

D.C. Office of the Tenant Advocate
Comments on the Department of Energy and Environment’s Proposed Rulemaking:
Building Energy Performance Standards Compliance and Enforcement Guidebook for
Compliance Cycle 1
October 1, 2021

OVERVIEW:

The Chief Tenant Advocate and the OTA appreciate the discussions that we have had to date with the Department of Energy and Environment (DOEE) regarding the Building Energy Performance Standards (BEPS) program, and the thought that DOEE has given to the housing affordability considerations in the “CleanEnergy DC Omnibus Amendment Act of 2018”¹ (the Act). We also appreciate this opportunity to comment on the BEPS Compliance and Enforcement Guidebook for Compliance Cycle 1 (the Guidebook). While the scope of this matter is generally limited to compliance and related technical matters, this does not mean that there can be no impact on affordable housing policy more generally.²

For example, the Guidebook allows for certain categories of buildings to qualify for delays in compliance. We see this benefit—the ability to delay compliance—as an opportunity to incorporate affordability protections for rent-controlled buildings (RCBs). Giving or expanding an RCB owner’s eligibility for a delay in compliance could give that owner more time to effectively plan and obtain technical and financial assistance. This can benefit tenants inasmuch as alternative funding could obviate the owner’s need to resort to a capital improvement petition to finance a BEPS compliance project. This in turn promotes housing affordability not only for the tenant, but also for the District’s stock of affordable RCB units.

The OTA looks forward to continuing this conversation with DOEE.

RECOMMENDATIONS:

Recommendation 1: Section 5.2.1 should include in its elaboration of “financial distress” the circumstance where an RCB owner requests a delay in order to seek out alternative funding, in good faith, for the purpose of avoiding implementation of a capital improvement petition.

Under Section 5.2.1 of the Guidebook, any building that meets one of the listed circumstances³ may request a compliance delay of up to three years (or, for the first cycle, effectively only two

¹ Law 22-257; D.C. Official Code § 8-1772.21 et seq.

² Several housing affordability considerations that have been built into the BEPS program. However, since the Guidebook has different definitions and uses for the terms “qualifying affordable housing,” “affordable housing,” and “rent controlled buildings,” it appears that RCBs are afforded less protections than buildings that qualify under the definitions of “qualifying affordable housing” and/or “affordable housing.” For example, qualifying affordable housing is eligible for being approved for delays that are more than three years, while RCBs that do not fall under the “qualifying affordable housing” category are not eligible for this extension. Affordable housing and RCBs both may qualify for the Extended Deep Energy Retrofits (EDER) Alternative Compliance Pathway (ACP) Option.

³ Section 5.2.1 lists circumstances provided under 20 DCMR 3520.7: financial distress, change of ownership during a compliance cycle, major renovation, the building becoming unoccupied, pending demolition, change in property type, energy use during the COVID-19 pandemic, historical status, or where DOEE determines the building is implementing an innovative approach to energy efficiency.

additional years as all buildings were granted a one-year delay due to the COVID-19 pandemic).⁴ The OTA would recommend that the Guidebook further elaborate on the “Financial distress” circumstance in particular in order to cover indicators of financial distress that are unique to RCBs. Specifically, the Guidebook should list the need to obtain a Capital Improvement (CI) petition under the circumstances constituting “financial distress.” Since § 8–1772.21(e)(1) allows DOEE to establish exemption criteria for qualifying buildings to delay compliance for up to three years for “other acceptable circumstances determined by DOEE by regulation,” we believe this technical fix would aptly fall within the scope of a recommendation that amends the Guidebook so that it fits within the existing regulation.

While RCB landlords may be entitled to impose CI rent surcharges on tenants in order to complete legally required upgrades⁵ – thereby potentially avoiding financial distress personally and to their rental housing businesses – CI surcharges simply pass the hardship on to tenants who depend on the predictable and manageable rent increases that rent control otherwise provides. CI rent surcharges can be as high as 15% or 20% of the rent charged for a given unit. This would be an onerous rent increase for virtually *any* tenant – let alone the elderly and disabled tenants, tenants on fixed incomes, and families on tight budgets – in other words, those who commonly occupy rent controlled housing in the District.

On the other hand, outside funding is available that would likely allow landlords of many RCBs to avoid implementing such substantial rent increases. For Fiscal Year 2022, our understanding is the following District funds are available to potentially assist RCB owners with BEPS-related upgrades: \$3 million from the Sustainable Energy Trust Fund (SETF);⁶ \$10.8 million from the D.C. Green Bank; and an additional \$8.2 million from the D.C. Sustainable Energy Utility (DC SEU). The SETF funding statutorily may assist RCBs in general, while the latter two sources are targeted toward Naturally Occurring Affordable Housing (NOAH). Many RCBs in the District likely meet the 80% AMI affordability level to qualify as NOAH.

Accordingly, if the landlord of an RCB is requesting an extension to allow time to seek outside funding to avoid implementing a CI petition, the OTA believes the landlord should be granted the delay in that scenario under the rubric of “financial distress” in Section 5.2.1. Conversely, where a landlord is seeking a delay in order to cover the period of time until a CI can be implemented (i.e., while the Rental Accommodations Division reviews the petition, and the tenants’ opportunities to object to the petition’s approval expire), this delay request should be denied. Therefore, the OTA would recommend that DOEE add a bullet point under “Financial distress” in Section 5.2.1, with the language along the following lines:

“For rent-controlled buildings, in addition to any of the circumstances listed above, financial distress shall mean that the building owner is requesting a delay in order to seek outside funding necessary to avoid implementing a Capital Improvement (CI) petition under D.C. Official Code § 42–3502.10 for the purpose of complying with BEPS. Financial distress does not mean that the building owner seeks a delay until a CI petition is approved by the Department of Housing and

⁴ Generally, § 8–1772.21(e)(1) allows DOEE to delay compliance for up to three years. However, since DOEE granted all buildings a one-year delay of compliance due to COVID-19, DOEE can only provide two-year extensions under § 8–1772.21(e)(1).

⁵ D.C. Official Code § 42–3502.10(h).

⁶ D.C. Official Code § 8–1774.10(c)(17).

Community Development (DHCD) and may be legally implemented. To qualify for a delay in order to avoid implementing a CI petition, a building owner must in good faith seek out and apply all available outside funding before implementing a CI petition for any remaining necessary BEPS upgrades.”

Relatedly, we note that some RCBs may qualify for the Qualifying Affordable Housing delay under Section 5.3 or the Extended Deep Energy Retrofits (EDER) Alternative Compliance Pathway (ACP) under Section 4.2.2. In accordance with the above, we would also recommend that the Guidebook similarly discourage or prohibit approval of delays for RCBs that otherwise qualify under either section where the owner does not agree to pursue all available outside funding in good faith prior to implementing a CI petition.

In the alternative, we ask that DOEE try to incorporate other opportunities for RCBs to delay compliance in order to incentivize landlords to avoid passing the financial costs of BEPS upgrades to tenants. If RCBs are permitted adequate time to seek financial assistance in order to avoid steep rent increases, this will in turn prevent financial distress for tenants and help preserve the affordability of the building.

Recommendation 2: DOEE should conduct education and outreach efforts that fully inform RCB owners on whether they qualify for the Financial Distress delay under Section 5.2.1, the Qualifying Affordable Housing delay under Section 5.3, and/or the EDER ACP under Section 4.2.2.

If the aforementioned programs also incorporate provisions that help preserve RCB’s affordability, as previously recommended, then RCB owners should be encouraged to participate in them. The OTA recommends DOEE conduct education and outreach efforts that notify RCB owners of the eligibility criteria for any relevant delay option. Doing so will encourage RCB owners to participate in these programs which in turn will promote housing affordability.

Recommendation 3: DOEE should collect information from housing providers regarding the quantity and makeup of the District’s rental housing stock and projected BEPS costs from all units as part of the information that it requests in the Pathway Selection Form.

In its comments on the DOEE’s First Proposed Rulemaking regarding the Application of BEPS for Privately-Owned Buildings, the OTA recommended that DOEE should collect certain information from housing providers as part of its reporting and data verification requirements. Some of this information is being collected as part of the EDER ACP option.⁷ However, not all

⁷ As part of the EDER ACP Option, an RCB building owner is required to include, among other things, the following information in their EDER Proposed Milestone plan:

- A list of current or past BEPS projects that are meant to achieve the EDER option's goals;
- A list of the total number of dwelling units, the number of rent-controlled dwelling units, and the number of dwelling units exempt from rent-control;
- A description of the funding strategy that will be pursued in order to implement interim and final EEMs and/or retrofits to meet the savings target. This description should provide an estimate of the projected funding sources (property operating income, reserves, private financing, public financing, etc.) needed and the estimated costs to be incurred in order to meet the requirements for this ACP option; and,

RCBs will participate in the EDER ACP option, as not all RCBs may need to obtain an extension in order to reach compliance.

Since we had not previously identified which form should be the vehicle for the previously suggested data collection, we now recommend that DOEE complete the data collection as part of the Pathway Selection Form (PSF). The PSF is completed by all buildings that did not reach the minimum BEPS energy performance threshold. These buildings would be required to select a pathway via the PSF and complete a 5-year compliance cycle. Given that more building owners will complete the PSF than will participate in the EDER ACP option, we believe that the PSF would be a more appropriate vehicle for the collection of data that will actually help us get a more accurate understanding of what the District’s “BEPS-deficient” housing stock looks like.

We suggest that DOEE collect the following information through the PSF:

1. Whether the building is subject to rent control and, if so, how many rent-controlled units are in the building;
2. The size of the building;
3. The age of the building and the year of any significant building system replacement(s);
4. The list of funding sources the owner intends to use to pay for BEPS related costs;
5. The active rent-control registration number(s) and any active exemption number(s) that have been filed with the Rental Accommodations Division (RAD) of the Department of Housing and Community Development (DHCD); and,
6. The projected cost and a list of expected BEPS-related upgrades.

We understand that DOEE is in the process of creating a BEPS portal that in future iterations will be capable of aggregating this kind of data. We ask that DOEE consider granting maximum access to strategic partners and policy-makers including sister agencies such as DHCD / RAD and the OTA, researchers, and others. This will inform a common understanding of the District’s housing stock generally and the “BEPS-challenged” housing stock in particular – which in turn should improve the saliency of future policy recommendations whether to the Council, DOEE, or otherwise.

• Their active rent-control registration number(s) and any active exemption number(s) that have been filed with the Rental Accommodations Division (RAD) of the Department of Housing and Community Development (DHCD).

See: The Guidebook at 43-44.