

Government of the District of Columbia



Office of the Tenant Advocate

Testimony of

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Public Hearing on:

B25-801, the “Building Energy Performance Standards Amendment Act of 2024”

Committee on Transportation and the Environment
The Honorable Charles Allen, Chairperson
Council of the District of Columbia

on

Thursday, June 6, 2024
9:30 a.m.

John A. Wilson Building, Room 120
1350 Pennsylvania Avenue, NW
Washington, DC 20004
and hybrid via Zoom

Introduction

Thank you, Chairperson Allen and members of the Committee on Transportation and the Environment, for this opportunity to submit testimony for the record on Bill 25-801, the “Building Energy Performance Standards Amendment Act of 2024.”

I thank the Committee for promoting energy efficiency in the District and for its critically important work in the fight against global warming. Seven months ago, the Department of Energy and Environment (DOEE) reported that buildings – and the energy used to heat, cool, and power them – produce 71 percent of the District’s carbon emissions.¹ Accordingly, the OTA recognizes that the Building Energy Performance Standards (BEPS) program is of paramount importance in the effort to reduce our carbon footprint.

The OTA has worked closely with DOEE to help reconcile that effort with another key policy interest in the District – protecting the affordability of rental

¹ Department of Energy and Environment, “Carbon Free DC - 2045 Strategy,” p. 3 (available at: https://doee.dc.gov/sites/default/files/dc/sites/doee/service_content/attachments/CFDC_StrategicSummary_11.30.23.pdf).

housing for its residents.² Towards that end, we urge the Committee to adopt the recommendation that DOEE made in its testimony at the June 6th hearing regarding an important clarification.³

Our concern

The apparent and stated intent of Section 2(c) of Bill 25-801 is to permit a building owner to pass an “alternative compliance payment” along to commercial tenants only, and not to residential tenants.⁴ However, neither the BEPS statute⁵

² The OTA submitted comments and recommendations to DOEE regarding their rulemaking on the implementation of BEPS (Comments by the Office of the Tenant Advocate on Proposed Rulemaking by the Department of Energy and Environment: “Application of the Building Energy Performance Standards for Privately-Owned Buildings” (proposed rulemaking published 1/1/21; comments submitted 4/13/21)); the BEPS Guidebook (Comments by the Office of the Tenant Advocate on the Department of Energy and Environment’s Proposed Rulemaking: “Building Energy Performance Standards Compliance and Enforcement Guidebook for Compliance Cycle 1” (published 7/23/21; comments submitted 10/1/21)); and the BEPS Accelerator Covenant (Comments submitted to DOEE on 1/24/22). The agency’s recommendations focused on preventing or minimizing the use of a Capital Improvement (CI) surcharge to shift the cost of BEPS compliance onto tenants, which the agency believes would generally be inequitable for a number of reasons. Chief among those recommendations was to require landlords of rent-controlled properties to exhaust available outside funding opportunities for energy efficiency upgrades before resorting to imposing CI surcharges on tenants (D.C. Official Code § 42-3502.10) to recoup the cost of the upgrades. Ultimately, per DOEE’s BEPS Guidebook, the owner of a rent-controlled building may qualify for a “financial distress” extension if they are seeking to avoid implementing CI surcharges on the tenants to recoup BEPS upgrades. To qualify for the extension, the owner must first exhaust all available outside funding opportunities before implementing the petition for any remaining costs. (Building Energy Performance Standards (BEPS) Compliance and Enforcement Guidebook for Compliance Cycle 1 (Sec. 5.2.1), available at https://dc.beam-portal.org/helpdesk/kb/BEPS_Guidebook). If the extension is granted, the owner will be required to achieve a deeper level of energy efficiency in order to offset the loss of such earlier in the process. (BEPS Compliance and Enforcement Guidebook for Compliance Cycle 1 at Sec. 4.2.2).

³ Testimony of Nicholas Burger, Deputy Director, DOEE, on Bill 25-801, the “Building Energy Performance Standards Amendment Act of 2024” before the Committee on Transportation and the Environment, Hon. Charles Allen, Chairperson, p. 5 (6/6/24). See Testimony of Katalin Peter, Vice President of Government Affairs, AOBA, on Bill 25-801, the “Building Energy Performance Standards Amendment Act of 2024” before the Committee on Transportation and the Environment, Hon. Charles Allen, Chairperson (6/6/24).

⁴ Councilmember Charles Allen’s Introductory Letter to Bill 25-801, the “Building Energy Performance Standards Amendment Act of 2024,” p.1 (5/1/24). We also note that AOBA testified verbally that their understanding is that the compliance payment pass-through to tenants is intended to apply only at commercial properties. Finally, we note the intent of the legislation is clear from both the definition of “excessive use” in a similar Budget Support Act subtitle (now removed from the BSA) – which referred to business hours and regular business days.

⁵ D.C. Official Code § 8–1772.21-23.

nor Bill 25-801 makes any explicit distinction between commercial and residential buildings, which may create an impression that the pass-through applies to both.

While Chapter 17M-i of Title 8 of the D.C. Code is entitled “*Commercial and Local Government Property Energy Conservation*” (emphasis added), a Code provision’s title does not necessarily affect or delimit its substantive content. Chapter 17M-I has three subchapters: Subchapter I (“Commercial Energy Conservation”); Subchapter II (“Building Energy Performance Standards and Benchmarking”); and Subchapter III (“Sustainable Energy Infrastructure Capacity Building and Pipeline Program”).

Subchapter I (“Commercial energy Conservation”) clearly does pertain only to “commercial properties.” It both defines that term⁶ in a definitions section and uses it when setting forth its requirements. The definition, however, applies only to that Subchapter I. Subchapter II, outlining the BEPS program: (a) includes no definitions section; (b) generally uses the terms “building” and “buildings” without reference to commercial or residential use; and (c) in setting forth the BEPS exemption criteria, specifically refers to “affordable housing”⁷ – specifically defining that term among other factors as “primarily residential.”⁸

⁶ D.C. Official Code § 8–1772.01(3).

⁷ D.C. Official Code § 8–1772.21(e)(2).

⁸ D.C. Official Code § 8–1772.21(k).

In short, we see no delimiting language anywhere in the BEPS-related portion of the statute that would prevent the pass-through of an “alternative compliance payment” to a residential tenant.

Recommendation

Accordingly, we recommend that the Committee clarify at Section 2(c)⁹ of the bill that a housing provider may impose the “alternative compliance payment” only on commercial tenants, and not on residential tenants. Specifically, we offer the following amendatory language:

“(c) Subsection (g) is amended by striking the phrase “alternative compliance penalty established by DOEE. Penalties” and inserting the phrase “alternative compliance payment established by DOEE; provided, that in no event shall a housing provider impose all or any portion of an alternative compliance payment on any residential tenant. Payments” in its place.”

Conclusion

Thank you, Chairperson Allen and members of the Committee, for your attention to this matter. My staff and I are available to respond to any questions or concerns you may have regarding this testimony.

⁹ Amending D.C. Official Code § 8-1772.21(g) (currently “(g) Buildings failing to comply with the building energy performance requirements at the end of the 5-year compliance period shall pay an alternative compliance penalty established by DOEE. Penalties collected pursuant to this provision shall be deposited into the Sustainable Energy Trust Fund.”)