

June 23, 2022

The Honorable Jeffrey Roy  
The Honorable Michael Barrett  
The Honorable Tackey Chan  
The Honorable Cynthia Stone Creem  
The Honorable Bradley Jones  
The Honorable Bruce Tarr  
Climate and Energy Conference Committee  
State House  
Boston, MA 02133

**Re: NAIOP Comments on Reconciliation of H. 4524, *An Act Advancing Offshore Wind and Clean Energy*, and S. 2842, *An Act Driving Climate Policy Forward***

Dear Members of the Conference Committee:

NAIOP Massachusetts, The Commercial Real Estate Development Association, views climate change as an economic development, public health, and environmental issue that affects every resident and business in the Commonwealth. Just 13-months ago, our organization worked closely with the Legislature to ensure practical policies advancing Massachusetts' goal of net zero by 2050 were implemented in Chapter 8 of the Acts of 2021.

The legislation before you will ensure the infrastructure deployment and jobs training we need to achieve our goals. From proposed historic investments in our wind industry to investments in green job programs and so many more critical policies, many of the proposals before you for reconciliation are critical tools in our climate efforts.

**However, NAIOP is concerned that section 65 of S. 2842, *An Act Driving Climate Policy Forward*, will in fact hinder many of our statewide goals and preempt existing regulatory processes that are occurring as a result of Chapter 8's implementation.** The section allows the Department of Energy Resources to prohibit new construction or major renovation projects that are not fossil fuel-free in ten communities. **NAIOP is strongly opposed to Section 65 and urges the Committee not to advance the proposal to the final bill.**

There are serious statewide impacts to implementing a fossil-fuel ban, outlined below:

- **Ongoing Regulatory Efforts Already Address Municipal Goals**
  - As required by Chapter 8 of the Acts of 2021, the Massachusetts Department of Energy Resources is currently drafting code language for the creation of a specialized net zero energy code.
  - This code, which is legally required to be promulgated by the end of this year, will give municipalities seeking to require either all-electric or net-zero ready construction a clear path forward.
  - **NAIOP believes that it is critical that this already occurring process be allowed to move forward without additional policies being adopted that threaten the predictability and safety of building energy systems throughout Massachusetts.**

- **Conflict with Existing State Law Threatens Safety and Predictability**

- In July of 2020, the Attorney General found that the Brookline Special Town Meeting Warrant, which sought to prohibit new fossil fuel infrastructure in major construction, could not be implemented in the Town of Brookline. The Article was found to be in direct conflict with the following statewide regulatory schemes: the State Building Code; the Gas Code and G.L. c. 142 §13; and the Department of Public Utilities' powers to comprehensively regulate the sale and distribution of natural gas in the Commonwealth (G.L. c. 164). **NAIOP believes that these communities should not be allowed to preempt critical statewide regulatory schemes and general laws.**
- Additionally, local building commissioners and inspectors are required to enforce the State Building Code for any building or structure within the city or town in which they are appointed (G.L. c. 143, §§ 3 & 3A). The Building Code includes both required and prohibited construction practices. **If a building includes the required elements and does not include any prohibited elements, the building inspector is *required* to issue the building permit.** Nor are building inspectors afforded legal discretion in this regard; that authority is expressly reserved by state statute to the State Building Code Appeals Board, which is empowered to order a building inspector to administer the State Building Code according to its terms, and alone is authorized to issue variances from the State Building Code, G.L. c. 143, § 100. **Finally, in the event a municipality wishes to adopt a local enactment that is more restrictive than the Building Code, state statute already establishes a process by which that municipality may request such permission from the State Board of Building Regulations and Standards (“Board”). G.L. c. 143, § 98.**

- **Impact on Housing Production and Economic Development**

- **The Commonwealth has set aggressive goals designed to decarbonize the building sector.** According to ISO New England President and CEO Gordon Van Welie, to achieve these goals, more renewable energy is needed, transmission must be improved, technological advances in building systems are needed, and challenges facing the grid must be addressed<sup>1</sup>. Banning fossil fuels in construction right now will not do any of these things. It will only serve as another tool to block housing and economic development projects.
- Massachusetts residents and businesses deserve safe, reliable, and affordable energy sources. Communities seeking fossil fuel bans are doing so without considering Commonwealth-wide impact. From public safety considerations to dissuading the creation of new, desperately needed housing, **fossil fuel bans in even a few municipalities create a bigger burden on the surrounding communities.**
- Allowing even one community to move forward with a fossil fuel ban would dissuade critical economic development projects and massively exacerbate our existing housing crisis by greatly increasing costs to build. Such policies would also negatively impact surrounding communities by placing an inequitable strain on the grid and dissuading investment from a region. Finally, NAIOP is concerned that such a policy would require residents Commonwealth-wide to take on a greater cost-burden in the utility maintenance of their businesses and homes due to an artificial imbalance in supply and demand.

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<sup>1</sup> <https://commonwealthmagazine.org/author/gordon-van-welie/>

**While NAIOP strongly supports investments outlined in the legislation before you designed to green the grid and provide cost-effective electricity to all of the Commonwealth, this is a process that will take years. NAIOP strongly urges the Committee to recognize the immediate negative ramifications of implementing fossil-fuel bans and hopes the Committee will not advance Section 65 to the final bill.**

Section 34.2 of S. 2842 (lines 337-388) proposes the implementation of a statewide, large building and energy reporting program. Many of NAIOP's members currently work within similar municipal regulatory programs and NAIOP had been engaged with the City of Boston for the past 10-years to ensure practical and achievable implementation. Based on these experiences, we respectfully submit feedback on this section, outlined below.

- **Utility Involvement**

NAIOP commends the inclusion of language requiring the utilities to provide the reporting related to gas and electricity usage. Given that utility oversight can only be mandated at the state level, we believe it is important to the successful implementation of this program.

In subsection (c), to ensure clarity and compliance, NAIOP suggests that for electricity and natural gas distribution delivered and charged directly to a tenant (i.e., the tenant has a direct contract with the utility), **the electric and gas distribution companies must be required to report the tenant's energy use directly to DOER in the same manner as item (b).**

Given the utility will have data on all electric and gas usage for any account having the same address as the building, NAIOP believes that including language allowing for the direct reporting of tenant usage by the utility will prevent errors or confusion with both tenants and owners.

- **Other "Energy" definitions**

If steam, hot water or chilled water are generated within the building, (i.e., not on the district system), the resulting source energy would already be captured in the electricity, natural gas or oil use. Therefore, NAIOP recommends the following language adjustments, in red, to accurately ensure reporting in the instances it would not already be captured:

*"Energy", electricity, natural gas, **district steam, district hot or chilled water, heating** fuel oil, propane or other products designated by the department that are used for heating, cooling, lighting, **emergency backup power generation**, industrial and manufacturing processes, water heating, cooking, clothes drying and other purposes.*

- **Statewide Consistency is Critical for Success**

Section 34.2 (h) allows municipalities to establish and enforce large building energy reporting requirements that exceed requirements pursuant to this legislation. We believe that a uniform, statewide program is the best path to implementation, and **NAIOP strongly urges that the Committee replace the language found in (h) that currently allows differing municipal program adoption with the following language, in italics below:**

*"(h) Municipalities shall not (i) establish, ordain and/or enforce large building energy reporting requirements that exceed the requirements established pursuant to this section; or (ii) levy civil penalties or fines for violations of local ordinances and/or bylaws."*

**This critical change will guarantee consistency and predictability statewide for both building owners and regulators.**

Furthermore, we encourage the adoption of language requiring the Department of Energy Resources (DOER) to consult with property owners to better understand any impediments to program implementation and potential areas for improvement. **We also urge the adoption of**

**language that requires DOER to establish Technical Advisory Groups composed of building energy professionals in the Commonwealth** to ensure that all regulatory implementation is grounded in industry best practices.

- **Fees and Fines Not Required for Compliance**  
During the first benchmark of 5-years, the City of Boston had collected no fines in the implementation of BERDO and had a compliance level of over 90%. NAIOP does not believe that charging \$300 a day for late reporting and levying massive alternative compliance penalties is an appropriate, or necessary, component of such a program. The Commonwealth should instead use a carrot vs. a stick approach for compliance with appropriate incentives provided as part of a proposed program. **As such, NAIOP recommends that section (g) in 34.2 not be advanced to a final bill.**
- It is worth noting that a similar program was identified in the 2030 Clean Energy and Climate Plan for 2030 (CECP), released at the end of December 2020. While the CECP is currently undergoing revision to ensure compliance with *An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy* (expected to be released by July 1), based on recent public presentations, it appears that the updated plan will retain a version of this plan. We urge the Committee to work closely with the appropriate regulatory agencies to ensure that the legislative language will not conflict with the CECP.
- Finally, while energy reporting programs have been in place in Cambridge and Boston, there will be a huge learning curve for property owners in the other 349 cities and towns in Massachusetts. Education on the software, reporting requirements, and basic training for property managers will be needed. In addition, based on our experiences in Boston, staffing and resources at the state level will be required for such a concept to work. We urge the Committee to ensure adequate long-term resources are dedicated to the implementation of such a program.

Thank you for your consideration of our comments. We welcome the opportunity to speak with you or members of your staff to discuss our position further.

NAIOP Massachusetts represents the interests of companies involved with the development, ownership, management, and financing of commercial properties. NAIOP has over 1,700 members who are involved with office, research & development, lab, industrial, mixed use, multifamily, retail and institutional space.

Sincerely,



Tamara C. Small  
Chief Executive Officer  
NAIOP Massachusetts, The Commercial Real Estate Development Association

cc:  
Speaker of the House Ronald Mariano  
Senate President Karen Spilka