



**TOWN OF LOS GATOS
COUNCIL AGENDA REPORT**

MEETING DATE: 12/17/2024

ITEM NO: 19

DATE: December 12, 2024

TO: Mayor and Town Council

FROM: Chris Constantin, Town Manager

SUBJECT: Introduce an Ordinance Amending Section 06.20.020 (Buildings and Building Regulations) to Add the Definition of Qualifying Alterations; and Consider Introducing an Ordinance Establishing Air Quality and NOx Emissions Regulations

Ordinance Titles: An Ordinance of the Town Council of the Town of Los Gatos Adding a Section 06.20.020, "Qualifying Alterations," to Article II, "Administration Of Codes," of Chapter 6, "Buildings And Building Regulations," of the Town Code to Add a Definition for "Qualifying Alterations"; and An Ordinance of the Town Council of the Town of Los Gatos Adding Article V, "Air Quality" to Chapter 13, "Health and Safety" of the Town Code to Establish Air Quality and NOx Emissions Regulations, and Amending Section 29.20.720, "Administration And Enforcement" to Add the Implementation of the Air Quality Ordinance, and Amending Section 29.20.720 to Add Implementation to Duties of the Building Official.

RECOMMENDATION:

Staff recommends that the Town Council take the following actions:

- **Introduce the Ordinance Defining Qualifying Alterations:** Adopt the proposed amendment to Section 6.20.020 of the Town Code, which defines "qualifying alterations." (Attachment 1)
- **Defer the Air Quality Ordinance Pending Legal Resolution:** Postpone the introduction of the Air Quality Ordinance regulating NOx emissions.

OR

PREPARED BY: Robert Gray
Building Official

Reviewed by: Town Manager, Assistant Town Manager, Town Attorney, and Finance Director

Alternative Recommendation

- **Introduce the Ordinance Defining Qualifying Alterations:** Adopt the proposed amendment to Section 6.20.020 of the Town Code, which defines “qualifying alterations.” (Attachment 1)
- **Introduce the Air Quality Ordinance:** Adopt the introduction of the Air Quality Ordinance regulating NOx emissions. (Attachment 2)

BACKGROUND:

On November 15, 2022, the Town Council adopted the 2022 California Building and Fire Codes as required by state law. As part of this adoption, the Town Council chose to address greenhouse gas emissions by approving specific amendments, known as Reach Codes, that created higher environmental standards in building construction, by requiring all new construction and qualifying major remodels to be fully electric.¹ This Reach Code also requires additional Electric Vehicle (EV) charging requirements. These Codes became effective January 1, 2023.

The Reach Code applies to new construction and major remodels for residential and commercial buildings, with exemptions for commercial cooking, gas-dependent processes, emergency services, and if all-electric equipment was deemed cost-prohibitive.

Ninth Circuit Ruling on Berkeley’s Gas Ban and Electrification Reach Codes

In April of 2023, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit held that the Energy Policy and Conservation Act (“EPCA”) preempts state and local building codes concerning the energy use of natural gas appliances, including Berkeley’s building code which prohibits natural gas piping into new buildings and thereby prevents those appliances from using natural gas. On January 2, 2024, the U.S. Court of Appeals for the Ninth Circuit denied Berkeley’s request for review by the full Ninth Circuit and the panel’s decision was reaffirmed.

On July 31, 2024, the Town received correspondence from the California Restaurant Association’s legal counsel regarding the ruling by the U.S. Court of Appeals for the Ninth Circuit. The letter requested that the Town Council repeal or suspend enforcement of the ordinance, make a public announcement of that decision, and direct relevant officials not to

¹ The Town originally adopted the Reach Code in order to reduce pollutants. Studies show that NOx – along with the Particulate Matter (PM2.5) and Ozone formed because of NOx pollution – are all dangerous to human health. These pollutants are associated with impaired lung function, coughing wheezing, increased asthma attacks, cardiovascular harm, lower birth weight, increased emergency room and hospital admissions, increased risk of respiratory infections, and premature death. The Town of Los Gatos is in a non-attainment area for Ozone at the Federal level, and for both Ozone and PM2.5 at the State level. By regulating NOx emissions, the Town can reduce harm to public health, improve air quality, and assist in the transition to BAAQMD’s rules, which will start to go into effect beginning in 2027.

apply the ordinance to building permit applications. It is important to note that the Town's adopted ordinance includes exceptions for tenant improvement projects and non-residential cooking facilities. However, based on the 9th Circuit decision, these exceptions do not save the ordinance from preemption.

Based on the Berkeley decision, the Town Attorney recommended that the Town rescind portions of the Town's existing Reach Code.

On October 15, 2024, staff presented a report to the Town Council providing possible alternatives to the adopted Reach Codes in effect at the time. Those alternatives were as follows:

Option 1: Repeal Existing Reach Code Without Adopting Alternative Requirements

This option provided that the existing Reach Codes could be repealed without replacement, which would satisfy the Berkeley decision requirements; however, it would not achieve the Town Council's goal of reducing greenhouse gas emissions.

Option 2: Energy Performance Standards Approach

This option would repeal the portion of existing Reach Codes that requires all-electric construction, staff and consultant would prepare a cost effectiveness study for review and approval by the California Energy Commission (CEC), then return to Town Council with a more stringent energy efficiency Reach Code that strongly encourages all-electric design for water and space heating systems (but not cooking).

Option 3: Air Quality Approach

This option would repeal the portion of existing Reach Code that requires all-electric construction and adopt new requirements, mandating that all new construction and qualifying major remodels utilize only NOx-free appliances.

At the October 15, 2024, meeting, the Town Council directed staff to return with an ordinance to repeal portions of the Town's Reach Codes that were affected by the Berkeley decision and provide additional ordinance language consistent with the Air Quality approach (option 3) that mandates all new construction and qualifying major remodels utilize only NOx-free appliances. The Town Council also directed staff to monitor litigation in this area.

The rescinding ordinance was introduced at the December 3, 2024, Council Meeting and is proposed for adoption at the December 17, 2024, Council Meeting.

DISCUSSION:

Based on a lawsuit that has been filed against the South Coast Air Quality Management District (SCAQMD) that alleges that EPCA preempts the District's NOx emissions ordinance. The lawsuit

alleges that EPCA preempts local regulation of NOx emissions.² Staff recommends that the Town Council delay the introduction of the proposed NOx emissions ordinance until the Southern California litigation has been resolved.

However, staff is recommending that the Town Council introduce an ordinance to amend Chapter 6 – Buildings and Building Regulations to include a definition of qualifying alterations. This language is necessary to determine at what point a renovation becomes new construction, therefore, giving a clear understanding of what code and applications apply to a specific project. This information was included in the previous Reach Code language that is proposed to be rescinded.

CONCLUSION:

Based on the information provided within this staff report, staff recommends that the Council adopt the ordinance defining “qualifying alterations.” Regarding the Air Quality Ordinance, the Council may either defer its introduction or proceed with its adoption as outlined above. However, it is staff’s recommendation to delay consideration of the Air Quality Ordinance to avoid the potential for challenge, until a decision is rendered in the pending litigation.

COORDINATION:

The Community Development Department coordinated with the Town Attorney’s Office in the preparation of this report.

FISCAL IMPACT:

The adoption of the ordinance defining “qualifying alterations” is not expected to have a significant fiscal impact. However, future implementation of NOx regulations may require additional resources for enforcement and compliance monitoring.

ENVIRONMENTAL ASSESSMENT:

Adopting this ordinance is not a project subject to CEQA because it can be seen with certainty that it will not impact the environment (CEQA Guidelines Section 15378).

Attachments:

1. Draft Ordinance Adding Definition of Qualifying Alterations
2. Draft Ordinance Regulating NOx Emissions and Adding Implementation to Duties of Building Official

² In March of 2023, the Bay Area Air Quality Management District (BAAQMD) adopted amendments to their Regulation 9, and Rules 4 and 6, to eliminate emissions of nitrogen oxides, or NOx from residential and commercial natural gas furnaces and water heaters in the Bay Area by requiring new appliance to be Zero-NOx. This proposed Ordinance follows the approach BAAQMD has taken, focusing on the negative health impacts of air pollution from building appliances.