or prohibits natural gas must be consistent with the local government’s comprehensive plan and must not conflict with the building code.

Strategies Likely to Face Legal Barriers

- Under Oregon law, a **moratorium on gas infrastructure** would be difficult to enact and likely counterproductive. Although a pause on gas infrastructure may be helpful for a local government to develop regulations prohibiting additional gas infrastructure, local governments must demonstrate a “compelling need,” which is a high bar to overcome.

AUTHORS & CONTRIBUTORS

AUTHORS:

NICK CALEB
Climate and Energy Attorney
Breach Collective

CAROLINE CILEK
Staff Attorney
Green Energy Institute

DEVIN KESNER
Legal Fellow
Breach Collective

CARRA SAHLER
Staff Attorney
Green Energy Institute

CONTRIBUTORS:

EMILIE DAJER-PASCAL
Legal Fellow
Breach Collective

JOSIE MOBERG
Climate Justice Movement Legal Fellow
Breach Collective

DANNY NOONAN
Climate and Energy Strategist
Breach Collective

AMY SCHLUSSER
Staff Attorney
Green Energy Institute

ACKNOWLEDGMENTS

Regulating Natural Gas in Oregon Buildings: A Guide for Local Governments was made possible through generous grants from The 11th Hour Project, Meyer Memorial Trust, Stand.Earth, and 350 Eugene.

THE AUTHORS WISH TO THANK THE FOLLOWING INDIVIDUALS FOR THEIR INSIGHTS AND CONTRIBUTIONS TO THIS WORK:

Christy Anderson-Brekken, Senior Instructor, Oregon State University
Amy Turner, Senior Fellow, Sabin Center for Climate Change Law

Disclaimer: This report is the responsibility of the Breach Collective and the Green Energy Institute at Lewis & Clark Law School and does not reflect the views of Lewis & Clark Law School. This report is an independent study for informational purposes only and does not constitute legal advice. Transmission of the information is not intended to create, and the receipt does not constitute, an attorney-client relationship between sender and receiver. No party should act or rely on any information contained in this report without first seeking the advice of an attorney.

Table of Contents

Executive Summary	i
I. Introduction	2
II. General Principles of Local Authority in Oregon	3
A. City Home Rule Authority	3
B. County Home Rule and Health Authority	3
C. Preemption Principles	4
1. Preemption Analysis for a State Law	4
2. Preemption Analysis for a Federal Law	5
III. Approaches to Local Regulation of Natural Gas	6
A. Strategy One: Franchise Agreements or Ordinances to Set Terms for Using Rights-of-way	7
1. Franchise Agreements	8
2. Alternatives to Franchise Agreements: Licensing Ordinances and Taxing the Utility	11
B. Strategy Two: The Oregon Building Code's "Local Amendment"	14
C. Strategy Three: Public Health and Safety Code	15
D. Strategy Four: County Health and Safety Regulatory Authority	17
1. Indoor Air Quality	17
2. Outdoor Air Quality	18
E. Land Use and Zoning	19
1. Strategy Five: Prohibiting Additional Gas Infrastructure	20
2. Strategy Six: Overlay Districts	21
3. Strategy Seven: Voluntary Zoning Incentives	24
4. Strategy Eight: Voluntary Process-related Incentives	25
5. Additional Requirements for Zoning Provisions	26
a. Exclusive Farm Use Zones	26
b. Crafting Clear and Objective Housing Development Standards	27
F. Strategy Nine: Building Performance Standards	28
1. Program Design Considerations	29
2. State and Local Government Examples	30
G. Strategy Ten: Moratorium on Gas Infrastructure Improvements	32
IV. Conclusion	34
Endnotes	36

I. Introduction

Regulating Natural Gas in Oregon Buildings: A Guide for Local Governments explores foundational legal principles that Oregon local governments may use to regulate natural gas (also known as methane or fossil gas) in buildings. The *Guide* describes the sources of local authority, as well as any legal constraints on that authority. It then provides ten different approaches to regulate gas in Oregon buildings.

Varying motivations drive local desire to reduce natural gas use throughout the United States (U.S.). Generally, governments seek to regulate natural gas in buildings for four reasons:

- (1) the climate impacts of methane;
- (2) significant air pollution caused by gas appliances and related health impacts;
- (3) the vulnerability of gas infrastructure to earthquakes and other seismic events; and
- (4) the expectation of sharp increases in utility costs as gas prices rise.⁷

Climate advocates and scientists have written widely about the health, safety and environmental impacts of natural gas.⁸ Accordingly, this publication addresses *how* to regulate gas rather than *why*.

This *Guide* provides ten ways local governments can cut greenhouse gas (GHG) emissions from buildings. One easily implemented policy not explored here relies on local authority over government-owned buildings. In other words, local governments

should begin by eliminating natural gas use in their own buildings since they possess clear legal authority to do so. The strategies offered by this *Guide* move beyond the important but limited impact of leading by example.⁹

At the time of publication, one city in Oregon has prohibited natural gas, and other fossil fuels, in newly constructed residential buildings,¹⁰ and several other city and county governments are openly exploring options for preventing gas use in new buildings, as well as how to decarbonize existing building stock.¹¹ This *Guide* focuses on regulations for new buildings but also includes a section explaining how local governments can use “Building Performance Standards” and “Overlay Zones” to regulate gas in new *and* existing buildings.

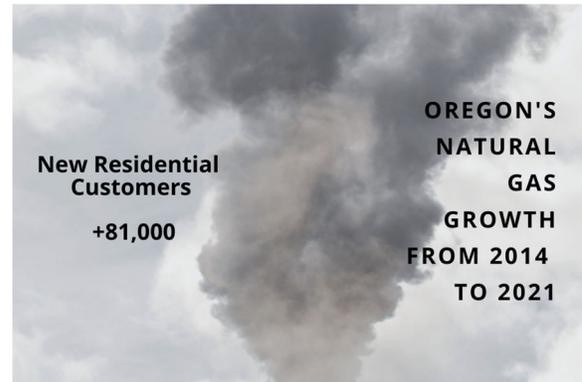


Figure 3. Number of new residential customers served by three natural gas utilities in Oregon from 2014 to 2021.

Natural Gas Reporting: Number of Natural Gas Consumers (Sales) Table (Annual), U.S. ENERGY INFO. ADMIN (2014-2021).
© Riznas / Piktochart.

II. General Principles of Local Authority in Oregon

The U.S. Constitution delegates authority between federal and state governments but does not account for local government authority.¹² Consequently, all local authority must be derived from and granted by the state. Local regulatory authority in Oregon operates by “home rule,” which grants local governments the authority to govern themselves without express or implied legislative authorization unless overridden (“preempted”) by state or federal law.¹³ Home rule authority differs between cities and counties, as described more fully below.

A. City Home Rule Authority

Oregon’s Constitution grants authority to city voters to confer power on their city governments by enacting a home rule “charter” (essentially a city constitution).¹⁴ All 241 Oregon cities have done so.¹⁵ The home rule charter is a grant of authority from voters to local leadership to enact substantive policies governing the local government.¹⁶ Commonly, charters will simply grant a city the maximum authority allowable by law rather than specifically enumerating authorities.¹⁷ For example, the City of Eugene’s charter grants the city “all powers that the constitution or laws of the United States or this state expressly or impliedly grant or allow cities, as fully as if this charter specifically stated each of those powers.”¹⁸

Two considerations are essential to determine whether an enacted law is within the scope of a specific city’s legal authority: (1) whether the local law is authorized and permissible under the local government’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.¹⁹ Oregon’s home rule doctrine means that the critical question is whether any state or federal statute *prohibits* the local action, not whether any statute expressly *authorizes* it.²⁰ Section II.C more fully addresses the concept of preemption.

B. County Home Rule and Health Authority

In Oregon, county home rule authority operates slightly differently than city home rule. Counties have two options on which to base their authority. First, the Oregon Constitution authorizes counties to adopt a home rule charter like cities.²¹ Nine of Oregon’s thirty-six counties have adopted a county home rule charter (“charter counties”).²² These counties have charters that set forth a general grant of jurisdiction, affording the maximum power allowed by the constitutions and laws of the United States and of Oregon rather than limiting and enumerating specific authorities.²³

Second, in the absence of such a charter, counties possess “statutory home rule.”²⁴ The remaining twenty-seven counties operate under a 1973 statute that granted counties the power to exercise broad home rule authority (“general law counties”).²⁵ Charter counties and general law counties have broad authority over “matters of county concern.”²⁶

Although the constitutional and statutory provisions differ with respect to government structure and procedure, Oregon courts have concluded that charter counties and general law counties possess the same legislative authority unless limited by a charter

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

provision, or state or federal law (section II.C addresses preemption).²⁷

However, one important difference between the two sources of authority is that because general law counties derive their authority from statute, the state legislature can remove or alter that authority at any time.²⁸ Another important difference is that county ordinances passed under statutory home rule authority may not extend to incorporated cities within that county without that city's consent. Charter counties operating pursuant to their charters are not so limited, except as indicated by statute.²⁹ This means that county-level laws in a general law county effectively would not apply to incorporated cities.

In addition to the legal authority granted by either county home rule charters or statutory authority, counties have the authority to enact laws to preserve and promote public health, safety, and the general welfare of their residents.³⁰ That authority is derived from these police powers,³¹ and from Oregon statute granting counties the right to establish a local public health authority.³² Pursuant to ORS 431.003(3), a Board of County Commissioners may act as the governing body of the local public health authority. A core responsibility of that local public health authority is to adopt ordinances necessary to administer any public health matter not expressly preempted by state or federal laws.³³

C. Preemption Principles

While home rule describes the maximum extent of a local government's authority to regulate, state and federal prerogatives may limit that authority. This is the concept of preemption. Preemption works within a

hierarchy of governance, where state and federal laws may override local law on the same subject if specific factors are met.

1. Preemption Analysis for a State Law

The Oregon legislature has broad authority to preempt local laws. It can preempt local laws on subjects "addressed primarily to substantive social, economic, or other regulatory objectives of the state."³⁴ There are two types of preemption, express and implied. Despite the different sources of home rule authority discussed above, Oregon courts have generally applied the same preemption analysis for both cities and counties.³⁵

Express preemption occurs when the state legislature "clearly" and "unambiguously" expresses its intent to preempt local policymaking on a particular subject.³⁶ This is often accomplished through an explicit preemption clause in a statute, but courts also look to the text, context, and legislative history of the legislation in question.³⁷ Even when an explicit preemption clause is included in the legislation, determining whether a particular city ordinance or law fits within the scope of that clause is not always straightforward, and is a matter of judicial interpretation.³⁸ Courts generally assume that the Oregon legislature knows how to preempt local regulation unambiguously, and will not presume such intent if it is not clearly manifested in the statutory scheme.³⁹ Common express declarations of preemptive intent found in statutes include "the state hereby preempts," "no local government shall," and "matter of state concern."⁴⁰

Implied preemption occurs when a local law and a state law conflict and "cannot operate

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

concurrently.”⁴¹ In other words, the local law is preempted when “the operation of the local law makes it impossible to comply with a state statute.”⁴²

Unlike preemption in federal law and many other states, Oregon courts will not find a local law preempted because the statutory scheme “occupies the field,” which means there is already extensive state regulation over a certain subject.⁴³ As a result, local governments may add stricter requirements in addition to state minimum requirements without conflicting with state law.⁴⁴ Therefore, “[a] local ordinance is not incompatible with state law simply because it imposes greater requirements than does the state, nor because the ordinance and state law deal with different aspects of the same subject.”⁴⁵

Even further limiting the application of implied preemption, a local law cannot be preempted by *negative inference*. This means that the state legislature’s express authorization of local authority on a certain subject does not imply that the local government is preempted from exercising authority beyond that expressly specified on the same subject.⁴⁶

In summary, answering two questions when evaluating a proposed ordinance is helpful to discern whether state law preempts it. *First*, does the state law contain an intention to be exclusive? The assumption is that the legislature does not intend a state law to preempt a local law. *Second*, if there is no intention to be exclusive, are the two laws incompatible? ⁴⁷ That is, can the laws operate at the same time? Where possible, courts have preferred to interpret local laws to “function consistently with state laws[.]”⁴⁸

These standards for preemption make it difficult to prove preemption in a challenge to a local ordinance and leave local governments with a lot of room for enacting local regulations. An important caveat is that, regardless of whether and to what extent local governments choose to regulate in an area, the state can enact laws that establish new preemptions at any time. Similarly, while local governments can regulate in areas where the legislature is currently silent,⁴⁹ nothing prevents the legislature from lawmaking in that area in the future, which may preempt local action from that point forward. Several U.S. states have recently used this tactic to preempt local governments that were contemplating enacting, or that already had enacted, regulations banning or limiting natural gas expansion. The Oregon legislature could theoretically act in the same manner.⁵⁰

2. Preemption Analysis for a Federal Law

This section will not extensively analyze federal preemption. However, it is worth covering briefly since federal preemption arises in challenges to natural gas regulations outside of Oregon and is an important constraint on a local government regulatory authority. The federal preemption doctrine is broader than Oregon’s preemption doctrine. More specifically, and similar to Oregon law, federal law preempts state and local law when either: (1) a federal statute or regulation contains explicit preemptive language (“express preemption”); or (2) the federal law’s structure and purpose implicitly reflect Congress’s preemptive intent (“implied preemption”).⁵¹

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

Federal doctrine diverges from state doctrine in circumstances where statutory language does not expressly preempt local action but where there is extensive federal regulation in the area. Accordingly, under federal law, implied preemption can occur through either:

- (1) “conflict preemption,” where compliance with both federal and state (including local) regulations is impossible or state law poses an obstacle to the accomplishment of the full purposes and objectives of Congress (which parallels the extent of implied preemption under Oregon law); or
- (2) “field preemption,” i.e., the scheme of federal regulations is so pervasive that it precludes additional state regulation.⁵²

Federal preemption is not a common argument against local natural gas regulation, with one exception. Litigation challenging the City of Berkeley’s 2019 Natural Gas Infrastructure Ordinance, which prohibits most natural gas infrastructure in newly constructed buildings, raises the question of whether a federal appliance efficiency law preempts local action on natural gas expansion.⁵³ The California Restaurant Association sued the City of Berkeley, claiming that, among other allegations, the federal Energy Policy and Conservation Act (EPCA) expressly preempted the Ordinance.⁵⁴ The EPCA sets energy efficiency standards for certain appliances.⁵⁵ Holding in favor of the City, the U.S. District Court for the Northern District of California found that Berkeley’s Ordinance focuses on regulating the underlying natural gas infrastructure and does not regulate or mandate a particular type of product or

appliance.⁵⁶ The case is currently on appeal in the Ninth Circuit Court of Appeals.⁵⁷

Outside the context of buildings, challenges to municipal regulation of fossil fuels have relied on other federal statutes to raise preemption arguments. These federal statutes include the Pipeline Safety Act⁵⁸ and the Hazardous Materials Transportation Act.⁵⁹ Although these statutes have not yet served as a basis for any federal preemption challenges to local regulations restricting or prohibiting natural gas expansion, any local government would be wise to keep these federal statutes in mind.⁶⁰



Figure 4. Residential air-source heat pumps transfer heat between the outside air and the home.

Heat Pump Systems, ENERGY.GOV,
<https://www.energy.gov/energysaver/heat-pump-systems> (last visited Feb. 9, 2023).
© V. J. Matthew / Adobe Stock File #114641497.

III. Approaches to Local Regulation of Natural Gas

As the previous sections have discussed, local governments in Oregon generally possess broad regulatory authority. However, federal or state statutes could preempt that authority in several ways. Each potential approach to regulating natural gas

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

will raise specific legal and policy issues, including preemption, which local governments should evaluate in deciding how best to address gas use locally.

This section outlines ten policies to regulate natural gas. Each section describes the overall distribution of authority between state and local governments, identifies any applicable state laws that expressly preempt action,⁶¹ identifies some areas of potential implied preemption, and provides some viable sources of authority for local regulation.

SECTION 1	DEFINITIONS
SECTION 2	GRANT OF FRANCHISE
2.1	Grant
2.2	Duration
2.3	Effective Date
2.4	Franchise Nonexclusive
2.5	Police Powers
2.6	Effect of Acceptance

Figure 5. Example provisions in a franchise agreement.

A. Strategy One: Franchise Agreements or Ordinances to Set Terms for Using Rights-of-way

Cities have explicit statutory authority to regulate the use of the public rights-of-way, in addition to any home rule authority they possess. Specifically, under ORS 221.420(2)(a), a city can determine the terms and conditions under which a utility may use its streets, highways, or other public property within the city. This authority includes the power to “exclude or eject any public utility” from the streets, highways, or other public property.⁶²

To provide service to customers, gas utilities in Oregon need to install and maintain

infrastructure (e.g., gas distribution or service lines) on or beneath public rights-of-way (e.g., public streets and sidewalks) to connect to the gas meter outside the building. In addition to any charter authority a city possesses,⁶³ the state authorizes municipalities to govern utilities’ use of public property through four categories of actions that can be introduced in a franchise agreement, an ordinance, or other lawful manner.⁶⁴

The four statutory categories permit the city to:

- (1) identify terms and conditions of the public utility’s use of streets, highways, and public property, including payment of fees; cities may exclude or eject a public utility from public property;
- (2) require a public utility to modify, add, and extend its equipment as needed in “the interest of the public,” and designate the location, conditions, and time in which the improvement is made;
- (3) provide for a penalty in the event of noncompliance with a city’s charter, ordinance or resolution;
- (4) set rates, charges or tolls that a public utility may collect and “[f]ix the character of each kind of product or service to be furnished or rendered[.]”⁶⁵

The first three categories authorizing city action allow a city to impose charges and fees on gas utilities to use public property,⁶⁶ and require gas utilities to modify equipment, facilities, plant, or service in the public interest.⁶⁷ Additionally, a city may designate

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

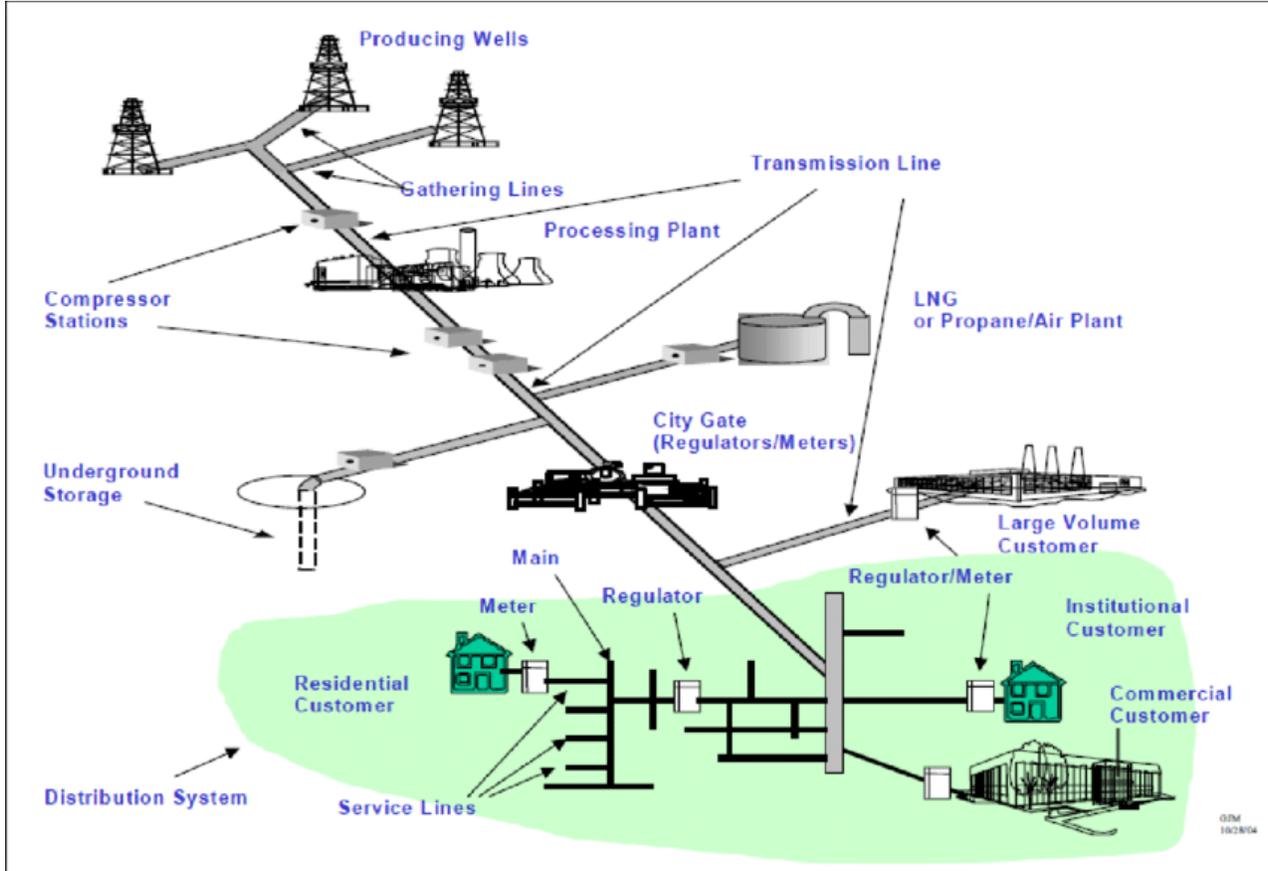


Figure 6. Schematic of the Natural Gas Delivery Pipeline Infrastructure. Generally, the distribution system entails the mains, service lines, and meter.

AMERICAN GAS FOUNDATION, SAFETY PERFORMANCE AND INTEGRITY OF THE NATURAL GAS DISTRIBUTION INFRASTRUCTURE 3-1 (2005).

the location and nature of any additions and conditions under which the utility constructs its infrastructure.⁶⁸

In contrast, the fourth category addressed by the statute, affecting rates collected and products or services a utility offers, automatically requires the Oregon Public Utility Commission (PUC) to review the entire agreement and determine whether it is “in the public interest.”⁶⁹ The PUC’s governing mandate—to protect utility customers from unreasonable prices and ensure that the service they receive is reasonable—guides its review.⁷⁰ If the PUC objects to the agreement within 90 days, the agreement

does not go into effect unless municipal voters ratify it.⁷¹

1. Franchise Agreements

Cities often enter into franchise agreements with utilities. Franchise agreements are legally binding contracts freely negotiated between a local government and a utility. These agreements set out the terms and conditions for a utility to use public property in exchange for paying fees to the city and remain in effect for a set term.⁷² The term of these agreements is typically ten years, which often automatically renews absent proactive action by either party. The agreements typically provide very little

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

leeway for negotiating new provisions partway through the term of the contract, and the circumstances for terminating the agreement early are usually explicitly limited to situations involving violations of material provisions contained in the contract, such as construction in an unauthorized location, failure to pay fees, insolvency, or willful misrepresentation.

The most advantageous time for a city to consider its regulatory options is when a franchise agreement is about to renew automatically,⁷³ is about to expire, or has expired. Because the precise terms are key to maintaining a city's flexibility to regulate natural gas, and because there are some unanswered questions about how provisions might be interpreted by a court in the event of litigation, avoiding a franchise agreement may be best.

For a city short on time, negotiating an increased franchise fee and reducing the length of the agreement can be a straightforward and logical strategy to reduce the costs and risks associated with uninterrupted gas infrastructure buildout, while continuing to provide value to the city. Some additional provisions to consider targeting include those permitting the "expansion" of utility service or similar provisions that limit the city's authority to stop the growth of gas utility service. Ideally, a city would include provisions subjecting the contract to future ordinances or revocation of the agreement at the will of the city. Other ideas include providing clear authorization in the agreement for the city to prohibit gas infrastructure. This puts the utility on notice of subsequent regulations that might otherwise be the subject of a breach of contract claim. For example, the City of Ann Arbor, Michigan, entered a franchise

agreement with Michigan Consolidated Gas Company in 1997. The contract between the parties states that the city's use of the gas company "shall be and remain subject to all ordinances, rules, and regulations of the city now in effect or which may be subsequently adopted for the regulation of land uses or for the protection of the health, safety, and welfare of residents in the city."⁷⁴ The city also made the contract "subject to revocation at the will of the city at any time during the 30-year period."⁷⁵

Provisions in an agreement requiring a utility to incentivize reduced natural gas use or to facilitate fuel switching from gas to electricity, as well as reducing or eliminating incentives for providing gas service, such as line extension allowances,⁷⁶ would likely be subject to the PUC review process described above in section III.A. Such provisions "fix the quality and character of each kind of product or service to be furnished or rendered[.]"⁷⁷ As such, a local government pursuing this strategy should create a robust record justifying such terms as reasonable or necessary and in the public interest.⁷⁸

Once the parties execute a franchise agreement, the agreement can present a barrier to regulating natural gas because the agreements typically give utilities broad legal rights to install new infrastructure in both existing *and* future rights-of-way. As long as a franchise agreement is in effect, a city may balk at prohibiting a utility from expanding its distribution system or forcing a utility to remove existing gas infrastructure for fear of violating the terms of the franchise agreement and potential resulting litigation.

If the city has already entered into a lengthy franchise agreement, and its termination date is many years in the future, reviewing

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

the agreement's provisions may reveal possible opportunities to regulate natural gas in the meantime. For example, franchise agreements that contain terms explicitly reserving a broad use of police powers may provide an opening for legally defensible gas regulations during the term of a franchise agreement.⁷⁹ So long as those police powers are not limited in any other way, a city could possibly adopt regulations limiting or prohibiting natural gas expansion without violating the franchise agreement.⁸⁰

Furthermore, local governments interested in adopting ordinances that encourage electrification or restrict gas infrastructure can schedule the regulation to take effect

upon the expiration of the current franchise agreement.

Given the long lifespan of a franchise agreement and the growing urgency of the climate crisis, cities must consider the potential long-term impacts on their regulatory authority before renewing franchise agreements with gas utilities. Because franchise agreements can renew automatically, cities should review the terms of existing agreements to see what steps are required to revise or terminate the agreement.⁸¹

If cities *do not* act to terminate or revise their natural gas franchise agreements, and there is an automatic renewal clause, they risk

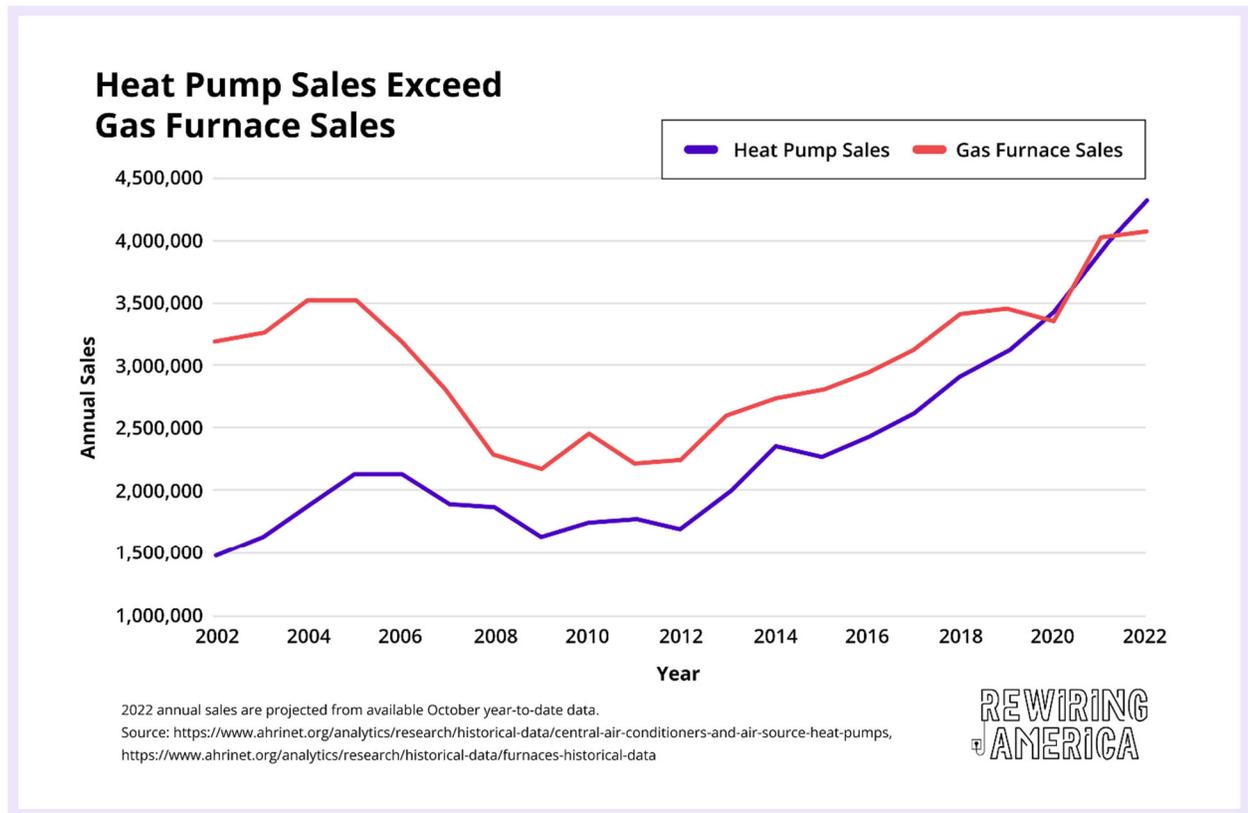


Figure 7. Heat pump year-end sales exceeded gas furnace sales in 2022.

Figure courtesy of Rewiring America (2023).

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

locking in utilities' rights to expand their systems for years or decades. In addition to the climate risks associated with authorizing the expansion of gas utility service, cities that allow their gas franchise agreements to renew may expose their residents to significant economic and health risks. If a shift to all-electric buildings accelerates and the number of gas customers declines, homes and businesses that rely on gas for heating and cooking could see their rates increase dramatically as they are forced to cover a larger share of the utility's fixed costs. However, local governments can help reduce this impact on existing customers by limiting a utility's investments in new natural gas service lines, which in turn can limit otherwise necessary investments in storage and transmission lines. Stopping the expansion of investments in infrastructure sooner rather than later will help to limit the extent of the costs borne by remaining ratepayers.⁸² Additionally, the health effects of indoor gas combustion from gas stoves raise significant questions about the fuel's safety.⁸³

In sum, any city using a franchise agreement to regulate its relationship with a gas utility will need to review and address the terms of that agreement regardless of what other regulatory pathways it pursues to regulate gas.

2. Alternatives to Franchise Agreements: Licensing Ordinances and Taxing the Utility

As a practical matter, it is highly unlikely that a gas utility will consent to a phase-out of gas or support restrictions on new gas infrastructure in a franchise agreement. Luckily, Oregon cities are not required to

contract with utilities⁸⁴ and can refuse to renew franchise agreements that give utilities unrestricted rights to expand their distribution systems.⁸⁵ The Oregon Supreme Court in *Northwest Natural Gas Co. v. City of Gresham* described this avenue of utility regulation.⁸⁶ While the issue litigated in the case involved the *amount of the fee* the city imposed on the utilities, as opposed to the *form* in which the city imposed the fee, the Oregon Supreme Court's description of home rule authority, relevant statutory provisions, and the city's licensing ordinance is instructive.

Rather than a franchise agreement, the City of Gresham regulates the utilities operating in its city under a licensing program. An entity that constructs, installs, operates, maintains, or submits a permit for a utility facility must obtain a utility license from the city.⁸⁷ The city's license is valid for ten years.⁸⁸ The city does not require utilities to obtain individual permits for work within a public utility easement unless it affects traffic, bike lanes, or sidewalks, but it does require an updated map of the utility's infrastructure and an annual schedule of proposed construction activities, the latter requiring updates as available.⁸⁹

Northwest Natural Gas Co. and Portland General Electric ("the utilities")⁹⁰ sought to invalidate the City of Gresham's utility licensing fee, which it had increased from five percent to seven percent in 2011.⁹¹ The utilities argued the seven percent fee conflicted with ORS 221.450, which states that:

The privilege tax may be collected only if the entity is operating for a period of 30 days within the city without a

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

franchise from the city and actually using the streets . . . in such city for other than travel . . . The privilege tax shall be for the use of those public streets . . . in such city in an amount *not exceeding five percent* of the gross revenues of the . . . utility . . . currently earned within the boundary of the city.⁹²

The Oregon Supreme Court determined that the license fee imposed by the city pursuant to its licensing ordinance was a “privilege tax” and the utilities were operating “without a franchise” within the meaning of ORS 221.450.⁹³ The court opined that ORS 221.450 did not preempt a city’s ability to impose a privilege tax under its home rule authority. Rather, the Court found no “indication that the ‘legislature meant its law to be exclusive’;” therefore the statute was just one method of imposing a privilege tax.⁹⁴ Finally, because the statute and the City of Gresham’s increase in its licensing fees was not incompatible, the court upheld the city’s fee increase as it applied to the utilities. Pursuant to *Northwest Natural Gas Co.*, Oregon cities, based on their home rule authority, can adopt local regulations to condition utility use of rights-of-way in accordance with their local requirements, while imposing a privilege tax on utilities that exceeds five percent of the utility’s gross revenues for the use of those rights-of-way.

Since the *Northwest Natural Gas Co.* case, other cities have adopted utility licensing programs with varying degrees of detail and procedures. In 2019, Lake Oswego adopted an ordinance establishing a utility licensing procedure for work in the city’s right of ways.⁹⁵ As part of its rationale for the

ordinance, the city noted that before the adoption of the ordinance, the city had “generally granted individually-negotiated franchises to each utility” but found that it could “more effectively, efficiently, [f]airly, and uniformly manage the public rights-of-way and provide consistent standards” for utilities through an ordinance rather than through franchise agreements.⁹⁶

Lake Oswego requires a utility license for entities who own, control, or use utility facilities in the city’s rights of way and who do not have an effective franchise agreement. Under the licensing program, the city grants the licensee the right to “construct, place, maintain and operate utility facilities in the public rights-of-way” for five years.⁹⁷ Additionally, within the licensing program provisions, the city reserves its police powers, retaining its ability to “exercise . . . any governmental right or power, including without limitation the City’s police powers and regulatory powers, regardless of whether such powers existed before or after the license is issued.”⁹⁸

As explained in section III.A, just as with franchise agreements, any licensing ordinance fixing rates, charges, or tolls, or the products or services provided, would be subject to PUC “public interest” review.⁹⁹

Establishing a utility licensing program offers several advantages to Oregon cities. First, for cities looking to adopt regulations limiting or prohibiting the expansion of natural gas, a utility licensing program offers cities the opportunity to adopt policies that might otherwise impair an existing franchise agreement or that a gas utility would not agree to include in a franchise agreement.

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

Second, a licensing program allows a city to choose and establish a shorter license term, without needing to negotiate that term. A local government may also amend its program as needed or adopt different conditions in exchange for right-of-way access.

Third, because a city does not need to negotiate formally with a utility when establishing a utility licensing program, it may develop a program that best fits its local needs and constraints.

Fourth, local governments have adopted flexible licensing programs that work alongside a franchise agreement or become effective once a franchise agreement expires. For example, the City of Tualatin adopted a licensing program in 2017 requiring every utility that owns or operates facilities in the city's right of way to obtain a 5-year license.¹⁰⁰ The city's program applies to existing or subsequent franchise agreements to the extent that the agreement and the program's provisions do not directly conflict.¹⁰¹

Fifth, a city also has more flexibility when establishing fees. Because a utility licensing program is not subject to the five percent cap established in ORS 221.450, there is no set statutory "limit" on the amount a city can charge a utility for a license to operate in the right-of-way. In setting the fee, cities should be mindful that the utility passes on the licensing fees to its customers. Oregon regulations allow utilities to include three percent of city fees in the service rate it charges utility customers. A utility must separately itemize a customer's bill for the portion of the fee above three percent.¹⁰² For example, if the city franchise fee is five percent, consumers pay three percent as

factored into the rate for service, and two percent is itemized and charged to the customer on the bill. City officials should understand that constituents pay all fees the city imposes, either itemized or included in the rates that utilities charge for service.



Figure 8. It is more economical to construct and operate a new single-family residence with all-electric appliances. Cold-climate heat pumps operate well in cold climates.

Claire McKenna, et al., *All-Electric New Homes: A Win for the Climate and the Economy*, RMI (Oct. 15, 2020), <https://rmi.org/all-electric-new-homes-a-win-for-the-climate-and-the-economy/>.

© Sebastian Studio / Adobe Stock File #188799476.

Oregon cities utilizing a utility licensing program have applied the program to all utilities, including electric, gas, and telecommunications.¹⁰³ This creates a seamless process for city staff and ensures that a local government treats similarly situated utilities in a similar fashion.¹⁰⁴

Finally, cities may choose to regulate utilities under existing ordinances and collect fees from the utility pursuant to a natural gas tax. After franchise agreement negotiations with its gas utility failed,¹⁰⁵ the City of Eugene relied on its existing Natural Gas Supplier Tax code provisions to continue to collect fees from the utility.¹⁰⁶ Under the Natural Gas Supplier Tax code requirements, a natural gas supplier must pay the city five percent of its gross revenues.¹⁰⁷ Eugene permits gas

utility work in the city's right of way on a permit-by-permit basis.¹⁰⁸

B. Strategy Two: The Oregon Building Code's "Local Amendment"

A building code is the most common method used by local governments nationwide to prohibit gas infrastructure in buildings or—the flip side of the same coin—to require building electrification.¹⁰⁹ However, Oregon's building code is established at the state level and must be uniform throughout the state. Specifically, ORS Chapter 455 gives the Oregon Building Codes Division (BCD) authority "to promulgate a state building code to govern the construction, reconstruction, alteration and repair of buildings and other structures and the installation of mechanical devices and equipment therein, and to require the correction of unsafe conditions caused by earthquakes in existing buildings."¹¹⁰ Municipalities¹¹¹ may not "enact or enforce" any ordinance or regulation "relating to the same matters encompassed by the state building code but which provides different requirements unless authorized" by the BCD.¹¹² Oregon's uniform building code narrows the options available to a local government

There is one exception to Oregon's uniform building code requirement. A municipality may apply to the BCD for a "local amendment" to adopt an ordinance that differs from the state building code.¹¹³ A local amendment is required if the proposed ordinance relates to matters covered under the building code, but sets forth "different requirements."¹¹⁴ Accordingly, pursuing a local amendment provides a clear pathway

for a local government to eliminate gas infrastructure in new construction via the building code. Because the building code applies to the reconstruction, alteration, and repair of buildings, a local amendment could also address retrofitting existing buildings to replace gas appliances with electric options. A local amendment is a useful tool if policymakers wish to use the building code to electrify structures in a manner that offers them control over construction standards.

The local amendment process consists of three tasks: hold a public meeting, complete a report, and submit an application to the BCD. Specifically, before submitting a request for a local amendment to the BCD, the municipality must hold a public hearing or meeting.¹¹⁵ The municipality must then complete a report summarizing the public response to the proposed amendment and address impacts on the community.¹¹⁶ The report must address seven criteria:

- (1) summarize comments received;
- (2) explain how the municipality responded to substantive concerns;
- (3) describe stakeholder outreach, summarize with whom the municipality communicated, and report on the results of the communications;
- (4) identify any other communities the municipality consulted with and any regional solutions that were considered;
- (5) "outline the impacts" of the local amendment;

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

- (6) estimate the fiscal impact of the amendment, including the additional construction cost per square foot; and
- (7) “identify the financial or regulatory incentives provided by the municipality to businesses or contractors impacted by the local amendment request.”¹¹⁷

The local government must then complete and submit an application to the BCD. In the application, the local government must give the reason for the request, submit a copy of the proposed ordinance or rule, and retain a copy of the report. The proposed ordinance or rule may not contain a severance clause, meaning that the entire ordinance fails if a court later deems any part of the ordinance contrary to law.¹¹⁸ The BCD must then review the request and either approve it or deny it.¹¹⁹ It has the authority to approve the ordinance in whole or in part.¹²⁰

In considering the local amendment, the director of the BCD required by statute to “encourage experimentation, innovation and cost effectiveness.”¹²¹ The Division can interpret the local amendment or add conditions to the approval.¹²² If the BCD approves the amendment, the only way to change it is to submit a new local amendment. The Division maintains the authority to review a local amendment to “determine if the [amendment] continues to be viable” and to “terminate approval” for a variety of reasons specified in the rule.¹²³

Although a somewhat onerous process for enacting natural gas regulation, especially for a small local government with limited staff, submitting a local amendment to the BCD provides a local government a clear

legal pathway to achieve building decarbonization in new *and* existing buildings. As a practical matter, the process of adopting a regulation pursuant to health and safety authority (**strategy number four**), or land use authority (**strategy numbers five, six, and seven**), will impose similar obligations on a local government to engage with the community. However, local governments should be aware that BCD exercises significant discretion over this process, which could result in unpredictable outcomes.

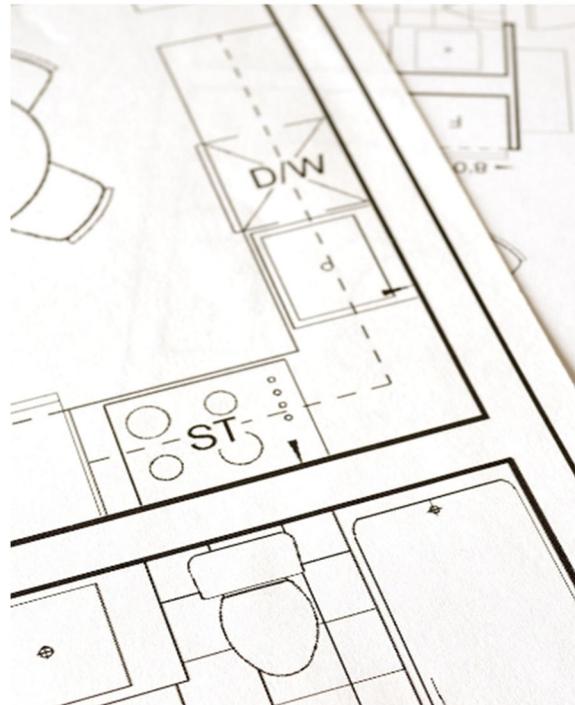


Figure 9. A local amendment allows a local government to regulate in an area already addressed by the building code, such as requiring specific kinds of appliances in buildings.

© Pixabay / Piktochart.

C. Strategy Three: Public Health and Safety Code

An Oregon local government seeking to limit or prohibit the expansion of gas

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

infrastructure may root its ability to act in its authority to regulate the health and safety of the community. In Oregon, state statutes affirms local authority to regulate public health and safety.¹²⁴ This authority, combined with the strong presumption against preemption in Oregon's case law, Oregon's specialty building codes contemplating local authority to protect health and safety,¹²⁵ and statutory authority for cities to "exclude or eject any public utility" from streets, highways, or other public property¹²⁶ supports local government action prohibiting natural gas in new buildings.

Successful use of this strategy requires consideration of any existing franchise agreement or licensing terms, pursuant to **strategy one**, and state preemption, as described next.



Figure 10. Woody Guthrie Place developed by Rose Community Development, provides affordable housing in outer southeast Portland. The building meets LEED Gold standards, with a large rooftop solar array and electric vehicle charging stations.

Photo courtesy of Rose Community Development. Photo by Josh Partee.

Oregon's building code is often referred to as a potential barrier to regulating gas infrastructure in buildings. As **strategy two** explains, Oregon's building code preempts local regulations "relating to the same matters encompassed by the state building code" but imposing "different requirements"

for those matters.¹²⁷ While no case law addresses the meaning of the "different requirements" statutory provision,¹²⁸ an Oregon appellate court has concluded the BCD does not have the authority to investigate a city for enacting an ordinance or order a city to repeal an ordinance it believes conflicts with the building code.¹²⁹ As a result, the BCD would likely be unsuccessful in directly preventing a local ordinance regulating natural gas from taking effect. Accordingly, local governments that carefully design an ordinance that avoids implicating the "same matters" in the building code should be legally sound.

The City of Eugene adopted an ordinance prohibiting fossil fuel infrastructure in new low-rise residential buildings.¹³⁰ The city has incorporated the ordinance in its Environment and Health code; the ordinance simply prohibits "fossil fuel infrastructure" in a "low-rise residential building."¹³¹ Such an approach is similar to the method Berkeley, CA, used to prohibit gas infrastructure in new buildings, grounding its authority in health and safety, in conjunction with its land use powers, to prohibit "natural gas infrastructure" in new buildings, unless not physically feasible.¹³² In its findings, the council for the City of Berkeley stated that natural gas combustion exacerbates asthma and other health conditions associated with poor indoor and outdoor air quality. Under its land use authority, the city found that as a coastal community it is vulnerable to sea level rise, erosion of its shoreline, wildfires, firestorms, and earthquake risk.¹³³

An emissions-based standard is an alternative to the Eugene and Berkeley method. Like an outright prohibition on natural gas in new buildings, which likely avoids conflicting with Oregon's requirement

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

for building code uniformity, an emissions-based ordinance recognizes the health and climate benefits of limiting natural gas system expansion. For example, a local government could modify New York's building performance standard (BPS), a GHG-intensity metric intended to drive building electrification, to apply to new buildings.¹³⁴ An emissions-based standard explicitly recognizes the health benefits associated with limiting building emissions and can serve as a more precise tool to regulate gas and other fossil fuels that accounts for building type and desirable exceptions.

In sum, cities in Oregon may limit or prohibit the expansion of natural gas using home rule authority to regulate for the benefit of public health and safety, buttressed by the statutory authority to "exclude or eject any public utility" from rights-of-way.¹³⁵ Considering any existing franchise agreement or licensing scheme is imperative. Notably, Eugene does not have a franchise agreement with its gas utility, and Milwaukie's ordinance will go into effect at the termination of its franchise agreement. Additionally, careful drafting of the ordinance to avoid a claim of building code preemption is crucial.

D. Strategy Four: County Health and Safety Regulatory Authority

Oregon Counties may rely on police powers to preserve and promote their communities' public health and safety.¹³⁶ In addition, County governments in Oregon¹³⁷ have special statutory authority to act as a "local public health authority" and "[a]dopt

ordinances and rules necessary for the local public health authority to administer [the Statewide Public Health Modernization Plan], any other public health law of this state and *any other public health matter not expressly preempted by a law of this state.*"¹³⁸ The extent of this local public health authority has not been tested in the courts, but the plain language of the statute suggests that this grant of regulatory authority—legislatively limited only by preemption—is substantial.¹³⁹

Due to a lack of judicial precedent, it is unclear how courts would distinguish between the scope of the statutory local public health authority and more general county police powers.¹⁴⁰ Nevertheless, a county relying on its statutory public health authority and police powers to protect against or mitigate the public health and safety impacts of natural gas would likely be afforded significant leeway in exercising regulatory authority if its approach avoided state preemption.¹⁴¹

Helpful examples of counties exercising their health and safety authority that present analogous regulatory options for counties seeking to limit gas infrastructure expansion include indoor and outdoor air quality measures.

1. Indoor Air Quality

Counties in Oregon have enacted targeted restrictions on activities based on adverse air quality and related public health impacts. For example, local governments in Oregon have used tobacco-related ordinances to regulate indoor air quality. Benton County passed an ordinance prohibiting tobacco smoking in all public enclosed spaces. The county's ordinance also prohibits smoking within a

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

reasonable distance of those public places.¹⁴² Similarly, the Tillamook Board of County Commissioners passed a smoke-free and tobacco-free county property ordinance.¹⁴³ The ordinance prohibits the use of tobacco products at any time on County property, and the Board specifically cited the exercise of its police powers to promote the long-term health and safety of its county employees.¹⁴⁴

This precedent is of particular importance because of the growing body of scientific evidence linking poor indoor air quality and adverse health impacts to the use of gas ranges.¹⁴⁵ In June 2022, the American Medical Association adopted a resolution informing physicians, health care providers, and the public that cooking with a gas stove increases household air pollution and the risk of childhood asthma.¹⁴⁶ More recently, Multnomah County, acting as a local public health authority, formally affirmed these findings to become the first government health authority in the U. S. to do so.¹⁴⁷ On November 10, 2022, the Multnomah County Health Department released a report finding that gas-fueled stoves emit dangerous air pollutants, namely nitrogen dioxide, and that children living in homes with such appliances are forty-two percent more likely to experience asthma symptoms and “[twenty-four percent] more likely to be diagnosed with lifetime asthma due to nitrogen dioxide emissions in the home.”¹⁴⁸ Based on these findings, the Multnomah County Health Department recommended that Multnomah County residents avoid using combustion appliances like gas stoves, and “[w]hen replacing combustion devices, [county] health officials recommend[ed] replacing them with non-combustion appliances.”¹⁴⁹ These findings—at the national and local level—formally recognize indoor gas

combustion as a public health matter and provide a foundation for future gas-related regulations.



Figure 11. The Multnomah County Health Authority report explains that gas ranges emit dangerous air pollutants, namely nitrogen dioxide, and that children living in homes with such appliances are more likely to experience asthma symptoms and be diagnosed with lifetime asthma.

MULTNOMAH CNTY., A REVIEW OF THE EVIDENCE: PUBLIC HEALTH AND GAS STOVES (2022).
© Gorodenkoff / Adobe Stock File #484667320.

As mentioned above, the authority granted to a local health authority to address public health matters appears significant and is limited only by preemption by the state legislature.¹⁵⁰ Because there is no direct precedent for giving guidance on how courts will assess an ordinance challenged as exceeding a local public health authority's regulatory power, a county seeking to exercise this power would be wise to design its ordinances or rules with a clear nexus between the harm (the health impacts of indoor gas combustion) and the proposed intervention.

2. Outdoor Air Quality

Oregon Counties have also passed tobacco ordinances to regulate outdoor air quality.¹⁵¹ For example, Multnomah County found that smoking cigarettes individually and in groups creates significant outdoor air pollution and that tobacco smoke should be kept at least 20 feet away from building entrances. Doing so reduced exposure to second-hand

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

tobacco smoke, which causes impaired breathing, asthma attacks, headache, nausea, and other symptoms. The Multnomah Board of County Commissioners passed an ordinance requiring hospitals to prohibit smoking in certain outdoor areas adjacent to hospital buildings. To support its ordinance, the County cited its authority over matters of county concern and declared the need to protect public health and welfare.¹⁵²

Multnomah County also passed a wood smoke curtailment ordinance so that during the winter heating season (October to March), when the County's outdoor air quality is expected to be poor, households and businesses are prohibited from burning wood (unless exempted). Citing public health risks, the County found such measures would help reduce air pollution negatively impacting public health.¹⁵³ Lane County, and the Cities of Eugene and Springfield, have also passed similar ordinances restricting solid fuel space heating devices during air pollution episodes.¹⁵⁴

In 2022, Multnomah County expanded its wood smoke curtailment program and strengthened its air pollution protections. Based on new research revealing the impacts of fine particulate pollution at low concentrations and the health risks of long-term exposure, the County amended its regulations to require daily air quality advisories instead of advisories issued only during the winter heating season.¹⁵⁵

Similarly, the Board of County Commissioners for Washington County used its police powers to protect the health and welfare of the people of the County and passed an outdoor air quality ordinance restricting residential home wood heating

and residential open burning of yard debris.¹⁵⁶

The health risks of outdoor air pollution, which local governments have previously cited to support their tobacco and wood stove ordinances, are undisputed.¹⁵⁷ Research shows that gas-fueled furnaces and water heaters that are vented outdoors release carbon monoxide and nitrogen oxides, contributing "significantly" to outdoor air pollution.¹⁵⁸ Other states have recognized this form of air pollution and have acted. For example, the California Air Resources Board approved a statewide plan in 2022 for attaining the federal health-based standard for ozone that includes a zero-emission standard for space and water heaters to go into effect in 2030 and effectively prohibit heaters, water heaters, and furnaces that operate on gas.¹⁵⁹ Considering the broad authority afforded to Oregon's county public health authorities, a county government may explore rules and ordinances, subject to any state preemptions, to restrict or mitigate the public health impact of ambient air pollution from gas-fueled appliances.¹⁶⁰

E. Land Use and Zoning

Oregon's comprehensive land use system is unique in the U.S., requiring collaboration among governments and thoughtful local planning efforts, resulting in specific outcomes for each jurisdiction. Land use planning can be technical and involved, but because local governments may turn to their land use authority stemming from their home rule power, it offers a promising pathway to regulate natural gas. This *Guide* identifies three ways local governments can capitalize on their land use authority to tackle gas expansion. First, local governments can adopt an ordinance that limits or prohibits

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

additional gas infrastructure. Second, local governments can create overlay zoning districts that limit or prohibit the expansion of gas infrastructure. Third, local governments can support electrification through voluntary zoning and process-related incentives. To accomplish one or more of these efforts, local governments must ensure their land use regulations are consistent with their comprehensive plans to comply with Oregon's planning requirements.



Figure 12. City of Milwaukie town hall meeting on its comprehensive plan.

Photo by Maria Sipin, *City of Milwaukie Comprehensive Plan Town Hall*, FLICKR.COM (April 4, 2018), CC BY-NC 2.0 Generic License.

Since 1973, Oregon's local governments have conducted local planning consistent with Oregon's Statewide Land Use Planning Goals.¹⁶¹ Specifically, local governments implement the Goals through local comprehensive plans, and cities and counties must adopt zoning ordinances and land-division ordinances that implement those comprehensive plans.¹⁶² The Land Conservation and Development Commission (LCDC) reviews (1) comprehensive plans to ensure consistency with the Statewide Goals and (2) proposed land use regulations for compliance with the jurisdiction's comprehensive plan and the Statewide Goals.¹⁶³ Therefore, local governments that seek to adopt land use regulations that limit or prohibit the expansion of natural gas must

first ensure that the proposed regulations are consistent with their comprehensive plans.¹⁶⁴

As a part of Oregon's land use program, the Land Use Board of Appeals (LUBA) hears appeals of local government land use decisions.¹⁶⁵ In an appeal, LUBA reviews a local government's land use decision for consistency with a local government's comprehensive plan.¹⁶⁶ A local government must provide robust support for its land use regulations, including an "adequate factual base" demonstrating how the decision advances the local government's comprehensive plan and regulations.¹⁶⁷

Bearing these principles in mind, local governments seeking to use their land use authority to regulate gas can adopt an ordinance that limits or prohibits additional natural gas infrastructure, establish overlay districts that require electrification of certain buildings, and institute voluntary zoning and process-related incentives to drive decarbonization in their communities.

1. **Strategy Five: Prohibiting Additional Gas Infrastructure**

Local governments may use their land use authority, which flows from their home rule power (subject to state preemptions), to adopt regulations limiting or prohibiting the expansion of gas infrastructure.¹⁶⁸ Cities in Oregon have already begun to use their zoning codes to regulate fossil fuels. For example, the City of Portland adopted regulations in its zoning code limiting the expansion of fossil fuel terminals (FFT) within its industrial zoning district in 2016.¹⁶⁹ The zoning amendments permit existing fossil fuel terminals to operate but prohibit

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

any additional fossil fuel capacity.¹⁷⁰ Portland found the FFT amendments were important to address health, safety, and environmental concerns related to subduction zone earthquakes and railroad spills. Further, the city aligned the FFT zoning amendments with its efforts to transition to non-fossil fuel energy sources.¹⁷¹ Before the amendments, the city did not have regulations limiting the expansion of fossil fuel terminals.¹⁷²

Regulated entities have challenged the adoption of the FFT amendments several times.¹⁷³ As it relates to land use, in their 2020 challenge, opponents argued that the FFT amendments did not comply with the city's comprehensive plan because the city "improperly balanced policies, advancing some . . . to the detriment of others."¹⁷⁴ LUBA held that the city's balancing of policies was permissible. However, LUBA remanded the decision because it found the city council's findings (1) did not address future natural gas demands, and (2) lacked an "adequate factual base" concerning the total amount of "terminal and storage capacity" for natural gas versus the capacity needs of one natural gas utility.¹⁷⁵

Challengers have not questioned the city's authority to regulate fossil fuels—evidence that local governments in Oregon likely have the authority to limit and prohibit the expansion of natural gas. However, given that Portland has experienced ongoing legal challenges to its findings supporting the FFA amendment ordinance, it would be prudent for a local government to ensure that it has "adequate findings" of fact.¹⁷⁶ In other words, a local government adopting an ordinance to limit or prohibit the expansion of natural gas must ensure it supports its findings with substantial evidence in the record, which is

"evidence a reasonable person would rely upon to make a decision."¹⁷⁷

Additionally, land use regulations limiting natural gas expansion must be consistent with the local government's comprehensive plan, ensure that it will not impair a gas utility's franchise agreement or license, or conflict with the state's uniform building code. Section E.5 discusses additional considerations regarding land use regulations.

2. **Strategy Six: Overlay Districts**

An overlay zone is a zoning district applied over an existing zoning district (the base zoning district) that establishes additional requirements.¹⁷⁸ Traditional overlay zones identify a specific subject, such as protecting historic neighborhoods or environmentally sensitive areas or promoting particular types of development, such as mixed-use or affordable housing.¹⁷⁹ Because local governments adopt overlay zoning districts to meet specific goals, they can be effective tools to initiate action.

A floating zone is an overlay zoning district that establishes conditions an applicant must meet before the local government can approve the zoning district for a development project.¹⁸⁰ A local government does not map a floating zone on the zoning map; instead, the local government includes the floating zone in the zoning ordinance. The zone "floats" until the local government, a developer, or a neighborhood petitions to rezone an area and apply the floating zone to new or existing development.

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

An overlay or floating zone can promote certain activities and a healthy environment. Sometimes called a green zone or public health overlay, a local government can customize an overlay district to meet its community's needs.¹⁸¹ For example, in 2017, Eugene adopted the Clear Lake Overlay Zone while annexing land into the city's jurisdiction.¹⁸² Through the annexation process, a community-based organization proposed an overlay that balanced the city's need for additional large-lot industrial sites with environmental justice concerns. Specifically, the Clear Lake Overlay Zone implements policies in the city's comprehensive plan that "call for fairness and equity in achieving a healthy environment, vibrant community and improved quality of life for surrounding neighborhoods."¹⁸³ The overlay district identifies industrial uses that are restricted or prohibited to "avoid incompatibility between odorous emissions or particulate discharges" with nearby residential neighborhoods, schools, and parks in the city.¹⁸⁴ The overlay also sets performance standards for odor, emissions, vibration, and noise.¹⁸⁵ Eugene's Clear Lake Overlay Zone sets a path in the city's zoning code to create other overlays with an environmental justice lens.

In December 2022, a community-based organization active in Eugene began advocating for a new Public Health Overlay Zone. This zone would apply to existing residential and industrial districts in the city and "ensure that future land development projects promote a healthy environment and improved quality of life for surrounding neighborhoods."¹⁸⁶ The proponent states that the Public Health Overlay Zone would help to "correct and move away from historical patterns of placing [the] working class and racially diverse communities

closest to heavy industrial polluters."¹⁸⁷ The zone would achieve this by prohibiting the "most toxic" land uses, establishing a quarter-mile buffer zone between industrial facilities and residential neighborhoods, schools, and parks, and adopting "public health requirements" within the land use code.¹⁸⁸

A local government can utilize an overlay district to support the electrification and decarbonization of existing building stock. A local government seeking to prohibit gas infrastructure can adopt policies that support decarbonization and electrification within its comprehensive plan and then adopt a floating zone within its zoning code that implements those policies.¹⁸⁹ A local government can tailor an overlay district to accommodate the needs of its community. For example, a local government could adopt an overlay that requires in-fill development and buildings that replace demolished buildings to be all-electric. To address existing buildings, a local government could specify when an existing building would be required to fuel switch, such as a change of ownership or the degree of repair or alteration work implemented by the owner.¹⁹⁰

LUBA has upheld the validity of overlay zoning districts even where regulations increase costs or a city applies an overlay to properties without owners' consent. For example, in *Seger v. City of Portland*,¹⁹¹ LUBA opined that a proposed warehouse in an industrial zoning district with a design review overlay was subject to the overlay requirements even though the use was permitted "outright" in the industrial zoning district. LUBA rejected the petitioner's argument that the "design review overlay provisions may [neither] prohibit [nor] significantly increase the cost of th[e]

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

permitted industrial use” because the city’s code established that the “regulations in . . . an overlay zone supersede regulations in base zones.”¹⁹² As such, LUBA upheld the validity of the design review overlay requirements and held that permissible industrial uses in the base zoning district “may be denied based on design review requirements.”¹⁹³ *Seeger* illustrates that overlay zoning districts are useful tools for requiring stricter standards than the base zoning district requires, particularly for new non-residential construction.

LUBA has also upheld the use of floating zones. For example, in *Walker v. Deschutes County*,¹⁹⁴ petitioners argued that the county erred in its application of a Surface Mining Impact Area zone (SMIA). After the county approved a surface mining facility, it applied the SMIA zone to properties within one-half mile of the facility's boundary.¹⁹⁵

Under the Deschutes County code, the SMIA was adopted “to protect the surface mining resources of Deschutes County from new development which conflicts with the removal and processing of a mineral and aggregate resource while allowing owners of property near a surface mining site reasonable use of their property.”¹⁹⁶ The petitioners objected to the SMIA application because they did not “sign the application” for the surface mine. However, LUBA explained that the “purpose [of the floating zone] would be frustrated if nearby property owners could effectively veto a surface mining operation by refusing to sign . . . the application” and that is likely why the county adopted the SMIA in its zoning code. LUBA upheld the application of the SMIA and opined that the “expression of specific intent overrides the general code provisions.”¹⁹⁷

Seeger and *Walker* demonstrate that if local governments are explicit in their zoning code that overlay district standards are in addition to (or supersede) those contained in the base zoning district, an overlay district’s regulations will prevail. *Walker* further illustrates that local governments in Oregon may use a floating zone. Additionally, presuming a local government provides the appropriate public hearings and stakeholder engagement in adopting a floating zone, *Walker* shows that including a floating overlay in the zoning code likely provides sufficient constructive notice to developers and property owners of the potential application of a floating zone.



Figure 13. Orchards of 82nd in Southeast Portland's Jade District is an energy efficient and sustainable building. Rose Community Development, an affordable housing provider, developed the project.

Photo courtesy of Rose Community Development. Photo by Brian Dalrymple, BD Aerial and O'Neill/Walsh Community Builders.

All-electric residential floating zones are likely the most feasible when a local government anticipates new construction, such as when the city annexes land or a neighborhood seeks out and supports an overlay promoting electrification. To ensure a local government maximizes these opportunities, it could establish criteria for when the city council or advisory boards must consider an all-electric overlay district.

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

For example, a local government could establish criteria that the planning commission considers applying an all-electric floating zone when a proposed subdivision exceeds a certain number of acres or housing units. A local government could impose an all-electric floating overlay zone that requires any infill development to be all-electric. Finally, a local government could tie the application of a floating zone to the termination or modification of a franchise agreement or license that grants the gas utility the ability to maintain its infrastructure rather than expand it.

3. Strategy Seven: Voluntary Zoning Incentives

Oregon's cities are authorized to "plan and otherwise encourage and regulate the development of land," including by adopting a zoning ordinance and permit requirements.¹⁹⁸ Voluntary zoning incentives are mechanisms local governments use to entice developers to provide a public benefit in exchange for a relaxed zoning standard, e.g. increased floor area ratio or increased density. A local government can offer incentives to offset the cost of the public benefit born by the developer.¹⁹⁹ Local governments can provide voluntary incentives in zoning ordinances to encourage all-electric developments and reduce the expansion of gas infrastructure.²⁰⁰

A local zoning ordinance could require developers to install only electric appliances and components in new and substantially rehabilitated buildings in exchange for a voluntary zoning incentive. Cities across the U.S. have implemented voluntary zoning

incentives to further climate change initiatives and green building policies.

For example, Portland's Planned Development process "provide[s] an opportunity for innovat[ive] and creative development" that promotes energy efficiency, among other things.²⁰¹ Under the Planned Development process, developers can obtain "additional floor area and an increase in height" for commercial buildings in exchange for providing public benefits, including energy-efficient buildings.²⁰² To receive a bonus, developers must meet specified energy use intensity standards and participate in an established building energy efficient program, such as the Energy Trust of Oregon Path to Net Zero program or LEED certification.²⁰³



Figure 14. Local governments can provide voluntary incentives to support all-electric buildings.

© Viacheslav Yakobchuk / Adobe Stock File #305933209.

Portland ensures these benefits will last into the future. Specifically, the city's program requires an applicant to sign a covenant, which is recorded with the county, which ensures the building's energy efficiency features will be maintained for 20 years after the certificate of occupancy is issued. The covenant includes tenant improvements and the city's general requirements for covenants.²⁰⁴

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

The City of Seattle also has several green building incentive programs. Seattle's Green Building Standard combines a performance-based standard with a zoning incentive that offers "additional development capacity in specific zones in exchange for meeting green building requirements."²⁰⁵ Notably, the Green Building Standard prohibits the installation of fossil fuel-fired equipment or appliances, including residential cooking appliances, clothes dryers, decorative or space heating fireplaces, indoor fire tables, outdoor radiant heaters, space heating appliances[,] and service water heating appliances."²⁰⁶ The standard provides exceptions for "emergency and standby power generators, cooking appliances in commercial kitchens, outdoor barbecues, and outdoor fireplaces, fire tables or fire pits."²⁰⁷ This incentive program ensures all-electric construction.



Figure 15. If all buildings in the U.S. used heat pump water heaters, the country could eliminate 100 million tons of carbon and save enough electricity to power 25 million homes.

Advanced Water Heating Initiative, New Buildings Institute,
<https://www.advancedwaterheatinginitiative.org/> last visited Feb. 14, 2023).

Other local governments offer voluntary zoning incentives for public benefits related to utilizing renewable energy for new development. For example, McCall, Idaho, provides a ten percent density bonus if a developer sources fifty percent of the project's total energy needs with renewable energy. McCall established this voluntary incentive through its planned unit development ordinance.²⁰⁸ Although the McCall ordinance does not require all-electric construction, it promotes a climate-friendly policy in exchange for a zoning incentive.

To encourage all-electric new developments, local governments can use voluntary zoning incentives to entice developers to construct buildings without relying on natural gas. A local government could use these voluntary zoning incentives in addition to existing rules that seek to achieve energy efficiency or adopt them in a stand-alone ordinance. To maximize the use of a voluntary zoning incentive that encourages all-electric construction, local governments should engage community members—both the developer groups and community groups—to identify an appropriate zoning incentive for all-electric development.

4. *Strategy Eight: Voluntary Process-related Incentives*

Local governments may also offer voluntary process-related incentives. A local government's ordinance can expedite site plans or building permit reviews in exchange for constructing all-electric buildings. For example, the City of Seattle's Green Building Permit incentive program offers developers

several process-related incentives for green buildings. Seattle's Priority Green Expedited program, available for all new construction, provides "faster building permit review and processing for projects that meet green building requirements with a focus on clean energy and indoor air quality, among other items."²⁰⁹ Under the expedited program, the city requires developers to eliminate fossil fuels from the project.²¹⁰

Other cities include discounted permit costs and marketing benefits. The City of Bonita Springs, Florida, offers a fast-track development review process, permit rebates, and specialized marketing²¹¹ for developers that obtain certification from a nationally recognized green building rating system for new or equivalent remodeling certification.²¹²

Voluntary process incentives are best suited for local governments that maintain longer permit review timeframes because the voluntary process saves developers time and money.

Local land use authority provides local governments in Oregon with a wide variety of options to adopt regulations that limit or prohibit the expansion of gas infrastructure. Given the degree of home rule authority to adopt land use regulations, local governments can adopt ordinances that regulate fossil fuels, develop tailored overlay zoning districts to meet the needs and goals of their communities, and provide zoning and process-related incentives that encourage decarbonization. Local governments should engage extensively with their community to garner community support and develop strategies to maximize electrification. Finally, as with all land use actions in the state, local governments must invest in updating their comprehensive plans to ensure alignment with gas-free building policies.

5. Additional Requirements for Zoning Provisions

In drafting land use regulations to limit or prohibit gas expansion in residential structures, local governments must abide by Oregon's general land use rules. This *Guide* flags two specific rules that any land use strategy should examine if the relevant factors are present. The first concerns measures applicable to areas zoned for exclusive farm use, and the second relates to crafting residential development standards for low-income housing.

a. Exclusive Farm Use Zones

Oregon law explicitly permits some nonfarm uses in areas zoned for exclusive farm uses. Since the statute itemizes those uses, the local government cannot prevent them; state law preempts local governments from limiting or prohibiting those uses. Natural gas piping for utility service is one of the uses that the statute permits by right in exclusive farm use zones in certain counties.²¹³ The statute applies to nonmarginal land counties and counties that adopted a marginal lands system prior to 1993.²¹⁴ The law applies to gas lines as well as the "accessory facilities or structures" that end at the customer's meter. For the statute to apply, the service lines must be either constructed in a public right-of-way, adjacent lands (so long as done so with the adjacent property owner's consent), or on property to be served by the utility.²¹⁵ Under this law, certain counties seeking to regulate gas cannot limit or prohibit the expansion of the gas system in exclusive farm use zones.

b. Crafting Clear and Objective Housing Development Standards

Local governments may not use subjective criteria to deny residential development projects. The Needed Housing Statutes codify this rule;²¹⁶ “cities with a population greater than 10,000”²¹⁷ “may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing,” including to low-income housing development.²¹⁸ This statute requires that the standards, conditions and procedures do not “discourag[e] needed housing through unreasonable cost or delay.” As such, a local government seeking to create a residential overlay district that limits or prohibits gas infrastructure or requires electrification must adopt and apply only “clear and objective criteria.”

To meet the “clear and objective” statutory requirement, local governments developing an ordinance applicable to housing should draft language not subject to varying interpretations.²¹⁹ For example, in *Nieto v. City of Talent*, the petitioner appealed the city’s denial of his subdivision application because the city found that the application failed to comply with its vehicular access and circulation standards.²²⁰ However, LUBA found the purpose of the vehicular access and circulation standard was “not clear from its text,” “subject to multiple interpretations,” and therefore was “ambiguous.”²²¹ As such, residential zoning provisions must not be subject to various interpretations.

Local governments should also be mindful of conditions that require the city to engage in subjective judgment for approval. For example, in *Wiper v. City Eugene (Wiper II)*, the petitioner appealed the city’s approval of his conditional use application for a housing

development because the city conditioned its approval.²²² The petitioner objected to a condition imposed by the planning commission. Specifically, the planning commission conditioned its approval of a pipe system on the applicant’s ability to show the pipe was the “*only* feasible means to connect wastewater service in this location.”²²³ LUBA determined that the condition was mandatory and required the city’s “subjective judgment” to decide whether it is the “only feasible means” to obtain sanitary sewer service.²²⁴ As such, the condition was not “clear and objective.”

Wiper illustrates that standards limiting or prohibiting natural gas in residential housing cannot require developers to put forward analyses or reports requiring subjective judgment for approval. In overlay ordinances, local governments should state clearly that they prohibit gas or fossil fuels for specified applications and identify any exceptions.

Finally, the Needed Housing Statutes require that the development standards, conditions and procedures for housing do not discourage building through “unreasonable cost or delay.”²²⁵ Existing research will be useful to support any restrictions on fossil fuel use in buildings. In its 2020 *Economics of Electrifying Buildings* report, RMI found that across the United States, “a new all-electric, single-family home is less expensive than a new mixed-fuel home that relies on gas for cooking, space heating, and water heating.”²²⁶ This report would support a local government finding that a regulation requiring electrification would not result in an “unreasonable cost.” Similarly, another study examined the cost savings of electrification in Portland and Bend, Oregon.²²⁷ This study found that replacing existing gas space and

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

water heating systems with electric heat pump systems would cost an additional \$640 at the time of purchase but would provide average annual bill savings of \$161 in Portland and \$192 in Bend, resulting in a short payback period and considerable cost savings over the systems' lifetimes.²²⁸

Existing gas customers also face increasing financial risks. In October 2022, the PUC approved rate increases resulting in a rate increase of eighteen percent for one utility and twenty-five percent for the other two utilities in the state.²²⁹ Based on this evidence, it is unlikely that LUBA or the courts would find eliminating fossil fuel use in homes to be an "unreasonable cost."

F. Strategy Nine: Building Performance Standards

Existing buildings offer the most significant opportunity to reduce energy consumption and decrease GHG emissions in the building sector.²³⁰ In Oregon, as discussed in **strategy two**, new buildings are subject to the state's uniform building code, including specialty codes. In contrast, the building code applies to existing buildings only if improvements rise to the level of renovation.²³¹ Although owners must replace appliances and building elements in compliance with the building code, the code does not regulate the energy or performance of the building. Thus, Oregon's local governments can enact ordinances requiring existing buildings to decarbonize fuel sources by conducting audits and complying with performance pathways.

A building performance standard (BPS) is a suite of policies designed to reduce energy,



Figure 16. Shari's Café and Pies in Roseburg, OR used more energy than many of the other restaurants in the chain. Remodeling in 2016 allowed implementation of energy and water saving measures.

Better Buildings, ENERGY.GOV, betterbuildingsolutioncenter.energy.gov/showcase-projects/sharis-roseburg (last visited Feb. 14, 2023). U.S. Dept. of Energy, Better Buildings, Showcase Project, Shari's of Roseburg.

gas, and water use over time.²³² Specifically, a BPS program requires building owners to make building improvements over the course of a building's life by requiring the building to meet outcome-based energy or emission performance targets.²³³ Most state or local governments implementing a BPS program have imposed requirements on larger buildings, typically in the commercial sector, whose owners and occupants have the capital and ability to measure and comply with the performance targets.

Local governments can tailor a BPS to local goals, including reducing GHG emissions, supporting energy efficiency upgrades, encouraging building electrification, and supporting renewable energy production measures. Typically, a BPS does not set

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

specific improvement criteria but provides a range of options for building owners to evaluate and decide which improvements will best achieve the set target.²³⁴



Figure 17. The Beaverton City Library installed solar panels while implementing other energy efficiency measures to address high utility costs. The power produced by the solar panels keeps 29,000 pounds of carbon dioxide out of the atmosphere.

Better Buildings, ENERGY.GOV, betterbuildingssolutioncenter.energy.gov/showcase-projects/city-beaverton-city-library (last visited Feb. 14, 2023); *Clean Energy Bright Futures*, Bonneville Env't Found., cebrightfutures.org/browse-projects/beaverton-library (last visited Feb. 14, 2023). U.S. Dept. of Energy, Better Buildings, Showcase Project, City of Beaverton City Library.

A BPS can also influence new construction. Under a BPS program, once an occupant is in the building, it is subject to the increasingly stringent targets of the benchmarks. These targets would likely incentivize developer-owned buildings to design and build structures aligned with a BPS because future improvements would likely be less costly.²³⁵

Equally constructive, a local BPS may make buyers more cautious of the buildings they purchase because they will likely factor future BPS upgrades into the purchase price.

Because any policy can result in unintended consequences and continue existing injustices, the development of a BPS should evaluate equity concerns. For example, as building improvements can lead to gentrification and rent increases, a BPS should incorporate complementary grants, technical programs, and novel legal tools, such as green lease agreements, to address these concerns.²³⁶

1. Program Design Considerations

There are several key steps to designing a BPS program. First, a local government must establish an energy-usage benchmarking program.²³⁷ Building energy benchmarking requires regularly measuring energy usage in a building, comparing energy usage data to similar buildings, and publicizing the benchmarking data.²³⁸ Local governments use the data to determine whether building owners have achieved the below-mentioned metrics. If not, then the building must conduct improvements, for example, to reduce energy use or GHG emissions.

Second, a local government should align a BPS program with climate action goals, such as a commitment to reduce GHG emissions. Linking a BPS program with climate action goals helps ensure that the BPS will achieve meaningful reductions.²³⁹ Third, a local government must establish metrics to base compliance, such as the energy per square foot or GHG emissions per square foot (intensity values), the total energy use, or total GHG emissions (absolute values).

Alternatively, a local government could base its metrics on the energy source.²⁴⁰

Fourth, the BPS must identify covered properties. Typically, a BPS program applies first to large commercial and multi-family structures, and regulators gradually phase in other building types and sizes over time.²⁴¹ Local governments determining which buildings are covered and at what point in the future may be based on the “amount of energy savings and GHG reductions that [owners] can . . . achieve[,],” as well as the necessary programmatic outreach and support to building owners.²⁴² For example, owners of large commercial and multifamily structures likely have the most significant opportunities to reduce energy consumption and may need less guidance and support than owners of smaller buildings. At the same time, local governments should consider exemptions and accommodations for building owners, such as building usage, economic hardship, occupancy rates, change of occupancy, etc.²⁴³

Fifth, local governments must establish how building owners will achieve compliance and how the local government will address noncompliance. Typically, achieving a BPS target does not mean meeting specific measures but rather following a performance pathway that achieves a certain amount of energy or GHG emission reductions.²⁴⁴ Establishing a monetary penalty that exceeds compliance costs is likely the most effective way to deter noncompliance.²⁴⁵ Local governments must also identify what the collected penalties should fund, such as reinvestment into the BPS program or providing funding to limit impacts to income-qualified renters.²⁴⁶

2. State and Local Government Examples

In January 2022, the Biden Administration launched the National Building Performance Standards Coalition.²⁴⁷ The nationwide group comprises states and local governments implementing BPS policies. The programs have varied goals and use different performance standards based on community needs. As of this publication, three states and over thirty-five local governments have committed to decarbonizing their existing building stock. Through their work, the communities plan to work with stakeholder groups, especially frontline communities, to create programs that address health, energy use, housing affordability, and climate-related needs in buildings.²⁴⁸

Washington State is a coalition member and adopted its Clean Building program to “lower costs and pollution” from fossil fuel usage in its large commercial and multifamily buildings.²⁴⁹ Specifically, the 2019 law utilizes a BPS based on an “energy use intensity target”—the net energy use intensity for buildings—as the standard of compliance.²⁵⁰ Washington’s program has two tiers based on building size. Tier 1 buildings greater than 220,000 square feet will be required to comply with the BPS starting in 2026. For buildings greater than 90,000 square feet, compliance begins in 2027, and for buildings greater than 50,000, compliance starts in 2028.²⁵¹ The state provided significant lead times to reduce the cost of compliance.²⁵²

In 2022, Washington expanded its program to include Tier 2 buildings which are 20,000 square feet or larger but less than 50,000 square feet, including multifamily buildings.

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

Tier 2 buildings must comply with the energy use intensity target starting in 2027. Under existing Tier 2 rules, the state requires buildings only to benchmark energy usage, implement an energy management plan, and institute an operations and maintenance program.²⁵³ Washington's program uses the Environmental Protection Agency's free Energy Star Portfolio Manager for benchmarking. Governments can use the Energy Star Portfolio Manager to benchmark GHG emissions, as well as benchmark energy, water, and waste costs.²⁵⁴

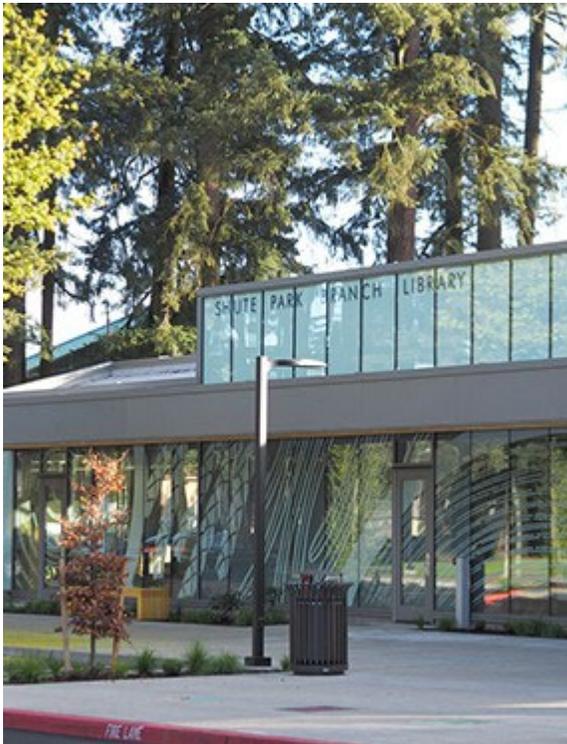


Figure 18. Shute Park Library in Hillsboro, Oregon, received HVAC, electrical and roof updates to save \$5,000 in annual energy costs, while preserving the historical value of the building.

Better Buildings, ENERGY.GOV, betterbuildingssolutioncenter.energy.gov/showcase-projects/city-hillsboro-shute-park-library (last visited Feb. 14, 2023).

U.S. Dept. of Energy, Better Buildings, Showcase Project, City of Beaverton City Library.

Other jurisdictions have based their BPS on GHG emission limits. In 2019, New York City established a BPS that sets GHG emission limits for most buildings larger than 25,000 square feet.²⁵⁵ This standard covers approximately 50,000 residential and commercial properties in the city.²⁵⁶ Similar to other jurisdictions with BPS programs, the city's approved program utilizes EPA's Portfolio Manager to track energy usage and resulting GHG emissions. In October 2022, the city issued proposed rules adding 60 property types from the EPA's Portfolio Manager and assigning new emission limits that ratchet down between 2030 through 2049, achieving zero emissions by 2050.²⁵⁷ The city's law is considered one of the most "ambitious local climate laws" and requires building owners to reduce covered building emissions by forty percent by 2030.²⁵⁸

Like other local governments, New York City tailored its BPS rules to address climate-related policies and laws. For example, the city has clarified that building owners may exclude energy used to charge plug-in vehicles from the building's reported emissions data.²⁵⁹ Presumably, the city adopted this exception to remove any penalty for buildings offering electric vehicle charging. Further, recognizing that a greater share of the city's electricity will come from renewable energy sources in the future, the city modified the electricity carbon coefficient used to determine the carbon content of the electricity consumed by a building after 2030.²⁶⁰ The city has also released guidelines for certain types of affordable housing buildings. Finally, the city is grappling with how to regulate the use of Renewable Energy Credits (RECs).²⁶¹ Under the current rules, RECs are available to offset electricity consumption but are not an option for offsetting gas used to heat and

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

provide hot water to buildings. However, stakeholders point out that the current policy allows building owners to circumvent emissions reduction requirements by purchasing RECs.²⁶² New York's BPS reveals that a local government can design a BPS to suit existing and future policies, but it should design the policy to provide on-the-ground emissions or energy reductions.

The City of Denver adopted its Energize Denver program in 2021. Energize Denver is a novel BPS program that utilizes a "trajectory approach" along with three distinct policy mechanisms, including (1) a BPS with "energy efficiency requirements," (2) "prescriptive efficiency requirements for small commercial and multifamily buildings," and (3) electrification of space and water heating equipment.²⁶³ Energize Denver applies to commercial and multifamily buildings 25,000 square feet or greater and requires that buildings meet a set energy use intensity standard based on occupancy type by 2030.²⁶⁴ Building owners must demonstrate ongoing compliance by meeting interim targets in 2024 and 2027. The city set its interim targets by a "trajectory"—a "straight line from the building's baseline performance in 2019 to the final standard."²⁶⁵ The benefit of a "trajectory" approach is that it provides building owners predictability as to the necessary amount of energy use intensity reductions; using interim targets also keeps implementation delays to a minimum.²⁶⁶

Other local governments have elected to pursue BPS with a specific focus at its core. For example, the City of Portland has begun developing a BPS with an equity focus. Working with BIPOC community members and building owners, the BPS, titled the Climate and Health Standards for Existing

Buildings, would apply to existing rental apartments and large commercial and multifamily buildings.²⁶⁷ Under Portland's BPS, as initially contemplated, covered buildings would be required to meet minimum standards for GHG emissions, indoor air quality, and indoor temperature by a specific date. The city plans to offer multiple pathways to achieve compliance to provide building owners "autonomy and flexibility" to meet compliance targets. Compliance would occur over time, with the end goal of zero carbon emissions by 2050.²⁶⁸

BPS allow state and local governments to develop policies that reduce energy consumption and decrease GHG emissions in existing building stock. Due to the limited role of the state's uniform building code for existing buildings, local governments can implement building standards that support decarbonization. States and cities implementing BPS illustrate that local concerns and needs play a large role in policy development. To maximize a BPS, Oregon governments should work with a broad coalition of stakeholders to develop bold policies that will result in on-the-ground energy or GHG emission reductions for the next several decades.

G. Strategy Ten: Moratorium on Gas Infrastructure Improvements

Oregon law restricts local governments from adopting moratoriums. Although many local governments across the country may enact a moratorium²⁶⁹ on development to provide time to research, publicly vet, and adopt land use regulations,²⁷⁰ adopting a moratorium on installing gas infrastructure would be

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

counterproductive in Oregon. Instead, Oregon's local governments should move forward with their chosen policy option to limit or prohibit the expansion of natural gas infrastructure rather than enact a moratorium on gas infrastructure while they discuss available policy options.

Under Oregon law, cities, counties, and special districts must follow certain procedures to declare a moratorium on "construction or land development." Therefore, any moratorium, such as on gas lines laid in the public right-of-way must either (1) fall outside of the meaning of "construction or land development" as used in the statute or (2) follow the statutory requirements.²⁷¹

It would be challenging for a local government to keep a temporary pause on gas infrastructure from being characterized as a delay on "construction or land development." Under ORS 197.534, "[w]hen a local government engages in a pattern or practice of delaying or stopping the issuance of permits, . . . or construction on, any land . . . the local government" must "[a]dopt a moratorium on construction or land development." The Land Use Board of Appeals' (LUBA) case law reveals that this statute encompasses various land use applications made to local governments, including building permits,²⁷² PUD amendments,²⁷³ road extensions,²⁷⁴ and subdivision applications.²⁷⁵ Moreover, to trigger the statutory requirements for a moratorium a local government does not have to halt permit issuance completely.²⁷⁶ As such, a local government seeking to deny a building permit application for connection to existing gas infrastructure or a permit to work in a right-of-way would likely be considered a moratorium on construction or

land development under ORS 197.534. Although there is an argument that a local government would not delay the construction of a *building* if a city granted permits to construct buildings without gas infrastructure, the fact that permits to connect gas infrastructure are *formally available*, and the city necessarily denies those permits, means that ORS 197.534 will likely be triggered.

For example, if a local government seeks to proceed with a moratorium on new gas piping laid in the public right-of-way, giving it time to consider whether to restrict natural gas permanently, it must comply with statutory requirements that will be difficult to meet. The process for a local government to adopt a moratorium regarding "construction or land development" requires the government to:

- (1) Notify the Department of Land Conservation and Development at least 45 days before the final public hearing at which the moratorium is to be adopted;
- (2) Prepare written findings demonstrating a "compelling need" for the moratorium; and
- (3) hold a public hearing for the adoption at which the findings in support of the moratorium are discussed.²⁷⁷

The required written findings must demonstrate a "compelling need" for the moratorium under ORS 197.520(3). The necessary findings are quite extensive and are specific to whether the moratorium applies to "urban or urbanizable land" (hereafter "urban land") or to "rural land." Further, LUBA has held that a county's need

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

to pause development to establish zoning regulations is insufficient to demonstrate a compelling need.²⁷⁸ Specifically, where a county sought to adopt two sets of zoning amendments within a short timeframe, LUBA opined that the “administrative convenience” for the county to “avoid[] duplicative amendments to its zoning regulations” was insufficient justification for delaying or avoiding the standard process for establishing zoning amendments. As such, it is unlikely that a local government seeking to prohibit gas in buildings could rely on the lengthy process of adopting a zoning amendment that limits or prohibits gas infrastructure in new buildings to meet the compelling need requirement.

Finally, the legislature intended that any moratorium be “limited in duration and scope.”²⁷⁹ Generally, a moratorium for urban land may not last longer than 120 days. Extensions, lasting no longer than six months, require a public hearing, and the local government must support its extension with written findings.²⁸⁰

Any temporary pause on natural gas expansion will likely qualify as a delay on “construction or land development under ORS 197.534. Accordingly, local governments will be faced with the difficult task of demonstrating a “compelling need” for the moratorium. Given existing case law, that task may be difficult. Even if a local government successfully substantiates its compelling need, a moratorium provides only a temporary timeframe to act. Therefore, local governments should advance their chosen policy option rather than enact a moratorium on gas infrastructure.

Local governments that have implemented strategies three, four, or five will need to

reject building permit applications seeking to connect to existing gas infrastructure. Local governments should not fear that these rejections will be considered a “de facto moratorium.” Under ORS 197.534, the denial of “permits, authorizations or approvals” is justified so long as the denial is consistent with a local government's comprehensive plan and land use regulations. LUBA has opined that a local government does not enact a de facto moratorium when it denies permits inconsistent with its comprehensive plans and zoning ordinances.²⁸¹

Therefore, a local government that adopts regulations requiring gas-free or fossil-free building development under its land use authority must first update its comprehensive plan, which LCDC must acknowledge.²⁸² A local government must also ensure its comprehensive plan's gas policy is directly related to the corresponding land use regulation. It is likely insufficient for a local government to model or “pattern” a land use regulation after a previously acknowledged concept.²⁸³ As with all land use decisions, LUBA would hear an appeal of a person or group of persons who have their interests “substantially affected” by a moratorium.²⁸⁴

IV. Conclusion

Now is the time for local governments to act to stop the expansion of natural gas in Oregon. Reducing methane emissions is the fastest and most cost-effective strategy to lessen the increasing impacts of climate change, while delivering health, safety, and energy savings outcomes to residents.²⁸⁵ As discussed in this *Guide*, some Oregon cities have identified the need to address methane emissions in their climate action plans and some have begun to explore code changes limiting the expansion of natural gas.²⁸⁶

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

Further, some cities have chosen to forgo long-term franchise agreements with gas utilities in favor of flexible utility licensing programs or a privilege tax.²⁸⁷

Local governments should not rely on state action to drive down greenhouse gas emissions in Oregon or expansion of the infrastructure necessary to deliver natural gas to homes and businesses. Rather, local governments in Oregon can and should continue the proud tradition of utilizing their home rule authority to implement measures that will address their citizens' needs, including reducing the impacts of climate change.

Local governments that have embraced regulating fossil fuels are not forging ahead alone. Over seventy cities across California

have adopted ordinances that limit or prohibit additional fossil fuels.²⁸⁸ Cities across the country have also implemented voluntary zoning or process-related incentives to support building electrification.²⁸⁹

This *Guide* identifies and explains ten legal strategies to regulate natural gas. While different local governments will find some approaches more feasible than others due to specific preemption concerns, franchise agreement terms or licensing provisions, local code provisions, or the capacity to meet specific statutory criteria, we hope that one or more of these strategies will suit the needs of your community. Oregon's local governments can lead the way in limiting or prohibiting the expansion of natural gas in the state, to the benefit of the health, safety, and pocketbooks of all Oregonians

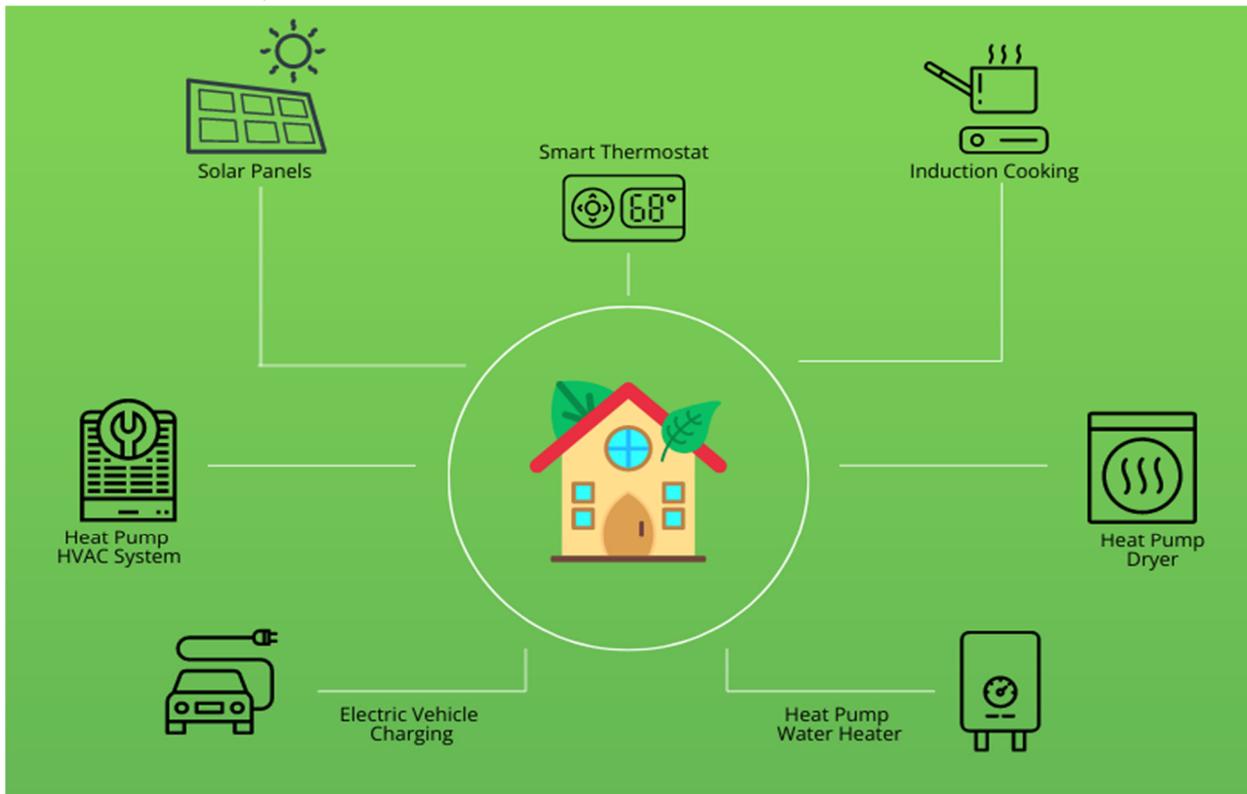


Figure 19. Electric appliances bring comfort, efficiency, and resiliency to buildings. Heat pumps for space heating, water heating, and drying clothes, as well as induction stoves, electric vehicles, and solar panels, bring money savings over time, provide better indoor air quality, and offer resiliency benefits in this time of energy transition.

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

-
- ¹ CITY OF SALEM, SALEM CLIMATE ACTION PLAN STRATEGY LIST 3 (2021), <https://www.cityofsalem.net/home/showpublisheddocument/16429/637931486294300000>.
- ² Barry Rabe, *Methane Comes Front and Center in Climate Change Policy*, BROOKINGS INST. (Jan. 6, 2023), <https://www.brookings.edu/blog/fixgov/2023/01/06/methane-comes-front-and-center-in-climate-change-policy/>.
- ³ EUGENE, OR., ORDINANCE NO. 20681 §§ 1, 2 (Feb. 6, 2023) (regarding the Prohibition of Fossil Fuel Infrastructure in New Low-Rise Residential Buildings), <http://cocapps.eugene-or.gov/cmoweblink/0/edoc/3521509/Ord.%2020681.pdf> [hereinafter EUGENE ORDINANCE NO. 20681 PROHIBITING FOSSIL FUELS].
- ⁴ MILWAUKIE, OR., COUNCIL RES. NO. 81-2022, A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, TO DECARBONIZE THE BUILDING SECTOR AND TO ACCELERATE ALL-ELECTRIC FUTURE BUILDINGS TO PROMOTE CLIMATE, PUBLIC HEALTH, AND RESILIENCY BENEFITS (Dec. 6, 2022), https://www.milwaukieoregon.gov/sites/default/files/fileattachments/ordinance/124274/r81-2022_bldgenenergy-new.pdf.
- ⁵ MULTNOMAH CNTY., A REVIEW OF THE EVIDENCE: PUBLIC HEALTH AND GAS STOVES (2022), <https://www.multco.us/multnomah-county/news/multnomah-county-health-department-report-recommends-transitioning-away-gas> [hereinafter MULTNOMAH CNTY'S REPORT ON PUBLIC HEALTH AND GAS STOVES].
- ⁶ *Id.* at 15.
- ⁷ A deep dive into the negative impacts of natural gas is outside of the scope of this paper, but for more detail, see DINEEN O'ROURKE ET AL., METHANE GAS: HEALTHY, SAFETY, ECONOMIC, AND CLIMATE IMPACTS (2022), <https://350pdx.org/wp-content/uploads/2022/11/Methane-Gas-Health-Safety-Economic-and-Climate-Impacts-Version-2-Updated-November-2022.pdf>. For methane related cost increases see Bob Jenks, *Natural Gas Prices Are Going Up Before Winter*, OR. CITIZENS' UTIL. BD. (Aug. 3, 2022), <https://oregoncub.org/news/blog/natural-gas-prices-are-going-up-before-winter/2610/--this>; Charlotte Shuff, *NW Natural Bills to Increase 25%*, OR. CITIZENS' UTIL. BD. (Oct. 26, 2022), <https://oregoncub.org/news/blog/nw-natural-bills-to-increase-25/2673/>.
- ⁸ See, e.g. MULTNOMAH CNTY'S REPORT ON PUBLIC HEALTH AND GAS STOVES, *supra* note 5.
- ⁹ MULTNOMAH CNTY., OR., COUNCIL RES. NO. 2021-021, REAFFIRMING MULTNOMAH COUNTY'S COMMITMENT TO FOSSIL FUEL FREE BUILDINGS AND AFFIRMING SUPPORT FOR THE UPDATE OF MULTNOMAH COUNTY'S LEED GOLD AND HIGH PERFORMANCE GREEN BUILDING POLICY (Apr. 15, 2021).
- ¹⁰ EUGENE ORDINANCE NO. 20681 PROHIBITING FOSSIL FUELS, *supra* note 3.
- ¹¹ See *supra* notes 3–6 and accompanying text. There is a growing trend nationwide of local governments restricting natural gas use and encouraging electrification for heating and cooling, water heating, and cooking in buildings. Over 90 cities and counties—affecting 31 million people—have passed policies that require or encourage electrification of residential and commercial buildings. Leah Louis-Prescott & Rachel Golden, *How Local Governments and Communities Are Taking Action to Get Fossil Fuels Out of Buildings*, RMI (Aug. 9, 2022, updated Nov. 2, 2022), <https://rmi.org/taking-action-to-get-fossil-fuels-out-of-buildings/>. As of January 25, 2022, over 70 local governments in California have passed regulations to phase out gas and require new buildings to be electric. Jessica Gable, *California's Cities Lead the Way on Pollution-Free Homes and Buildings*, SIERRA CLUB (July 22, 2021, updated Jan. 25, 2023), <https://www.sierraclub.org/articles/2021/07/californias-cities-lead-way-pollution-free-homes-and-buildings> (providing links to ordinances regulating natural gas in California).
- ¹² LEAGUE OF OR. CITIES, LOCAL GOV'T: THE BASICS 4 (2018), <https://www.orcities.org/application/files/2515/7427/7942/LocalGovernmentBasics-Updated11-20-19web.pdf> [hereinafter LEAGUE OF OR. CITIES, LOCAL GOV'T BASICS].
- ¹³ *Id.* at 5. Home rule authority is derived from OR. CONST. art. XI § 2 and art. IV, § 1(5).
- ¹⁴ OR. CONST. art. XI § 2 and art. IV, § 1(5); LEAGUE OF OR. CITIES, LOCAL GOV'T BASICS, *supra* note 12, at 5.
- ¹⁵ LEAGUE OF OR. CITIES, LOCAL GOV'T BASICS, *supra* note 12, at 5.
- ¹⁶ *Id.*
- ¹⁷ LEAGUE OF OR. CITIES, OR. MUN. HANDBOOK: CH. 2: HOME RULE & ITS LIMITS 4 (Sept. 2020), https://www.orcities.org/application/files/3715/9917/4968/Handbook_-_Chapter_2_Home_Rule_and_Its_Limits.pdf [hereinafter LEAGUE OF OR. CITIES, MUN. HANDBOOK: HOME RULE & ITS LIMITS].
- ¹⁸ *Id.*; see, e.g., EUGENE, OR., CHARTER ch. 2, § 4(2) (2002) (“The city has all powers that the constitution or laws of the United States or of this state expressly or impliedly grant or allow cities, as fully as if this charter specifically stated each of those powers.”); BEND, OR., CHARTER ch. II, § 4 (1995) (“The city has all powers that the

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

constitutions, statutes, and common law of the United States and of the State of Oregon now or hereafter expressly or impliedly grant or allow the city, as fully as though this charter specifically enumerated each of those powers.”).

¹⁹ LEAGUE OF OR. CITIES, MUN. HANDBOOK: HOME RULE & ITS LIMITS, *supra* note 17 at 5–11.

²⁰ See *Rogue Valley Sewer Servs. v. City of Phoenix*, 357 Or. 437, 448–450 (2015).

²¹ OR. CONST. art. VI, § 10.

²² The nine home rule counties are Washington, Lane, Hood River, Multnomah, Benton, Jackson, Josephine, Clatsop, and Umatilla. *Home Rule*, CLATSOP CNTY., OR., <https://www.clatsopcounty.gov/county/page/home-rule> (last visited Nov. 22, 2022).

²³ TOLLENAAR & ASSOCIATES, COUNTY HOME RULE IN OREGON 31 (2005),

<https://oregoncounties.org/news/publications/home-rule/> [hereinafter CNTY. HOME RULE IN OR.].

²⁴ OR. REV. STAT. § 203.035 (providing that a “governing body or the electors of a county may by ordinance exercise authority within the county over matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States and of this state, as fully as if each particular power comprised in that general authority were specifically listed in ORS 203.030 to 203.075.”).

²⁵ CNTY. HOME RULE IN OR., *supra* note 23, at 19; OR. REV. STAT. § 203.035(1); Legislative Committee Services, *Local and Regional Governments Background Brief*, STATE OF OR. 2 (2012),

<https://www.oregonlegislature.gov/lpro/Publications/LocalandRegionalGovernments.pdf>.

²⁶ Compare OR. REV. STAT. § 203.035(1) with OR. CONST. art. VI, § 10.

²⁷ GTE Northwest v. Pub. Util. Comm’n, 179 Or. App. 46, 51–54 (2002) (quoting *Allison v. Washington Cnty.*, 24 Or. App. 571, 581 (1975) and explaining that “in the absence of state preemption or a limiting charter provision, home rule and general law counties have the same legislative authority.”).

²⁸ CNTY. HOME RULE IN OR., *supra* note 23, at 22 (2005).

²⁹ Compare OR. REV. STAT. § 203.040 with OR. CONST. art. VI, § 10; CNTY. HOME RULE IN OR., *supra* note 23, at 86.

³⁰ CNTY. HOME RULE IN OR., *supra* note 23, at 12, 47.

³¹ “The inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality and justice. It is a fundamental power essential to government, and it cannot be surrendered by the legislature or irrevocably transferred away from government.” *Police Power*, BLACK’S LAW DICTIONARY (10th ed. 2009).

³² OR. REV. STAT. § 431.415(1)(b).

³³ *Id.*

³⁴ *City of La Grande v. Pub. Emps. Retirement Bd. (La Grande/Astoria)*, 281 Or. 137, 156 (1978) (“[A] general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community’s freedom to choose its own political form.”); LEAGUE OF OR. CITIES, MUN. HANDBOOK: HOME RULE & ITS LIMITS, *supra* note 17, at 10.

³⁵ CNTY. HOME RULE IN OR., *supra* note 23, at 71; *but see Thunderbird Mobile Club v. City of Wilsonville*, 234 Or. App. 457, 478–79 (2010), *rev den*, 348 Or. 524 (2010) (questioning practice of applying same principles to city and county home rule analysis because of differing authorizing language).

³⁶ *La Grande/Astoria*, 281 Or. at 148; *State ex rel Haley v. City of Troutdale*, 281 Or. 203, 211 (1978).

³⁷ LEAGUE OF OR. CITIES, MUN. HANDBOOK: HOME RULE & ITS LIMITS, *supra* note 17, at 12; *City of Portland v. Bartlett*, 304 Or. App. 580, 593 (2020).

³⁸ LEAGUE OF OR. CITIES, MUN. HANDBOOK: HOME RULE & ITS LIMITS, *supra* note 17, at 12; *see, e.g., Ashland Drilling v. Jackson Cnty.*, 168 Or. App. 624, 635–37 (2000) (examining the scope of an express preemption provision).

³⁹ *AT&T Commc’ns of the Pacific Nw. v. City of Eugene*, 177 Or. App. 379, 394 (2001).

⁴⁰ *AT&T Commc’ns of the Pacific Nw.*, 177 Or. App. at 394; *Rogue Valley Sewer Servs.*, 357 Or. at 454.

⁴¹ *La Grande/Astoria*, 281 Or. at 148; LEAGUE OF OR. CITIES, MUN. HANDBOOK: HOME RULE & ITS LIMITS, *supra* note 17, at 10.

⁴² *Thunderbird Mobile Club*, 234 Or. App. at 473. Note that, in the context of civil matters, courts have explicitly disavowed the principle that a conflict occurs when “the local legislation prohibits what the state legislation permits” or vice versa; this principle only applies in the criminal context. *Id.* at 475.

⁴³ *Rogue Valley Sewer Servs.*, 357 Or. at 454–55; *Thunderbird Mobile Club*, 234 Or. App. at 474 (“[T]he occupation of a field of regulation by the state has no necessary preemptive effect on the civil or administrative laws of a chartered city.”).

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

- ⁴⁴ See, e.g., *Owen v. City of Portland*, 305 Or. App. 267, 273 (2020) (parties can comply with both minimum requirements for no-cause lease termination and stricter Portland requirements surrounding lease termination); *Or. Rest. Ass'n. v. City of Corvallis*, 166 Or. App. 506, 508–09 (2000) (upholding city prohibition on indoor smoking despite less extensive state regulation under Oregon Indoor Clean Air Act).
- ⁴⁵ *Thunderbird Mobile Club*, 234 Or. App. at 474 (quoting *Springfield Util. Bd. v. Emerald PUD*, 191 Or. App. 536, 541–42 (2004), *aff'd*, 339 Or. 631 (2005)).
- ⁴⁶ See *Gunderson v. City of Portland*, 352 Or. 648, 662 (2012).
- ⁴⁷ *LaGrande/Astoria*, 281 Or. at 148–49.
- ⁴⁸ *Id.*
- ⁴⁹ “Indeed, we cannot simply assume that, by its silence, the legislature intended to permit conduct made punishable under an ordinance.” *Ashland Drilling*, 168 Or. App. at 634 (internal quotations and citations omitted).
- ⁵⁰ Caitlin McCoy, ENVIRONMENTAL & ENERGY LAW PROGRAM, HARVARD LAW SCHOOL, THE LEGAL DYNAMICS OF LOCAL LIMITS ON NATURAL GAS USE IN BUILDINGS 28–29 (June 8, 2020), <https://lpdd.org/wp-content/uploads/2020/10/The-Legal-Dynamics-of-Local-Limits-on-Natural-Gas-Use-in-Buildings.pdf>.
- ⁵¹ JAY B. SYKES & NICOLE VANATKO, FEDERAL PREEMPTION: A LEGAL PRIMER, CONGRESSIONAL RESEARCH SERVICE 2 (2019), <https://crsreports.congress.gov/product/pdf/R/R45825>.
- ⁵² *Id.*
- ⁵³ BERKELEY, CAL., ORDINANCE NO. 7,672–N.S. (Aug. 6, 2019).
- ⁵⁴ 42 U.S.C. § 6201 (2018) *et seq.*
- ⁵⁵ See generally MARTIN C. OFFUTT, THE DEPARTMENT OF ENERGY’S APPLIANCE AND EQUIPMENT STANDARDS PROGRAM, CONGRESSIONAL RESEARCH SERVICE (2022), <https://crsreports.congress.gov/product/pdf/R/R47038/2>.
- ⁵⁶ *Cal. Rest. Ass’n v. City of Berkeley*, 547 F. Supp. 3d 878 (N.D. Cal. 2021).
- ⁵⁷ *Cal. Rest. Ass’n v. City of Berkeley*, 547 F. Supp. 3d 878 (N.D. Cal. 2021), *appeal docketed*, No. 21-16278 (9th Cir. Nov. 3, 2021) The forthcoming decision should provide additional clarity around the scope of EPCA preemption in relation to state and local building electrification mandates.
- ⁵⁸ 49 U.S.C. § 60101 (2018) *et seq.*
- ⁵⁹ 33 U.S.C. ch. 25 (2018) and 42 U.S.C. ch. 37 (2018)
- ⁶⁰ Kevin Perron, “Zoning Out” *Climate Change: Local Land Use Power, Fossil Fuel Infrastructure, and the Fight Against Climate Change*, 45 COLUM. J. ENV’T. L. 573, 622–28 (2020).
- ⁶¹ See LEAGUE OF OREGON CITIES, LEGAL GUIDE TO OREGON’S STATUTORY PREEMPTIONS OF HOME RULE, APPENDIX A (Oct. 2020), <https://www.orcities.org/application/files/3116/0374/8436/StatutoryPreemptionGuideOct2020Update.pdf> (listing express statutory preemptions).
- ⁶² OR. REV. STAT. § 221.420 (City may exclude or eject any public utility or heating company from “the streets, highways or other public property.”).
- ⁶³ See *NW Nat. Gas Co. v. City of Gresham*, 359 Or. 309, 343 (2016) (“[I]n 1987, the legislature, when amending ORS 221.450, ‘[r]ecogniz[ed] the independent basis of legislative authority granted by cities in this state by municipal charters, . . . [and] reaffirm[ed] the authority of cities to regulate use of municipally owned rights of way[.]’”) (citing OR. LAWS 1987, ch. 245 § 1).
- ⁶⁴ OR. REV. STAT. § 221.420 (2).
- ⁶⁵ *Id.*
- ⁶⁶ OR. REV. STAT. § 221.420(2)(a).
- ⁶⁷ OR. REV. STAT. § 221.420(2)(b).
- ⁶⁸ *Id.*
- ⁶⁹ OR. REV. STAT. § 221.420(2)(c).
- ⁷⁰ OR. REV. STAT. § 756.040(1).
- ⁷¹ OR. REV. STAT. § 221.420(2)(c).
- ⁷² OR. REV. STAT. § ch. 650 (relating to franchise transactions); OR. ADMIN. R. §§ 441-325-0010 - 441-325-0050 (relating to franchise finance and securities regulations).
- ⁷³ Several franchise agreements in Oregon provide an automatic renewal term that can be avoided if stated in writing to the franchise grantee. See *infra* note 72.
- ⁷⁴ ANN ARBOR, MICH. CODE OF ORDINANCES, ch. 34 § 2:310.
- ⁷⁵ BEND, OR., ORDINANCE NO. NS-2222 § 2; PORTLAND, OR., ORDINANCE NO. 182618 § 1.4; ANN ARBOR, MICH., CODE OF ORDINANCES, ch. 34 § 2:301, 2:312.
- ⁷⁶ A line extension allowance is the amount of service extension that will be made free to connect a new customer. OR. ADMIN. R. § 860-021-0050(1).

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

⁷⁷ OR. REV. STAT. §§ 221.420(2)(c).

⁷⁸ *Id.*

⁷⁹ For example, the franchise agreement between NW Natural and the City of Corvallis, adopted in 2013, makes the agreement subject to the City's police powers "to adopt and enforce ordinances necessary to the safety, health, good order, comfort and general welfare of the public[.]" CORVALLIS, OR., ORDINANCE NO. 02-27 § 2.5 (2013).

⁸⁰ The same franchise agreement between NW Natural and the City of Corvallis appears to require compliance with only those laws and ordinances that are of "general applicability[.]" *Id.*

⁸¹ See BEND, OR., ORDINANCE NO. NS-2222 § 13 (granting the franchise a term of ten years which "shall be extended for one [ten] year term if neither party provides written notice of non-renewal to the other party at least six months prior to the expiration of the initial term."); ONTARIO, OR., CODE OF ORDINANCES art. 5 § 3-19-65 (granting the franchise a five-year term which "shall be extended for one five-year term if neither party provides written of non-renewal to the other party at least six months prior to the expiration of the initial term."); BEAVERTON, OR., RES. NO. 2299 § 2 (March 17, 2015) (granting the franchise a term of ten years and automatic renewal for two additional five-year terms unless one party gives prior written notice not less than 180 days from the effective date.).

⁸² Laura Feinstein, *No, Hydrogen Is Not the Savior Gas Utilities Are Looking for*, SIGHTLINE INST. (Oct. 24, 2022), <https://www.sightline.org/2022/10/24/no-hydrogen-is-not-the-savior-gas-utilities-are-looking-for/>; see also OR. PUB. UTILITY COMM'N DOCKET NO. UM 2173, NATURAL GAS FACT FINDING FINAL REPORT 19 (Jan. 2023).

⁸³ MULTNOMAH CNTY'S REPORT ON PUBLIC HEALTH AND GAS STOVES, *supra* note 5, at 10.

⁸⁴ OR. REV. STAT. § 221.450.

⁸⁵ See OR. REV. STAT. § 757.667 (giving cities authority to "control the use of its rights of way and collect license fees, privilege taxes, rent or other charges for the use of the city's rights of way."); § 757.954 (similar).

⁸⁶ *Nw. Natural Gas Co. v. City of Gresham*, 359 Or. 309 (2016).

⁸⁷ GRESHAM, OR., REV. CODE, art. 6.30.070(1).

⁸⁸ GRESHAM, OR., REV. CODE, art. 6.30.070(8). However, the city's term of the grant was initially for 5 years. GRESHAM, OR., ORDINANCE NO. 1523 (2001).

⁸⁹ GRESHAM, OR., REV. CODE, art. 6.35.040(5)(a) (utility permits are exempt), 6.30.100(2) (map requirement), 6.30.130(1) (schedule of construction).

⁹⁰ Rockwood Water People's Utility District was an additional plaintiff. The court ruled that because it was a people's utility district, the City of Gresham did not have "express statutory authority to impose a tax in excess of five percent ... under ORS 221.450." *Id.* at 347.

⁹¹ *Nw Natural Gas Co.*, 359 Or. at 313.

⁹² OR. REV. STAT. § 221.450 (emphasis added).

⁹³ *Nw. Natural Gas Co.*, 359 Or. at 312.

⁹⁴ *Id.* at 346 (quoting *La Grande/Astoria* at 149).

⁹⁵ LAKE OSWEGO, OR., ORDINANCE NO. 2804 (Jan. 2, 2019) (see title).

⁹⁶ LAKE OSWEGO, OR., ORDINANCE NO. 2804 (Jan. 2, 2019).

⁹⁷ LAKE OSWEGO, OR., ORDINANCE NO. 2804 § 51.01.070(6), (7) (Jan. 2, 2019).

⁹⁸ LAKE OSWEGO, OR., ORDINANCE NO. 2804 § 51.01.070(6) (Jan. 2, 2019).

⁹⁹ *Id.*

¹⁰⁰ TUALATIN, OR., MUN. CODE ch. 3-06 (2022); see also *Utility Facilities in the Right-Of-Way: License Application*, CITY OF TUALATIN, OR., <https://www.tualatinoregon.gov/publicworks/webforms/utility-facilities-right-way-license-application> (last visited Jan. 13, 2023).

¹⁰¹ *Id.* § 3-6-420.

¹⁰² OR. ADMIN. R. § 860-022-0040(1) (for the purposes of ratemaking, three percent of the gas utility's fees paid to a city for right-of-way use shall be considered an operating expense, which is passed onto the customer in the calculation of the rate and is not itemized on the bill).

¹⁰³ See *Utility Facilities in the Right-Of-Way*, *supra* note 100 (Tualatin's utility licensing program applies to "[e]very entity owning or operating facilities in the right-of-way").

¹⁰⁴ The Oregon Constitution does not contain an equal protection clause that is textually analogous to the Federal Equal Protection Clause of the 14th Amendment of the U.S. Constitution. Thomas A. Balmer, "Does Oregon's Constitution Need a Due Process Clause?" *Thoughts on Due Process and Other Limitations on State Action*, 91 WASH. L. REV. ONLINE 157, 159–60 (2016). Rather, Oregon's Constitution contains an "equal privileges and immunities clause." *Id.* at 169.; OR. CONST. art. I, § 20 ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."). Oregon State courts have, however, relied on Equal Protection Clause federal case law when examining the "differential treatment of similarly situated persons." See *Hewitt v. State Accident Insurance Fund Corp.*, 294 Or. 33 (1982); 39

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

Tanner v. Or. Health Scis. Univ. 157 Or. App. 502 (1998). The Oregon courts have applied OR. CONST. art. I, § 20 as a “more general prohibition on differential treatment.” Balmer, *supra* note 104, at 171. Oregon courts have yet to determine whether a corporation, which would include a utility, is a “person” for the purposes of Or. Const. art. I, § 20. *See* Advanced Drainage Systems v. City of Portland, 214 Or. App. 534, 537–39 (2007) (asking whether “a business corporation is a ‘citizen’ that can claim entitlement to equal privileges and immunities” under Or. Const. art. I, § 20 and leaving the issue unresolved). Should utilities argue that a utility licensing program does not treat utilities equally under the federal Equal Protection claim, the burden would be on a utility to argue that the utility licensing provisions were not rational, a level of scrutiny that has an “extremely inclusive definition” in Oregon. *Id.* at 586.

¹⁰⁵ EUGENE, OR., ORDINANCE NO. 20639 (Oct. 1, 2020) (final extension of NW Natural’s non-exclusive natural gas franchise and citing extension was due to a “novel ... franchise negotiation.”).

¹⁰⁶ EUGENE, OR., CODE ch. 3.600.

¹⁰⁷ EUGENE, OR., CODE ch. 3.605.

¹⁰⁸ *See* EUGENE, OR., CODE ch. 7.290.

¹⁰⁹ *See* Jessica Gable, *supra* note 11, (listing over seventy California cities and counties with building electrification codes or ordinances, with most using California’s “reach code”).

¹¹⁰ OR. REV. STAT. § 455.020(1).

¹¹¹ A “municipality” is defined in OR. REV. STAT. § 455.010 as “a city, county or other unit of local government otherwise authorized by law to administer a building code.” OR. REV. STAT. § 455.010(5).

¹¹² The statute requires that the application be made to the Director of the Department of Consumer and Business Services, which is the head of the agency under which the Building Codes Division operates. OR. REV. STAT. § 455.040(1). The regulation, however, directs the application to be made to the “division,” which is by definition, the Building Codes Division. OR. ADMIN. R. § 918-020-0370(1); OR. ADMIN. R. § 918-001-0005(3).

¹¹³ OR. REV. STAT. § 455.040(1); OR. ADMIN. R. § 918-020-0370.

¹¹⁴ In 1978, the Oregon Supreme Court analyzed the then-applicable law creating the state’s building code, which prohibited adoption of ordinances “in conflict” with the state building code. *State ex rel* Haley v. Troutdale, 281 Or. 203, 210 (1978). The court interpreted the provision to allow municipalities to adopt more stringent building code provisions so long as they were compatible with the state’s provisions. Oregon’s legislature *subsequently amended the law* to clarify that no municipality is permitted to enact an ordinance “relating to the same matters encompassed by the state building code but which provides different requirements” unless permitted to do so by the Building Codes Division. *See* OR. OP. ATTY. GEN. OP-5874, at *4 (1985),

<https://www.bendoregon.gov/Home/ShowDocument?id=20960> (explaining that the legislature amended the preemption language at the next legislative session following the *Haley* decision); OR. REV. STAT. § 455.040(1). The 1978 case is no longer good law on the issue of local building codes that conflict with state building code.

¹¹⁵ OR. ADMIN. R. § 918-020-0370(2)(a).

¹¹⁶ OR. ADMIN. R. § 918-020-0370(2)(b).

¹¹⁷ OR. ADMIN. R. § 918-020-0370(2).

¹¹⁸ OR. ADMIN. R. § 918-020-0370(3).

¹¹⁹ OR. ADMIN. R. § 918-020-0370(4).

¹²⁰ *Id.*

¹²¹ OR. REV. STAT. § 455.040(1).

¹²² OR. ADMIN. R. § 918-020-0370(3).

¹²³ OR. ADMIN. R. § 918-020-0370(8)-(9).

¹²⁴ OR. REV. STAT. § 455.020(4) (building code does not limit “authority of a municipality to enact regulations providing for . . . minimum health, sanitation and safety standards for governing the use of structures for housing.”).

¹²⁵ *See* OR. MECH. SPECIALTY CODE § 101.2 (Oregon Mechanical Specialty Code does not apply to the “construction, alteration, moving, demolition, repair, maintenance, and work located primarily in a public way.”); OR. RESIDENTIAL SPECIALTY CODE § R101.2.3.1 (“Public utility facilities owned and maintained by the serving facility” is a matter “outside the statutory authority of the state building code” and municipalities “may have additional authority outside of the state building code to regulate these matters locally, where not preempted.”).

¹²⁶ OR. REV. STAT. § 221.420 (City may exclude or eject any public utility or heating company from “the streets, highways or other public property.”).

¹²⁷ OR. REV. STAT. § 455.040(1).

¹²⁸ A recent set of cases illustrates that the “different requirements” question is alive and ripe for judicial interpretation. Specifically, the suits entailed a Portland ordinance that imposed additional fire sprinkler requirements beyond the building code standards. The cases implicated the “different requirement” preemption

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

issue, but the court decided *Ragaway v. City of Portland*, 315 Or. App. 647 (2021) on the doctrine of common-law exhaustion, and *City of Portland v. Building Codes Division*, 313 Or. App. 93 (2021) on the issue of whether BCD had the authority to penalize and compel the repeal of a city ordinance where the city was preempted under ORS 455.040.

¹²⁹ *City of Portland v. Bldg. Codes Div.*, 313 Or. App. at 107, 108.

¹³⁰ EUGENE ORDINANCE NO. 20681 PROHIBITING FOSSIL FUELS, *supra* note 3.

¹³¹ *Id.*

¹³² BERKELEY, CAL., MUN. CODE § 12.80.010 (2020), <https://berkeley.municipal.codes/BMC/12.80>; BROOKLINE, MASS., GENERAL BY-LAWS ART. 8.39 PROHIBITION ON NEW FOSSIL FUEL INFRASTRUCTURE IN MAJOR CONSTRUCTION (2019) (struck down by the Mass. Attorney General).

¹³³ BERKELEY, CAL., MUN. CODE § 12.80.010 (2020).

¹³⁴ *See* NEW YORK CITY, N.Y., LOCAL LAW NO. 154,

https://www1.nyc.gov/assets/buildings/local_laws/l197of2019.pdf.

¹³⁵ OR. REV. STAT. § 221.420 (City may exclude or eject any public utility or heating company from “the streets, highways or other public property.”).

¹³⁶ *Ashland Drilling v. Jackson Cnty.*, 168 Or. App. 624 (2000).

¹³⁷ Specifically, “[t]he governing body of a county,” or a county’s board of commissioners. OR. REV. STAT. § 431.003.

¹³⁸ OR. REV. STAT. § 431.415 (emphasis added).

¹³⁹ *Id.*

¹⁴⁰ *See* OR. REV. STAT. §§ 431.003 and 431.313.

¹⁴¹ *See* OR. REV. STAT. § 174.010 (“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substances, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”).

¹⁴² BENTON CNTY., OR., CODE § 18.010.

¹⁴³ TILLAMOOK CNTY., OR., ORDINANCE NO. 82 (Mar. 23, 2017).

¹⁴⁴ *Id.*

¹⁴⁵ NATIONAL CENTER FOR HEALTHY HOUSING, STUDYING THE OPTIMAL VENTILATION FOR ENVIRONMENTAL INDOOR AIR QUALITY (2022), https://nchh.org/resource-library/report_studying-the-optimal-ventilation-for-environmental-indoor-air-quality.pdf; NatBrady Seals & Andee Krasner, HEALTH EFFECTS FROM GAS STOVE POLLUTION, ROCKY MOUNTAIN INST. (2020), <https://www.psr.org/wp-content/uploads/2020/05/health-effects-from-methane-stove-pollution.pdf>; Brett Singer et al., *Pollutant Concentrations and Emission Rates from Scripted Natural Gas Cooking Burner Use in Nine Northern California Homes*, LAWRENCE BERKELEY NAT.’L LAB’Y. (Oct. 2016), <https://escholarship.org/uc/item/859882pw>; WORLD HEALTH ORG. WHO GLOBAL AIR QUALITY GUIDELINES (2021), <https://apps.who.int/iris/bitstream/handle/10665/345329/9789240034228-eng.pdf>.

¹⁴⁶ AMERICAN MEDICAL ASS’N HOUSE OF DELEGATES, REPORT OF REFERENCE COMMITTEE D: RESOLUTION 339 – INFORMING PHYSICIANS, HEALTH CARE PROVIDERS, AND THE PUBLIC THAT COOKING WITH A GAS STOVE INCREASES HOUSEHOLD AIR POLLUTION AND THE RISK OF CHILDHOOD ASTHMA 16 (2022), <https://www.ama-assn.org/system/files/a22-refcmt-d-report-annotated.pdf>.

¹⁴⁷ Author’s note: Our research revealed no evidence that another county has acted similarly with the same authority.

¹⁴⁸ MULTNOMAH CNTY.’S REPORT ON PUBLIC HEALTH AND GAS STOVES, *supra* note 5, at 10.

¹⁴⁹ *Id.* at 15.

¹⁵⁰ OR. REV. STAT. § 431.415.

¹⁵¹ MULTNOMAH CNTY., OR., ORDINANCE NO. 1051 (Oct. 21, 2004).

¹⁵² *Id.*

¹⁵³ MULTNOMAH CNTY., OR., ORDINANCE NO. 1253 (Jan. 11, 2018).

¹⁵⁴ LANE CNTY., OR., CODE §§ 9.120 - 9.160; EUGENE, OR., CODE § 6.250 - 6.270; SPRINGFIELD, OR., CODE § 4-8-4.

¹⁵⁵ MULTNOMAH CNTY., OR. CODE § 21.453.

¹⁵⁶ WASHINGTON CNTY., OR., ORDINANCE NO. 807 (Oct. 6, 2015).

¹⁵⁷ *Ambient (Outdoor) Air Pollution*, WORLD HEALTH ORG. (Dec. 19, 2022), [https://www.who.int/news-room/fact-sheets/detail/ambient-\(outdoor\)-air-quality-and-health](https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health).

¹⁵⁸ Dennison, J. et al., HOW AIR AGENCIES CAN HELP END FOSSIL FUEL POLLUTION FROM BUILDINGS, ROCKY MOUNTAIN INST., (2021), <https://rmi.org/insight/outdoor-air-quality-brief/>.

¹⁵⁹ CAL. AIR RES. BD., 2022 STATE STRATEGY FOR THE STATE IMPLEMENTATION PLAN (2022), https://ww2.arb.ca.gov/sites/default/files/2022-08/2022_State_SIP_Strategy.pdf.

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

¹⁶⁰ Indoor air quality is not regulated on a federal level, but under the Federal Clean Air Act, the EPA sets limits on outdoor air pollutants. 42 U.S.C. § 7409. At the state level, the Department of Environmental Quality has primary authority over outdoor air pollution and is charged with ensuring federal air quality standards are met. OR. ADMIN. R. § ch. 340 div. 202.

¹⁶¹ S.B. 100, 1973 Leg., Reg. Sess. (Or. 1973).

¹⁶² *Oregon Planning: Oregon's Statewide Land Use Planning Goals*, OREGON.GOV, <https://www.oregon.gov/lcd/op/pages/goals.aspx> (last visited Feb. 6, 2023) [hereinafter *Oregon's Statewide Land Use Planning Goals*]; OR. REV. STAT. § 197.250 (compliance with goals required); OR. REV. STAT. § 215.050 (requiring counties to adopt a comprehensive plan and related ordinances that apply to all land in the county); OR. REV. STAT. § 197.175(1) (“Cities and counties shall exercise their planning and zoning responsibilities . . . in accordance with ORS chapters 195, 196, and 197 and the goals approved under [those chapters.]”); OR. ADMIN. R. § 660-015-0000(2) (Goal 2, establishing the land use planning process and policy framework).

¹⁶³ *Oregon's Statewide Land Use Planning Goals*, *supra* note 162. See OR. REV. STAT. §§ 197.175(2), 197.251, 197.610, 197.625.

¹⁶⁴ OR. REV. STAT. § 197.175(2)(a) (describing that each city and county shall “[p]repare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission”); 197.175(2)(b) (describing that each city and county shall “[e]nact land use regulations to implement their comprehensive plans.) See JEFFREY LITWAK & EDWARD J. SULLIVAN, OREGON LAND USE LAW: CASES AND MATERIALS 31-45 (2023).

¹⁶⁵ OR. REV. STAT. §§ 197.820, 197.825.

¹⁶⁶ OR. REV. STAT. §§ 197.835.

¹⁶⁷ See, e.g., *Columbia Pac. Bldg. Trades Council v. City of Portland*, 289 Or. App. 739, 759 (2018); OR. REV. STAT. § 197.829 (establishing standards LUBA applies in reviewing land use decisions).

¹⁶⁸ Home rule authority is derived from OR. CONST. art. XI § 2 and art. IV, § 1(5); see also LEAGUE OF OR. CITIES, MUN. HANDBOOK: HOME RULE & ITS LIMITS, *supra* note 17, at 4.

¹⁶⁹ PORTLAND, OR., ORDINANCE NO. 190978 (Aug. 24, 2022), <https://www.portland.gov/council/documents/ordinance/passed/190978>.

¹⁷⁰ PORTLAND BUREAU OF PLANNING AND SUSTAINABILITY, FOSSIL FUEL TERMINAL ZONING AMENDMENTS: EXHIBIT B REMAND REPORT 35 (2022), <https://efiles.portlandoregon.gov/Record/15379901/>; see also *About the Fossil Fuel Terminal Project*, PORTLAND.GOV, <https://www.portland.gov/bps/planning/fossil-fuel-zoning/about-fossil-fuel-terminal-project> (last accessed Dec. 12, 2022) (bulk fossil fuel terminals are those that are accessed by ships, railroad, or pipelines transport access; “transloading facilities (such as rail-to-ship loading); or transloading facilities with storage capacity exceeding 2 million gallons”).

¹⁷¹ PORTLAND, OR., ORDINANCE NO. 190978 §§ 6, 14, 21 (Aug. 24, 2022), <https://www.portland.gov/council/documents/ordinance/passed/190978>.

¹⁷² *About the Fossil Fuel Terminal Project*, *supra* note 170.

¹⁷³ See *Columbia Pacific Building Trades Council v. City of Portland*, ___ Or. LUBA ___ (LUBA No. 17-001, July 19, 2017) (finding the FFT amendments violated the Dormant Commerce Clause and Goals 2 and 12 and reversing city’s decision), *aff’d in part, rev’d in part, and rem’d*, 289 Or. App. 739 (2018) (holding that the FFT amendments did not violate the Dormant Commerce Clause but upheld LUBA’s decision on the grounds that the amendments violated Goal 2) *rev den*, 363 Or. 390 (2018); *Columbia Pac. Bldg. Trades Council v. City of Portland*, ___ Or. LUBA ___ (2020) (LUBA No. 2020-009, Oct. 10, 2020) (remanding decision on the grounds that the decision lacked an adequate factual base).

¹⁷⁴ *Columbia Pac. Bldg. Trades Council v. City of Portland*, ___ Or. LUBA ___ (2020) (LUBA No. 2020-009, Oct. 10, 2020) (slip op. at 26-35).

¹⁷⁵ *Id.* at 26-27.

¹⁷⁶ See Or. Rev. Stat. §§ 197.835(9)(a)(C). Petitioners argue that the “FFT amendments violated Goal 2 because the decision is not supported by an ‘adequate factual base,’ which is the equivalent of substantial evidence, which in turn is evidence a reasonable person would rely upon to make a decision.”) *Columbia Pac. Bldg. Trades Council v. City of Portland*, ___ Or. LUBA ___ (2020) (LUBA No. 2020-009, Oct. 10, 2020) (slip op. at 10) (citing DLCD v. Douglas Cnty., 37 Or. LUBA 129, 132).

¹⁷⁷ *Id.*

¹⁷⁸ *Property Topics and Concepts*, AM. PLANNING ASS’N, <https://www.planning.org/divisions/planningandlaw/propertytopics.htm#Overlay> (last visited Oct. 26, 2022) [hereinafter *Property Topics and Concepts*]; see also *Overlay Zones*, PORTLAND.GOV, <https://www.portland.gov/bds/zoning-land-use/zoning-code-overview/overlay-zones> (last visited Oct. 26, 2022).

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

¹⁷⁹ *Property Topics and Concepts supra* note 178; *see also* *400's Overlay Zones*, PORTLAND.GOV, <https://www.portland.gov/code/33/400s> (last visited Oct. 27, 2022) (listing nineteen overlay zones).

¹⁸⁰ *Property Topics and Concepts, supra* note 178.

¹⁸¹ The City of Minneapolis, Minn., has adopted two green zones, which is a “group of neighborhoods with: [r]acial, political, and economic marginalization [that have] [h]igh levels of environmental pollution.” Each green zone has a work plan and a task force. *Green zones*, MINNEAPOLIS.GOV, <https://www2.minneapolismn.gov/government/departments/health/environmental-programs/sustainability/green-zones/> (last visited Jan. 18, 2023); *Southside Green Zone Council*, ACHIEVING CLIMATE AND ENVIRONMENTAL JUSTICE IN THE SOUTHSIDE GREEN ZONE: RECOMMENDATIONS FOR CITY OF MINNEAPOLIS WORK PLAN ACTION (2022-2025) (Dec. 16, 2029), <https://www2.minneapolismn.gov/media/content-assets/www2-documents/departments/Achieving-Climate-and-Environmental-Justice-in-the-Southside-Green-Zone.pdf>; *see also* Brandon Hanson, *Green Zones, Sustainable Dev. Code*, <https://sustainablecitycode.org/brief/creating-green-zones/> (last visited Oct. 26, 2022).

¹⁸² EUGENE, OR., CODE § 9.4150.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* § 9.4165.

¹⁸⁶ *Create a Public Health Overlay Zone*, BEYOND TOXICS, <https://www.beyondtoxics.org/work/environmental-justice/the-public-health-overlay-zone/> (last accessed Dec. 12, 2022).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *See* OR. REV. STAT. § 197.175(2)(d). Under Statewide Planning Goal 2, cities’ and counties’ land use actions must be consistent with their comprehensive plans.

¹⁹⁰ Hanson, *supra* note 181.

¹⁹¹ *Seeger v. City of Portland*, 23 Or LUBA 334 (1992).

¹⁹² *Id.* at 337.

¹⁹³ *Id.*

¹⁹⁴ *Walker v. Deschutes Cnty.*, 55 Or LUBA 93 (2007).

¹⁹⁵ *Id.* at 97.

¹⁹⁶ *Id.* (quoting DESCHUTES CNTY., OR., CODE § 18.56.010 (2007)).

¹⁹⁷ *Id.*

¹⁹⁸ OR. REV. STAT. § 227.215(2).

¹⁹⁹ George C. Homsy, et. al., *Incentive Zoning: Understanding a Market-based Planning Tool*, OPEN REPOSITORY @ BINGHAMTON 1 (2015).

²⁰⁰ ALADDINE JOROFF, STRATEGIES FOR MASSACHUSETTS MUNICIPALITIES TO IMPLEMENT NET ZERO BUILDING MANDATES 2 13-14 (2019).

²⁰¹ PORTLAND, OR., ZONING CODE § 33.270 (2022); *see also* MINNEAPOLIS, MINN., CODE OF ORDINANCES § 549.220(12) (2022) (Minneapolis, Minn., offers greater floor area ratios for buildings with increased energy efficiency located in the downtown district.)

²⁰² PORTLAND, OR., BUREAU OF PLANNING AND SUSTAINABILITY, ENERGY EFFICIENT BUILDING REQUIREMENTS FOR PLANNED DEVELOPMENT BONUSES § 1 (Dec. 2018).

²⁰³ *Id.* § 4.0(H).

²⁰⁴ *Id.* § 4.0(H)(6).

²⁰⁵ *Green Building Permit Incentives*, SEATTLE DEP’T. OF CONSTR. & INSPECTIONS, <https://www.seattle.gov/sdci/permits/green-building> (last visited Oct. 27, 2022).

²⁰⁶ SEATTLE DEPARTMENT OF CONSTRUCTION & INSPECTIONS DIRECTOR’S RULE 4-2021 § A.2 (2021), <https://www.seattle.gov/dpd/codes/dr/DR2021-4.pdf>.

²⁰⁷ *Id.*

²⁰⁸ MCCALL, ID., CODE § 3.10.024(A).

²⁰⁹ *Green Building Permit Incentives*, SEATTLE DEP’T. OF CONSTR. & INSPECTIONS, <https://www.seattle.gov/sdci/permits/green-building> (last visited Oct. 27, 2022).

²¹⁰ *Priority Green Expedited – Overview*, SEATTLE DEP’T. OF CONSTR. & INSPECTIONS, <https://www.seattle.gov/sdci/permits/green-building/priority-green-expedited-overview> (last visited Oct. 27, 2022).

²¹¹ The City of Bonita Springs, Fl., includes the building’s program participants on the city’s website, related press releases and an award called the “Green Building Award” to one participant for the “best overall project.” BONITA SPRINGS, FL., CODE OF ORDINANCES, ORDINANCE NO. 15-19, §§ 7 (2015).

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

²¹² BONITA SPRINGS, FL., CODE OF ORDINANCES, ORDINANCE NO. 15-19, §§ 6-8 (2015).

²¹³ OR. REV. STAT. §§ 215.213(1)(x) (establishing that utility facility service lines are permitted in exclusive farm use zones in nonmarginal lands counties); 215.283(1)(u) (establishing that utility facility service lines are permitted in exclusive farm use zones in counties that adopted marginal lands system prior to 1993).

²¹⁴ *Id.*; *Cox v. Polk Cnty.*, 174 Or. App. 332, 344 (2001) (finding that “utility facility” includes “delivery or furnishing of . . . natural gas.”)

²¹⁵ OR. REV. STAT. § 215.213(1)(x).

²¹⁶ *Nieto v. City of Talent*, ___ Or LUBA ___, ___ (2021) (LUBA No. 21-100, March 10, 2021) (slip op. at 7) (describing the Needed Housing Statutes in the First Assignment of error); OR. REV. STAT. § 197.307(4). Needed housing “means all housing on land zoned for residential use or mixed residential and commercial use that is determined to meet the need shown for housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes, as those terms are defined by the United States Department of Housing and Urban Development under 42 U.S.C. 1437a.” Among other types of housing, “needed housing” includes “[a]ttached and detached single-family housing and multiple family housing for both owner and renter occupancy” OR. REV. STAT. § 197.307(1).

²¹⁷ OR. REV. STAT. § 197.293(1).

²¹⁸ OR. REV. STAT. § 197.307(4). Under ORS § 197.307(6), local governments may also “adopt and apply . . . an alternative approval process for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective.” LUBA has opined that an alternative approval process would amount to “standards, conditions or procedures that involve subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community.” *Rogue Valley Ass’n of Realtors v. City of Ashland*, 35 Or LUBA 139, 148 (1998). This *Guide* presumes that any standards adopted by a local government for an overlay district would be “clear and objective” and therefore does not discuss the option of an alternative process.

²¹⁹ *See* OR. REV. STAT. § 197.831 (requiring “standards and conditions imposed on needed housing that are required to be clear and objective “are capable of being imposed only in a clear and objective manner”).

²²⁰ *Nieto*, ___ Or LUBA ___, ___ (2021) (LUBA No. 21-100, March 10, 2021) (slip op. at 11) (describing permit denial in the First Assignment of Error).

²²¹ *Id.*; *see also* *Rogue Valley Ass’n of Realtors*, 35 Or LUBA at 158 (finding invalid code provisions with multiple interpretations).

²²² *Wiper v. City of Eugene*, 75 Or LUBA 109, 118–19 (2017) (The condition addressed the petitioner’s claim for the need to pipe a stream corridor on the property for sanitary sewer service).

²²³ *Id.* (emphasis added).

²²⁴ *Id.* at 119.

²²⁵ OR. REV. STAT. § 197.307(4).

²²⁶ Claire McKenna, et al., *All-Electric New Homes: A Win for the Climate and the Economy*, ROCKY MOUNTAIN INST. (Oct. 15, 2020), <https://rmi.org/all-electric-new-homes-a-win-for-the-climate-and-the-economy/>.

²²⁷ SYNAPSE ENERGY ECONOMICS, TOWARD NET ZERO EMISSIONS FROM OREGON BUILDINGS 53 (2022), <https://www.synapse-energy.com/sites/default/files/Net-Zero-Emissions-from-Oregon-Buildings-21-127.pdf>.

²²⁸ *Id.*

²²⁹ Charlotte Shuff, *Natural Gas Bills Increase Due to Soaring Methane Prices*, CITIZENS UTIL. BD. (Nov. 3, 2022), <https://oregoncub.org/news/blog/natural-gas-bills-increase-due-to-soaring-methane-prices/2677/> (explaining that the Oregon PUC “approved two rate increases for NW Natural in October,” which combined totaled a twenty-five percent increase).

²³⁰ OR. DEP’T OF ENERGY, 2022 BIENNIAL ENERGY REPORT 512 (2022), <https://www.oregon.gov/energy/Data-and-Reports/Documents/2022-BER-Policy-Briefs.pdf#page=137> [hereinafter OR. 2022 ENERGY REPORT].

²³¹ The building code applies to the “construction, reconstruction, alteration and repair” of buildings and structures, as well as the “installation of mechanical devices and equipment therein[.]” OR. REV. STAT. § 455.020(1).

²³² Inst. for Market Transformation, *Building Performance Standards*, <https://www.imt.org/public-policy/building-performance-standards/> (last visited Nov. 16, 2022).

²³³ OR. 2022 ENERGY REPORT, *supra* note 230, at 519.

²³⁴ *Id.*

²³⁵ ENV’T PROTECTION AGENCY, BUILDING PERFORMANCE STANDARDS: OVERVIEW FOR STATE AND LOCAL DECISION MAKERS at 5, (Feb. 2021), <https://www.epa.gov/sites/default/files/2021->

02/documents/benchmarking_building_performance_standards_section2.pdf [hereinafter BUILDING PERFORMANCE STANDARDS OVERVIEW].

²³⁶ Urban Sustainability Dirs. Network, *Building Performance Standards – A Framework for Equitable Policies to Address Existing Buildings* 5, 26 (July 2021), https://www.usdn.org/uploads/cms/documents/bps-framework_july-2021_final.pdf; *Creating Collaborative Owner-Tenant Relationships*, GREEN LEASE LEADERS, <https://www.greenleaseleaders.com/about/contact-us/> (last visited Nov. 18, 2022).

²³⁷ Or a local government can incorporate an existing energy-usage benchmarking program.

²³⁸ Urban Sustainability Dirs. Network, *Building Performance Standards – A Framework for Equitable Policies to Address Existing Buildings* 4 n.1 (July 2021), https://www.usdn.org/uploads/cms/documents/bps-framework_july-2021_final.pdf.

²³⁹ BUILDING PERFORMANCE STANDARDS OVERVIEW, *supra* note 235, at 3.

²⁴⁰ *Id.*

²⁴¹ OR. 2022 ENERGY REPORT, *supra* note 231 at 519.

²⁴² BUILDING PERFORMANCE STANDARDS OVERVIEW, *supra* note 235, at 6.

²⁴³ *Id.*

²⁴⁴ *Id.* at 7.

²⁴⁵ *Id.*

²⁴⁶ BUILDING PERFORMANCE STANDARDS: A FRAMEWORK FOR EQUITABLE POLICIES TO ADDRESS EXISTING BUILDING 44 (July 2021), https://www.usdn.org/uploads/cms/documents/bps-framework_july-2021_final.pdf.

²⁴⁷ Of note, in December 2022, the Federal Government announced its Federal Building Performance Standard. This standard requires “agencies to cut energy use and electrify equipment and appliances to achieve zero scope 1 emissions in thirty percent of the building space owned by the Federal government by square footage by 2030.” *Fed. Bldg. Performance Standard*, OFF. OF THE FED. CHIEF SUSTAINABILITY OFFICER, <https://www.sustainability.gov/federalbuildingstandard.html> (last visited Dec. 14, 2022). Scope 1 emissions are direct GHG emissions that result from sources that are controlled or owned by an entity, such as emissions associated with fuel combustion in a furnace or boiler. *Scope 1 and Scope 2 Inventory Guidance*, EPA.GOV (Sept. 9, 2022), <https://www.epa.gov/climateleadership/scope-1-and-scope-2-inventory-guidance>.

²⁴⁸ *About the National BPS Coalition*, NAT'L BPS COAL., <https://nationalbpscoalition.org/#cities> (last visited Feb. 1, 2023).

²⁴⁹ *Clean Buildings*, WASH. STATE DEP'T OF COM., <https://www.commerce.wa.gov/growing-the-economy/energy/buildings/> (last visited Nov. 16, 2022).

²⁵⁰ WASHINGTON STATE CLEAN BUILDINGS PERFORMANCE STANDARD, ASHRAE STANDARD 100-2018 4, 7 (2021).

²⁵¹ *Clean Buildings Performance Standard, Frequently Asked Questions*, WASH. STATE DEP'T OF COM., <https://www.commerce.wa.gov/growing-the-economy/energy/buildings/faq/> (last visited Nov. 16, 2022).

²⁵² *How to Comply: 2. Start Now!*, WASH. STATE DEP'T OF COM., <https://www.commerce.wa.gov/growing-the-economy/energy/buildings/how-to-comply/> (last visited Nov. 18, 2022).

²⁵³ *Clean Buildings Performance Standard, Frequently Asked Questions*, WASH. STATE DEP'T OF COM., <https://www.commerce.wa.gov/growing-the-economy/energy/buildings/faq/> (last visited Nov. 16, 2022).

²⁵⁴ BUILDING PERFORMANCE STANDARDS OVERVIEW, *supra* note 235, at 7.

²⁵⁵ NEW YORK CITY, N.Y., LOCAL LAW NO. 97 INT. NO. 1253-C (2019), https://www1.nyc.gov/assets/buildings/local_laws/ll97of2019.pdf.

²⁵⁶ *All About Local Law 97*, URBAN GREEN 20 (Oct. 2022), <https://www.urbangreencouncil.org/content/projects/all-about-local-law-97>.

²⁵⁷ *Five Things to Know About the LL97 Proposed Rules*, URBAN GREEN 20, <https://www.urbangreencouncil.org/content/news/five-things-know-about-ll97-proposed-rules> (last visited Nov. 18, 2022).

²⁵⁸ Ben Brachfeld, *Hundreds Turn Out to Hearing Urging Stricter Rules for Implementation of NYC Landmark Climate Law*, AMNY.COM (Nov. 14, 2022), <https://www.amny.com/environment/hundreds-hearing-rules-nyc-climate-law/>.

²⁵⁹ *All About Local Law 97*, *supra* note 257; *see also Building 2012—019 Technical Bulletin*, NYC BLDGS. (Oct. 5, 2021), https://www1.nyc.gov/assets/buildings/bldgs_bulletins/bb_2021-019.pdf.

²⁶⁰ *Five Things to Know About the LL97 Proposed Rules*, *supra* note 258.

²⁶¹ A REC is a “market-based instrument that represents the property rights to the environmental, social, and other non-power attributes of renewable electricity generation. RECs are issued when one megawatt-hour (MWh) of electricity is generated and delivered to the electricity grid from a renewable energy resource.” *Renewable Energy*

REGULATING NATURAL GAS IN OREGON'S BUILDINGS

Certificates, EPA.gov (Feb. 25, 2022), <https://www.epa.gov/green-power-markets/renewable-energy-certificates-reccs>.

²⁶² Brachfeld, *supra* note 259.

²⁶³ *Denver Passes Building Performance Standard*, INST. FOR MARKET TRANSFORMATION, <https://www.imt.org/news/denver-passes-building-performance-standard/> (last accessed Nov. 16, 22).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Climate and Health Standards for Existing Buildings: Project Overview and Background*, PORTLAND.GOV, <https://www.portland.gov/bps/climate-action/building-standards/project-overview> (last visited Nov. 16, 2022).

²⁶⁸ *Id.*; see also BUREAU OF PLAN. & SUSTAINABILITY, CLIMATE AND HEALTH STANDARDS FOR EXISTING BUILDINGS DRAFT POLICY CONCEPT (March 3, 2022), <https://efiles.portlandoregon.gov/record/15008595>.

²⁶⁹ A moratorium is defined as a “suspension of a specific activity.” *Moratorium*, BLACK’S LAW DICTIONARY (10th ed. 2009).

²⁷⁰ See *Tahoe-Sierra Pres. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302 (2002) (holding that two moratoria, covering a 32-month period, did not constitute a per se taking and that temporary regulations that deny property owners all viable economic use of their property is to be analyzed under the multifactor test established in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

²⁷¹ OR. REV. STAT. § 197.505 *et seq.*

²⁷² *Home Builders Assoc. v. City of Wilsonville*, 30 Or LUBA 246 (1995).

²⁷³ *Dept. of Transp. v. City of Klamath Falls*, 177 Or. App. 1, 34 P.3d 667 (2001).

²⁷⁴ *GPA1 v. City of Corvallis*, 73 Or LUBA 339 (2016).

²⁷⁵ *Gisler v. Deschutes Cnty.*, 33 Or LUBA 272 (1997).

²⁷⁶ See *Home Builders Assoc. v. City of Wilsonville*, 30 Or LUBA 246, 250–55 (1995) (describing that a rationing system for permits constituted a moratorium).

²⁷⁷ OR. REV. STAT. § 197.520(1); OR. REV. STAT. § 197.524(1) (describing a de facto moratorium that is subject to the same moratorium process of OR. REV. STAT. § 197.520).

²⁷⁸ *Kovash v. Columbia Cnty.*, 72 Or LUBA 132, 140 (2015) (holding that administrative inconvenience in combination with failing to adopt zoning amendments during state designated timeframes resulted in an insufficient demonstration of a compelling need.)

²⁷⁹ OR. REV. STAT. § 197.510(2).

²⁸⁰ OR. REV. STAT. § 197.520(4).

²⁸¹ OR. REV. STAT. § 197.524(2); see *Gisler v. Deschutes Cnty.*, 33 Or LUBA 272 (1997); *GPA1 v. City of Corvallis*, 73 Or LUBA 339 (2016).

²⁸² OR. REV. STAT. § 197.175(2)(d).

²⁸³ See *Home Builders Assoc. v. City of Wilsonville*, 30 Or LUBA 246 (1995).

²⁸⁴ OR. REV. STAT. § 197.540.

²⁸⁵ *Methane: A Crucial Opportunity in the Climate Fight*, ENV’T DEFENSE FUND, <https://www.edf.org/climate/methane-crucial-opportunity-climate-fight> (last visited Jan. 18, 2023) [hereinafter *Methane: A Crucial Opportunity in the Climate Fight*]; UNITED NATIONS ENVIRONMENT PROGRAMME AND CLIMATE AND CLEAN AIR COALITION, GLOBAL METHANE ASSESSMENT: BENEFITS AND COSTS OF MITIGATING METHANE EMISSIONS 8 (2021), <https://www.ccacoalition.org/en/resources/global-methane-assessment-full-report>.

²⁸⁶ See *supra* notes 6–8 and accompanying text.

²⁸⁷ See *supra* Section III.A.2.

²⁸⁸ See Gable, *supra* note 11.

²⁸⁹ See *supra* Section III.E.3, E.4.