


**COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON HOUSING AND NEIGHBORHOOD REVITALIZATION
COMMITTEE REPORT**

1350 Pennsylvania Avenue, N.W., Suite 404, Washington, D.C. 20004

TO: All Councilmembers

FROM: Councilmember Anita Bonds 
Chairperson, Committee on Housing and Neighborhood Revitalization

DATE: July 27, 2020

SUBJECT: Report on B23-0074, the “Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Amendment Act of 2020”

The Committee on Housing and Neighborhood Revitalization, to which B23-0074, the “Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Amendment Act of 2019” (renamed by the Committee the “Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Amendment Act of 2020”) was referred, reports **favorably** on this bill and recommends its approval by the Council of the District of Columbia.

SUMMARY OF CONTENTS

I.	PURPOSE AND EFFECT	2
II.	LEGISLATIVE CHRONOLOGY	6
III.	POSITION OF THE EXECUTIVE.....	7
IV.	COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS.....	7
V.	SUMMARY OF TESTIMONY	7
VI.	IMPACT ON EXISTING LAW	12
VII.	FISCAL IMPACT.....	12
VIII.	SECTION-BY-SECTION ANALYSIS	12
IX.	COMMITTEE ACTION	13
X.	ATTACHMENTS	14

I. PURPOSE AND EFFECT

The purpose of B23-0074 is to clarify that under certain limited circumstances, low-income housing tax credit (LIHTC) redevelopment projects do not fall under the requirements of the Tenant Opportunity to Purchase Act of 1980 (“TOPA”) and to require that a notice of transfer include certain material facts.

A. Committee Reasoning

The Low-income housing tax credit

The Low-Income Housing Tax Credit (“LIHTC”) provides equity financing that subsidizes the acquisition, construction, and rehabilitation of affordable rental housing for low- and moderate-income tenants. Between 1987 and 2018, LIHTC has helped create housing as part of 48,672 projects and 3.23 million housing units.¹

LIHTC is the single most important federal resource available to support the development and rehabilitation of affordable housing. LIHTC was created by the Tax Reform Act of 1986 and made permanent in 1993 as an indirect federal subsidy.² The LIHTC program gives State and local LIHTC-allocating agencies the equivalent of approximately \$8 billion in annual budget authority to issue tax credits for the acquisition, rehabilitation, or new construction of rental housing targeted to lower-income households.³ LIHTC serves as an incentive for private developers and investors to provide more low-income housing.⁴ Without the incentive, affordable rental housing projects do not generate sufficient profit to warrant private investment. LIHTC currently finances about 90 percent of all new affordable housing development.⁵

How does the LIHTC work?

LIHTC gives investors a dollar-for-dollar reduction in their federal tax liability in exchange for providing financing to develop affordable rental housing.⁶ An investor’s equity contribution subsidizes low-income housing development, thus allowing some units to rent at below-market rates. In return, investors receive tax credits paid in annual allotments, generally over 10 years.

Financed projects must keep units rent restricted and available to low-income tenants for at least 30 years after project completion.⁷ At the end of the period, the properties remain under the control of the owner. Units funded by the LIHTC must be affordable for people earning no more

¹ <https://www.huduser.gov/portal/datasets/lihtc.html>

² The Low-Income Housing Tax Credit, How It Works and Who It Serves, the Urban Institute, Corianne Payton Scally, Amanda Gold, Nicole DuBois, July 2018, page 1.

³ https://www.urban.org/sites/default/files/publication/98758/lihtc_how_it_works_and_who_it_serves_final_2.pdf

⁴ <https://www.huduser.gov/portal/datasets/lihtc.html>

⁵ <https://www.novoco.com/resource-centers/affordable-housing-tax-credits/lihtc-basics/about-lihtc>

⁶ <https://bostoncapital.com/knowledge/affordable-housing-tax-credit/>

⁷ <https://www.msdevelopmentllc.com/lihtc-white-paper/>

⁷ The Urban Institute, *supra* at 2, page 2.

than 60 percent of the Area Median Income (AMI), although most residents have far lower incomes. Rents may not exceed 30 percent of the qualifying income.⁸

Federal tax credits are allocated to the housing finance agencies of states and territories by a formula based on population. Each state establishes its affordable housing priorities and developers compete for an award of tax credits based on how well their projects satisfy the state's housing needs. Developers receiving an award use the tax credits to raise equity capital from investors in their developments. Once an applicant secures a tax credit reservation, the developer must leverage the financial resources for the development. Under a typical LIHTC transaction, a developer must secure a conventional loan from a private mortgage lender or public agency, gap financing from a public or private source and equity from the developer or private investor in exchange for the tax credits.

Claimed *pro rata* over 10 years, LIHTC can be used to construct new or renovate existing rental buildings. LIHTC is designed to subsidize either 30 percent or 70 percent of the low-income unit costs in a project. The 30 percent subsidy, which is known as the “automatic 4 percent tax credit”, covers new construction that uses additional subsidies or the acquisition cost of existing buildings. The 70 percent subsidy or “9 percent tax credit” supports new construction without any additional federal subsidies.⁹

Tenant Opportunity to Purchase Act

In the District of Columbia, the LIHTC life-cycle has become complicated by TOPA. TOPA requires an owner of a rental housing accommodation to give tenants an offer of sale before selling the accommodation.¹⁰ TOPA was enacted in 1980 as a response to the depletion of rental housing stock due to the conversion of rental buildings to condominiums and cooperatives and the severe adverse effects of the conversions on tenants.¹¹ The conversions often resulted in forced displacement, overcrowding, unsustainable housing costs, and widespread fear and uncertainty among lower income tenants, the elderly, and tenants with a disability.

In most buildings, TOPA can be an important tool in preventing tenant displacement, maintaining affordable housing, promoting home ownership, and protecting the homes of tenants. TOPA affords tenants the ability to choose what will happen to their homes, as opposed to having an outcome imposed on them. However, particularly in lower income buildings, with TOPA comes the very real risk that market rate investors might successfully outmaneuver and outbid affordable housing developers and then try to buy-out low- to moderate-income tenants with lucrative cash offers that appear to have short-term benefits, but in the long run usually result in tenant displacement and the loss of affordable housing.

The TOPA “trigger” and associated risks

Currently, District law is unclear whether TOPA offers are required during a LIHTC renewal or similar recapitalization, as unlike in standard TOPA sales, the affordable housing accommodation

⁸ *Ibid.*

⁹ The Urban Institute, *supra* at 2, page 3.

¹⁰ D.C. Official Code § 42–3404.02.

¹¹ D.C. Official Code § 42–3401.01.

remains under the control of the same entity and only new non-management investors leave or enter the new entity. The legislative history of TOPA from 40 years ago indicates that the intent of TOPA was to provide tenants an opportunity to purchase their homes when the ownership of a building actually changes, but not when the ownership effectively stays the same and only the corporate entity changes “on paper” to comply with federal LIHTC requirements.¹²

Thus, TOPA may appear to be triggered when as required by federal LIHTC law, a new tax entity is created after 15 years when a housing provider renews LIHTC tax credits or recapitalizes in order to continue to maintain the building as affordable housing. It is at this point the continued affordability of a building is threatened if market rate investors outbid affordable housing developers, cease the affordability of the project, and entice tenants to leave with cash buyouts, and then proceed to convert the building into luxury apartments.

This concern is not imaginary, as in several District properties, non-profit developers have experienced firsthand how this powerful preservation tool can be exploited in ways unfavorable to tenants. For example, in one such transfer a District developer admitted a LIHTC investor into the project for the purpose of renovating it for its existing residents and the developer attempted to use the recapitalization event to take over the property and redevelop the property as luxury condos.

Concerns of title insurance companies and further delays due to COVID-19 requirements

An additional complicating factor is that title insurance companies often will serve as TOPA “gatekeepers” by requiring documentation of compliance with TOPA as a condition of issuing title insurance covering a transaction that might appear to include elements of a TOPA “sale”. Because the title companies by their nature are always very wary of the risk of litigation, title insurance companies prefer a bright-line test in the form of a specific statutory provision that plainly states whether a particular type of transaction falls under TOPA, or not. In the absence of near absolute clarity, it is not uncommon for title insurance companies to refuse to insure a LIHTC transaction if there is not a clear statutory exemption, even where there is little doubt that the transaction does not constitute a “sale” under TOPA.

Furthermore, the resolution of this problem has become even more essential with the current public health emergency arising from the COVID-19 pandemic. Even when a clear TOPA exemption exists, prior to closing a transaction owners still must provide tenants a 90-day Notice of Transfer.¹³ COVID-19 has further interfered with the ability of affordable housing developers to complete LIHTC deals that finance these affordable housing projects, as during the public health emergency all TOPA deadlines have been tolled.

What are the clarifications in the bill and notice requirements?

Bill 23-0074 facilitates the preservation of affordable housing by protecting LIHTC equity and long-term affordability covenants of affordable housing projects. The bill accomplishes this goal by clarifying that when LIHTC investors leave and enter a new ownership entity, TOPA is not triggered. These clarification help avoid the risk that a market rate investor may attempt to purchase

¹² See Committee Report, D.C. Law 3-86, the Rental Housing Conversion and Sale Act of 1980, available at Legislative Services of the DC Council, 1350 Pennsylvania Avenue, Washington, DC 20004.

¹³ D.C. Official Code § 42-3404.02(d)(1)(A).

the tenants' TOPA rights in types of arrangements that do not well serve the long-term affordability of the building. The Committee believes that this bill strikes the proper balance between supporting tenants' rights, dissuading subversive market forces, and streamlining the preservation of LIHTC based affordable housing.

The first clarification in Bill 23-0074 makes clear that TOPA is not triggered when there is a transfer of interest in an entity that owns a housing accommodation or a transfer of title to a housing accommodation if :

- The sole purpose of the transfer is to qualify for and enter into a new credit period for purposes of the rehabilitation of the housing accommodation;
- The low-income housing tax credit period has ended;
- Immediately prior to the transfer, the housing accommodation is subject to an extended low-income housing commitment or a comparable District program;
- Before and after the transfer, the owner of the housing accommodation will be controlled, directly or indirectly, by the same person or entity; and
- Immediately following the transfer, the housing accommodation shall for a term of not less than 10 years, either remain subject to an existing or become subject to a new extended low income housing commitment.

Furthermore, following the October 2, 2019 hearing, the bill was discussed at length among tenant advocates, staff at the Department of Housing and Community Development, and affordable housing providers in the District of Columbia, who reached consensus on the following additional changes, which were intended to clarify further TOPA and keep the law consistent with its original purposes. Thus subparagraph (O) was further refined, subparagraph (P) was added, and an amendment to the notice of transfer language was added as follows:

- Subparagraph (O) of the bill as introduced was further clarified and now requires that for a LIHTC transaction to not fall under TOPA:
 - The purpose of the transaction must be rehabilitation;
 - The ownership entity must continue to be controlled by the same person or entity before and after the transaction; and
 - The property must remain subject to an extended use agreement for at least 10 years after the transaction.
- Subparagraph (P) was added to clarify that when there is a transfer of interests in a partnership or limited liability company that owns an accommodation as its sole or principal asset, TOPA is not triggered only if the sole purpose of the transfer is to remove one or more limited partners or investor members who have made capital contributions and received tax benefits pursuant to section 42 of the United States Internal Revenue Code of 1986 or a comparable federal or District program.

- Subparagraph (Q) was added to clarify that when a transfer of interest in an entity that owns a housing accommodation or a transfer of title to a housing accommodation, TOPA is not triggered only if the sole purpose of the transfer is to qualify for and enter into a new credit period, as defined in Section 42 of the United States Internal Revenue Code of 1986. Also, the transfer must be for purposes of the rehabilitation of the housing accommodation and before and after the transfer, the owner of the housing accommodation is controlled, directly or indirectly, by the same person or entity.
- Finally, the Notice of Transfer requirements were strengthened by requiring a disclosure of the material facts of the transaction to tenants, including whether there will be “any changes in ownership, management, current rents, or any applicable affordability requirements for the housing accommodation.”

In conclusion

Because of all of these complications to the effective production and preservation of affordable housing in the District through LIHTC tax credits, without this clarification bill affordable housing developers and private investors in affordable housing are potentially deterred from creating and preserving affordable housing through LIHTC tax credit transactions.

Bill 23-0074 makes important changes to TOPA which are contingent upon the ownership entity remaining committed to providing long-term low-income housing at the property. This is critically important for non-profit low-income property owners who wish to maintain affordable housing beyond the usual 15-year syndication period that is associated with LIHTC.

Bill 23-0074 will help ensure that when investors are ready to transition out of a low-income LIHTC deal at the end of its syndication, the original development group can continue to operate the property with a commitment to low-income housing, without triggering a costly and competitive TOPA process. This legislation will make it more difficult for rogue influences to subvert TOPA for private gain and will make it more efficient for affordable housing developers using LIHTC to preserve at risk properties from being lost to the market. Without this important legislation, the property would be subjected to sale, leading to higher cost housing and fewer available subsidy dollars that could otherwise be used to develop further affordable housing options throughout the District.

B. Committee Recommendation

For the reasons explained above, the Committee recommends approval of B23-0074.

II. LEGISLATIVE CHRONOLOGY

January 16, 2019	B23-0074 is introduced by Chairman Mendelson at the request of the Mayor.
January 22, 2019	B23-0074 is referred to the Committee on Housing and Neighborhood Revitalization.

January 25, 2019	Notice of Intent to Act on B23-0074 is published in the <i>District of Columbia Register</i> .
August 23, 2019	Notice of Public Hearing is published in the District of Columbia Register
October 2, 2019	The Committee on Housing and Neighborhood Revitalization holds a public hearing on B23-0074.
July 27, 2020	The Committee on Housing and Neighborhood Revitalization marks up B23-0074.

III.POSITION OF THE EXECUTIVE

The Executive testified on B23-0074 as follows:

Polly Donaldson, *Director, Department of Housing and Community Development*, stated that the bill was one remaining recommendation of the Mayor's Preservation Strike Force. The Preservation Strike Force concluded that the current LIHTC exemption found in D.C. Official Code §42-3404.02(c)(2)(H) was too narrow and its use too limited. This issue unnecessarily slowed the redevelopment of affordable housing and allowed third parties to destabilize affordable properties through the misuse of the TOPA process.

Ms. Donaldson went on to state that B23-0074 would resolve this problem as a housing accommodations eligible for the exemption would be at a stage in its lifecycle where it is ready for reinvestment and as a result of that investment, the housing accommodation would remain as quality affordable housing for District residents for decades. She concluded by stating that she believed B23-0074 represents prudent public policy that will preserve affordable housing without diminishing the role of TOPA in providing tenants a voice in the sale and conversion of their rental homes.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee on Housing and Neighborhood Revitalization did not receive testimony or comments from any Advisory Neighborhood Commission on B23-0074.

V. SUMMARY OF TESTIMONY

The Committee on Housing and Neighborhood Revitalization held a public hearing on B23-0074 on October 2, 2019. The hearing testimony summarized below reflects opinions based upon the introduced version. A copy of the witness list is attached to this report; the video recording of the hearings (available online at http://oct.dc.gov/services/on_demand_video/channel_13.asp) is incorporated by reference. A copy of submitted testimony is part of the hearing record and is available through the Office of the Secretary.

The following witnesses testified at the hearing:

Beth Mellen Harrison, *Director, Housing Law Unit, Legal Aid Society of the District of Columbia*, stated that Legal Aid urged the Committee to proceed with caution regarding Bill 23-0074. Specifically, Legal Aid believes that the Committee should seek more information regarding the degree to which the problem the bill purports to address is both common and pressing enough to require a legislative solution. Further, if the Committee does move forward with the legislation, it should amend it ahead of mark-up to narrow its language, so that the bill is carefully tailored and does not weaken TOPA in unnecessary or unintended ways. Ms. Harrison continued by stating that Legal Aid's position is that any narrowing of TOPA should be based on a strong record (and not simply a few anecdotes) that a new exemption is needed. If the Committee moves forward with this bill, Legal Aid recommends narrowing it in several ways to focus on the problem at hand.

Ms. Harrison stated that in order to determine whether a new LIHTC TOPA exemption is needed and the proper scope for any such exemption, it is critical for the Committee to examine the interaction between LIHTC financing and TOPA and the particular problems alleged. Legal Aid urged the Committee to seek more information - through the public hearing process and by convening DHCD and interested parties in discussions after the hearing - to determine if a problem actually exists and whether it threatens affordable housing preservation in the District. Understanding the scope of any problem also will inform how the Committee should narrow and tailor the proposed bill in order to ensure a new exemption does not morph into a broader loophole.

Ms. Harrison continued by stating that the policy question for the Council to consider is whether these types of transfers of ownership interests should trigger TOPA. DHCD and some developers, including affordable housing developers, believe this type of exemption is necessary to protect the ownership and investment interests of developers. They believe developers may not continue to seek LIHTC financing up front or new LIHTC financing at the 15-year or 30-year mark if it may result in loss of control of the property. They also will likely note that tenants had the opportunity to exercise TOPA rights, choose a developer, and opt into the LIHTC affordability regime when a new owner first put LIHTC financing in place.

Ms. Harrison stated that if the Committee decides to move forward with the bill, Legal Aid believes it should be revised to focus tightly on two situations: 1) existing LIHTC properties where investors are exiting the ownership entity and 2) existing LIHTC properties where the owner is seeking new LIHTC financing for purposes of rehabilitation, either at the 15- or 30-year mark. In both of these situations, any transfer of ownership interests is not intended to transfer actual control of the property - meaning the project sponsor/developer selected at the prior point when tenants were offered TOPA rights will remain in place. Any such transfer also is arguably necessary in order to secure LIHTC financing for ongoing and needed rehabilitation, which in most cases will be in the interest of tenants at the property.

Ms. Harrison added that Legal Aid recognizes that it is challenging to formulate statutory language to focus narrowly on the second situation described above, where an existing LIHTC owner seeks new LIHTC financing. The current bill attempts to do so by limiting the exemption to existing LIHTC properties already subject to an extended use agreement, where the credit period has expired and the property will remain or become subject to an extended use period following the transfer. While this will cover situations where actual control is not transferred, it also would cover traditional sales and transfers that occur without new LIHTC financing, or situations where the

project sponsor/developer exits and actual control of the property changes. Legal Aid sees no reason these types of transactions should be exempt from TOPA. Whenever both ownership interests and actual control of a property transfer to a new owner, even within the context of LIHTC, tenants should have the right to purchase. This ensures that tenants can have some say in which entity gains ownership and control of the property and how that new entity will ensure ongoing affordability and protect tenants' rights.

Ms. Harrison stated that Legal Aid recommends narrowing the current bill by adding three new requirements. First, the bill should specify that the remaining or new extended use period, following the exempt transfer, is at least 10 years. Second, the bill should specify that before and after the transfer the owner will be controlled by the same entity or person. Finally, the bill should specify that the sole purpose of the transfer is to secure new LIHTC financing for purposes of rehabilitation, *i.e.* to qualify for and enter a new credit period for this purpose. Adding these additional requirements will ensure that the exemption is limited to transactions that will result in both long-term affordability and new financing for rehabilitation, without resulting in a real change in ownership.

Ms. Harrison concluded by stating that the Committee should ensure that the owner of the property is required to provide a Notice of Transfer to tenants when claiming the exemption. The Notice of Transfer alerts tenants to the owner's claim and provides them with an opportunity to challenge this claim through an administrative or court process. This acts as a check on any bad actors that might seek to exploit a new exemption for improper purposes. The Committee also may want to use this opportunity to consider whether more information should be required in a Notice of Transfer, including a focus on real-life consequences for tenants such as whether the controlling owner or property manager will change and whether current affordability requirements will be affected. For complex transactions such as these, the Notice of Transfer can nearly incomprehensible and does not do an adequate job alerting tenants to these potential concerns.

Scott Bruton, *Vice President, Housing Policy, Coalition of Nonprofit Housing & Economic Development or CNHED* stated that CNHED is in favor of the following two requirements in the original bill. First, the housing accommodation must be subject to a tax credit extended use agreement immediately prior to the transfer. Second, the owner of the property must provide a Notice of Transfer to tenants when claiming the exemption.

Mr. Bruton recommended amending the bill to deal with two types of events. First, exempting from TOPA LIHTC properties where the tax credit investor (the limited partner) is leaving the ownership entity. Second, exempting from TOPA LIHTC properties for which a developer (the general partner) is creating a new ownership entity to take on new LIHTC financing and a new tax credit investor for the purpose of rehabilitation at either the fifteen-or thirty-year mark. In both the first and second type of event, the transfer of ownership interest does not transfer actual control of the property from the developer that tenants selected in the TOPA process, which led to the original LIHTC investments and affordability covenants. The first type of event is the normal process of the LIHTC program and would not change the entity controlling the property, for which the tenants originally voted. The second type of event is intended to secure additional LIHTC financing fifteen years after the previous round for the purposes of rehabilitation, which would not change the controlling entity for which the tenants originally voted and would improve conditions at the property.

Mr. Bruton stated that in regard to the second type of event, CNHED believes that the TOPA exemption should be limited to a situation where the developer/general partners is taking on a new tax credit investor/limited partner in order to access a new round of LIHTC financing for rehabilitation. The bill, as currently written, has a broader TOPA exemption, for any LIHTC property already subject to an extended use agreement, where the credit period has expired, and the property will remain or become subject to an extended use period following the transfer. This broader exemption would cover not only transfers where controlling interest is not transferred but also traditional sales. For example, under current law, if a tax credit investor chooses to push out a developer/general partner for poor performance, taking on a new general partner triggers TOPA. Under the original language of this bill, pushing out a general partner and taking on a new one would be exempt from TOPA. The tenants would then be subject to a new entity running the property that they had not chosen as part of the TOPA process that resulted in the conversion to LIHTC. Whenever both ownership interests and actual control of the property transfer to a new developer/general partner, tenants should be able to exercise their TOPA rights.

Mr. Bruton concluded by stating that the Committee should also consider exempting from TOPA one other type of event that affects a small, but possibly growing number of LIHTC deals that include a partnership between a nonprofit and a for-profit as the general partner. The Committee should consider exempting from TOPA the removal of the for-profit developer from the ownership entity at year fifteen, if the nonprofit developer is exercising a right of first refusal that was contained in the agreement approved by a tenant association during the TOPA process.

Nechama Masliansky, *Senior Advocacy Advisor, SOME, Inc. (So Others Might Eat)* stated that SOME has extensive involvement with the LIHTC program and is very interested in the issue of streamlining the TOPA process as it relates to the transfer of ownership at the expiration of the initial tax credit compliance period. Ms. Masliansky said that SOME has reviewed the testimony of CNHED, Legal Aid Society, and Jubilee Housing and conferred with SOME's counsel who has had extensive involvement in the TOPA/LIHTC process as counsel to SOME and several other nonprofits, counsel to tenant associations, and as a title insurance agent. She also said that SOME agrees with the positions stated in their testimony about the benefits of the bill and the need to modify it. Ms. Masliansky added that SOME has several additional points to make which were included in their testimony.

Suzanne Welch, *Vice President, Real Estate, Community Preservation and Development Corporation* stated that CPDC supports changes in the TOPA legislation proposed by the Mayor. The change would allow properties financed with LIHTC to be more easily refinanced in year 15 of the compliance period. This will allow the extension of the affordability for a property and the ability to raise millions of dollars in equity by qualifying for acquisition tax credits. CPDC also supports legislative clarifications recommended by CNHED.

Ms. Welch continued by stating that affordable developers like CPDC make considerable continued investment in their properties to operate and provide programs for the residents. A tax credit refinancing requires CPDC to technically sell the property to another entity which CPDC controls to qualify for low income housing tax credits for acquisition, but in doing so, with the current legislation, CPDC runs the risk of losing the property altogether along with years of investment. With the change CPDC can more confidently and quickly proceed with the refinancing and renovation.

Ms. Welch concluded by stating that this legislative change is a direct benefit to residents and the District. The more easily a LIHTC property can be renovated, the more quickly the residents can benefit from unit upgrades and property improvements. The legislation will also benefit the District in that Housing Production Trust Fund (“HPTF”) dollars can be stretched further. Simply put, if the affordable housing developers can raise more equity through this legislative change, then they need less in HPTF funds while providing extended affordability.

Walter Johnston, *Acting Director, Non-Profit Community Development Corp. of Washington, DC, Inc. (NPCDC)* stated that the legislation is very simple and critically important for organizations, such as NPCDC, to continue to build and promote healthy, affordable rental housing units across the District of Columbia. Bill 23-0074 makes changes to the TOPA exemption given to affordable property owners transferring ownership interests as long as the ownership entity remains committed to providing long-term low-income housing at the property.

Mr. Johnson further stated that the bill is critically important for small non-profit low-income property owners such as NPCDC that wish to maintain affordable housing in the district beyond the usual 15-year syndication period that is associated with LIHTC. This bill will ensure that when an investor is ready to transition out of a low-income deal at the end of syndication, the original development group can continue to operate the property under existing conditions while continuing the commitment to low-income housing, without triggering a costly and competitive TOPA process.

Mr. Johnson concluded by stating that without this legislation, the property would be subjected to sale, leading to higher cost housing and fewer available subsidy dollars that could otherwise be used to develop further affordable housing options throughout the District.

James D. Knight, *President, Jubilee Housing* stated that Jubilee Housing has partnered with several tenant associations that have exercised their rights under TOPA and assigned those rights to Jubilee. This process has enabled Jubilee to help preserve more than 250 units of deeply affordable housing, ensuring that existing residents are able to afford newly renovated homes in highly desirable neighborhoods, fostering racial and socioeconomic equity and inclusion in the geographic heart of the District.

Mr. Knight continued by stating that Jubilee has also experienced firsthand how this powerful preservation tool can be exploited. In a similar transfer, where Jubilee was admitting the LIHTC investor into the project for the purpose of renovating it for its existing residents, a developer attempted to use the recapitalization event to take the property and redevelop it as luxury condos. Mr. Knight stated that the legislation will make it more difficult for rogue influences to subvert TOPA for private gain, and it will make it more efficient for affordable housing owner/developers using LIHTC to preserve at risk properties from being lost to the market.

Melissa Bondi, *Mid-Atlantic State & Local Policy Director Enterprise Community Partners* stated that Enterprise supports the intent of Bill B23-0074, which will make it easier for those committed to providing long-term housing affordability to do so as housing credit transactions reach certain predictable financing and investment milestones that are built into the program.

Ms. Bondi added that Community Partners supported the proposed amendments recommended by CNHED of which Enterprise is a proud member. She continued by stating that

Community Partners believes the amendments put forth by CNHED clarify the bill to ensure and achieve additional years of commitment to ensure long-term affordability for buildings and units, and are consistent with the intention of TOPA as well as the overarching goals to support quality housing affordability for residents over the long term. The property owner will be required to rehabilitate the property to improve site and unit conditions that extend its usable life as quality housing, and in some cases will extend the commitment for housing affordability and other housing credit protections and requirements for an additional term up to 30 years.

VI. IMPACT ON EXISTING LAW

The proposed bill amends section 402 of the Tenant Opportunity to Purchase Act of 1980, effective September 10, 1980 (D.C. Law 3-86; D.C. Official Code § 42-3404.02)) to exempt LIHTC redevelopment projects from the requirements of TOPA under certain limited circumstances and to require that a notice of transfer include certain material facts

VII. FISCAL IMPACT

On July 24, 2020, the Chief Financial Officer, Jeff DeWitt, concluded that are sufficient in the fiscal year 2021 through fiscal year 2024 budget and financial plan to implement the legislation. Mr. DeWitt stated that the legislation could create additional work for the Department of Housing and Community Development (DHCD), such as educating the public on the new law and handling disputes related to it, but DHCD staff can handle the work without additional resources.

VIII. SECTION-BY-SECTION ANALYSIS

- | | |
|-----------|---|
| Section 1 | States the short title of B23-0074. |
| Section 2 | <p>Amends TOPA by adding four new subparagraphs that clarify that LIHTC redevelopment projects do not fall under the requirements of TOPA as follows:</p> <ul style="list-style-type: none">• For a LIHTC transaction to not fall under TOPA, the purpose of the transaction must be rehabilitation, the ownership entity must continue to be controlled by the same person or entity before and after the transaction, and the property must remain subject to an extended use agreement for at least 10 years after the transaction.• When there is a transfer of interests in a partnership or limited liability company that owns an accommodation as its sole or principal asset, TOPA is not triggered only if the sole purpose of the transfer is to remove one or more limited partners or investor members who have made capital contributions and received tax benefits pursuant to section 42 of the United States Internal Revenue Code of 1986 or a comparable federal or District program. |

- When a transfer of interest in an entity that owns a housing accommodation or a transfer of title to a housing accommodation, TOPA is not triggered only if the sole purpose of the transfer is to qualify for and enter into a new credit period, as defined in Section 42 of the United States Internal Revenue Code of 1986. Also, the transfer must be for purposes of the rehabilitation of the housing accommodation and before and after the transfer, the owner of the housing accommodation is controlled, directly or indirectly, by the same person or entity.

The Notice of Transfer requirements were strengthened requiring a disclosure of the material facts of the transaction to tenants, including whether there will be any changes in ownership, management, current rents, or any applicable affordability requirements for the housing accommodation.

Section 3 Provides the fiscal impact statement.

Section 4 Provides the effective date.

IX. COMMITTEE ACTION

On July 27, 2020, the Committee on Housing and Neighborhood Revitalization held an additional meeting to consider and mark-up B23-0074. The meeting was called to order at 1:09 p.m. A quorum was present, which included Chairperson Bonds and Councilmembers Silverman, Nadeau, T. White, and R. White. Chairperson Bonds provided an opening statement summarizing the provisions of the proposed resolution. Chairperson Bonds moved for approval of B23-0074 and opened the floor for discussion. A brief discussion followed emphasizing the importance of the carefully crafted change to TOPA of B23-0074 that will provide continued rent stability to renters.

Chairperson Bonds then moved for final approval of the Committee Print and Report for B23-0074, with leave for staff to make technical and conforming amendments.

Committee members voted as follows:

Committee members voting in favor: Chairperson Bonds and Councilmembers Silverman, Nadeau, T. White, and R. White.

Committee members voting against:

Committee members voting present:

Committee members absent:

The meeting was adjourned at 1:16 p.m.

X. ATTACHMENTS

1. B23-0074 as introduced
2. Secretary's Memorandum
3. Public Hearing Notice
4. Agenda and Witness list
5. Hearing Testimony
6. Fiscal Impact Statement
7. Legal Sufficiency Determination
8. Comparative Redline
9. Committee Print

Attachment #1 - B23-0074 as Introduced



2019 JAN 16 PM 3:54

OFFICE OF THE
SECRETARY

MURIEL BOWSER
MAYOR

JAN 16 2019

The Honorable Phil Mendelson
Chairman
Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, N.W., Suite 504
Washington, D.C. 20004

Dear Chairman Mendelson:

Enclosed for consideration and approval by the Council of the District of Columbia ("Council") is the "Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of 2019." This legislation will amend the Tenant Opportunity to Purchase Act of 1980, effective September 10, 1980 (D.C. Law 3-86; D.C. Official Code § 42-3404.02(c)(2) ("TOPA") to exempt low income housing tax credit redevelopment projects from the notice requirements. I urge the Council to take prompt and favorable action on the proposed legislation.

Sincerely,

A handwritten signature in dark ink, appearing to read "Muriel Bowser", written over the printed name.

Muriel Bowser

Enclosures

cc: Nyasha Smith, Secretary to the Council



Chairman Phil Mendelson
at the request of the Mayor

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Phil Mendelson, on behalf of the Mayor, introduced the following bill, which was referred to the Committee on _____.

To amend the Tenant Opportunity to Purchase Act of 1980, effective September 10, 1980 (D.C. Law 3-86; D.C. Official Code § 42-3404.02(c)(2) ("TOPA") to exempt low income housing tax credit redevelopment projects from the notice requirements.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of 2019".

Sec. 2. Section 402(c)(2) of the Tenant Opportunity to Purchase Act of 1980, effective September 10, 1980 (D.C. Law 3-86; D.C. Official Code § 42-3404.02(c)(2)), is amended as follows:

(1) A new paragraph (O) is added to read as follows:

"(O) A transfer of interests in an entity that owns a housing accommodation, or a transfer of title to a housing accommodation, if each of the following conditions is satisfied: (i) immediately prior to the transfer the housing accommodation is subject to, and following such transfer the housing accommodation will remain or will become subject to, an extended low-income housing commitment, as that term is defined in Section 42 of the United States Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42), or a comparable District program; and (ii) the credit period, as defined in Section 42, for the housing accommodation has ended."

1 Sec. 3. Fiscal impact statement.

2 The Council adopts the fiscal impact statement in the committee report as the fiscal
3 impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act,
4 approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

5 Sec. 4. Effective date.

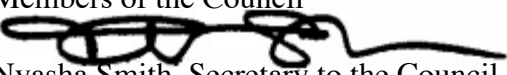
6 This act shall take effect following approval by the Mayor (or in the event of veto by the
7 Mayor, action by the Council to override the veto), a 30-day period of Congressional review as
8 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
9 24, 1973 (87 Stat.813; D.C. Official Code § 1- 206.02(c)(1)), and publication in the District of
10 Columbia Register.

Attachment #2 - Secretary's Memorandum

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From :  Nyasha Smith, Secretary to the Council

Date : January 22, 2019

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Wednesday, January 16, 2019. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of 2019", B23-0074

INTRODUCED BY: Chairman Mendelson at the request of the Mayor

The Chairman is referring this legislation to the Committee on Housing and Neighborhood Revitalization.

Attachment

cc: General Counsel
Budget Director
Legislative Services

Attachment #3 - Public Hearing Notice

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON HOUSING AND NEIGHBORHOOD REVITALIZATION
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, NW, Washington, DC 20004

2019 OCT 23 PM 2:06
OFFICE OF THE
SECRETARY

COUNCILMEMBER ANITA BONDS, CHAIRPERSON
COMMITTEE ON HOUSING AND NEIGHBORHOOD REVITALIZATION

ANNOUNCES A PUBLIC HEARING OF THE COMMITTEE

on

Bill 23-0074, the “Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of 2019”

and

Bill 23-0173, the “Accounting Clarification for Real Estate Professionals Amendment Act of 2019”

Wednesday, October 2, 2019, at 11:00 AM
John A. Wilson Building, Room 500
1350 Pennsylvania Avenue, NW
Washington, DC 20004

On Wednesday, October 2, 2019, Councilmember Anita Bonds, Chairperson of the Committee on Housing & Neighborhood Revitalization, will hold a public hearing on Bill 23-0074, the “Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of 2019” and Bill 23-0173, the “Accounting Clarification for Real Estate Professionals Amendment Act of 2019”. The hearing will take place in Room 500 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., at 11:00 a.m.

Bill 23-0074, the “Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of 2019”, would exempt low income housing tax credit redevelopment projects from TOPA notice requirements. Bill 23-0173, the “Accounting Clarification for Real Estate Professionals Amendment Act of 2019”, would allow payment of a real estate commission to be made to a business entity.

Those who wish to testify are requested to telephone the Committee on Housing and Neighborhood Revitalization, at (202) 724-8198, or email jtrimboli@dccouncil.us, and provide their name, address, telephone number, organizational affiliation and title (if any), by close of business on October 1, 2019. Persons wishing to testify are encouraged to **submit 15 copies of written testimony**. Oral testimony should be limited to three minutes for individuals and five minutes for organizations.

If you are unable to testify at the public hearing, written statements are encouraged and will be made a part of the official record. Written statements should be submitted to the Committee on Housing and Neighborhood Revitalization, John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Suite G6, Washington, D.C. 20004. The record will close at 5:00 p.m. on October 16, 2019.

Attachment #4 - Agenda and Witness list

**COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON HOUSING AND NEIGHBORHOOD REVITALIZATION
AGENDA/WITNESS LIST**

1350 Pennsylvania Avenue, NW, Washington, DC 20004

**COUNCILMEMBER ANITA BONDS, CHAIRPERSON
COMMITTEE ON HOUSING AND NEIGHBORHOOD REVITALIZATION
ANNOUNCES A PUBLIC HEARING OF THE COMMITTEE**

on

**Bill 23-0074, the “Low Income Housing Tax Credit TOPA Exemption for
Transfers of Interest Act of 2019”**

and

**Bill 23-0173, the “Accounting Clarification for Real Estate Professionals
Amendment Act of 2019”**

Wednesday, October 2, 2019, at 11:00 AM
John A. Wilson Building, Room 500
1350 Pennsylvania Avenue, NW,
Washington, DC 20004

I. CALL TO ORDER

II. OPENING REMARKS

III. WITNESS TESTIMONY

A. Public Witnesses

- | | |
|-------------------------|--|
| 1. Beth Mellen Harrison | Director, Housing Law Unit , Legal Aid Society DC |
| 2. Scott Bruton | Vice President, Housing Policy, CNHED |
| 3. Raquel Jones | President/CEO, Can I Live, Inc. |
| 4. Suzanne Welch | Vice President, Real Estate, Community
Preservation and Development Corporation |
| 5. Barbara Sumers | Public Witness |
| 6. Dianah Shaw | DC Association of Realtors |
| 7. Deirdre Brown | DC Association of Realtors |
| 8. Suzie Martin | Long & Foster |
| 9. Jacqueline Manning | ANC Commissioner, SMD 5C04 |
| 10. Kariem Bassiem | Tax Masters, Inc. |
| 11. Preston Hall | Tax Masters, Inc. |
| 12. Dorothy Douglas | ANC Commissioner, SMD 7D03 |
| 13. James D. Knight | President, Jubilee Housing |
| 14. Nick D'Ambrosia | Long & Foster |
| 15. Walter Johnston | Acting Director, Non-Profit Community
Development Corp. of Washington, DC Inc. |

B. Government Witnesses

- | | |
|---------------------|--------------------------------|
| 1. Polly Donaldson | Director, DHCD |
| 2. Frank Pietranton | Chair, Real Estate Commission. |

VI. ADJOURNMENT

Attachment #5 - Hearing Testimony

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT**



Public Hearing
On
Bill 23-74, the "Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of
2019"

Testimony of
Polly Donaldson
Director

Before the
Committee on Housing and Neighborhood Revitalization
The Honorable Anita Bonds, Chairperson

John A. Wilson Building
Room 500
1350 Pennsylvania Avenue, NW
Washington, D.C. 20004

October 2, 2019
11:00 a.m.



Good morning, Chairperson Bonds and members of the Committee on Housing and Neighborhood Revitalization. I am Polly Donaldson, Director of the Department of Housing and Community Development (DHCD). I am pleased to appear before you to testify on behalf of the Bowser Administration on Bill 23-74, the “Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of 2019,” which would add an additional exemption to the current list of TOPA exemptions. This bill would exempt a transfer of interest or a transfer of title in cases where a property currently benefits from Low Income Housing Tax Credits (LIHTC) and the sole purpose of the transfer is to again pursue LIHTC or other comparable District program funds that impose similar affordability requirements following the transfer, thus maintaining affordability for an extended period of time. To assure this exemption applies only to properties that may be at risk and are likely to need reinvestment, the exemption is limited to properties where the housing tax credit period, as defined by the LIHTC program, has ended at year 15 or 30.

Over the past three years, I have come before the Committee on Housing and Neighborhood Revitalization on numerous occasions to encourage the committee to act favorably on the recommendations of the Preservation Strike Force, of which you were a member, to develop new programs and authorize further reforms. With your support, the six recommendations of the Strike Force can be seen behind many of Mayor Bowser’s recent accomplishments in the preservation of affordable housing. We have:

- established a “Preservation Unit” at DHCD with three staff members focused on preserving affordable housing (Recommendation #1);
- created and funded the DC Housing Preservation Fund with nonprofit partners that with three annual appropriations of \$10 million and a 3:1 match, will create an approximately \$120 million

revolving loan fund, which to-date has closed 12 loans, including nine Tenant Opportunity to Purchase Act (TOPA) projects, preserving a total of 1,148 affordable units, the vast majority affordable below 80% of median family income (MFI) (Recommendation #2);

- opened the window for applications to the Small Buildings Program to support small landlords in making critical repairs (Recommendation #3);
- implemented the District Opportunity to Purchase Act (DOPA) (Recommendation #4); and
- enacted numerous programs to assist seniors to age in place (Recommendation #6).

Today I come before you to address the remaining recommendation of the Preservation Strike Force, to exempt projects from TOPA in the case where the only purpose of a transfer is to maintain existing affordable housing. The Strike Force concluded that the current LIHTC exemption (D.C. Official Code §42-3404.02(c)(2)(H)) is narrow and its use is limited, unnecessarily slowing the redevelopment of affordable housing and allowing third parties to destabilize affordable properties through the TOPA process.

As I described above, B23- 74 will resolve this problem. The housing accommodations eligible for this exemption will be at a stage in their lifecycle where they are ready for reinvestment and, as a result of that investment, they will remain quality affordable housing for District residents for decades to come. We believe this is prudent public policy that will preserve affordable housing without diminishing the role of TOPA in providing tenants a voice in the sale and conversion of their rental homes.

This concludes my testimony on Bill 23-74, the “Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of 2019.” I appreciate the opportunity to testify before you today in support of this bill. I am available to answer any questions you may have at this time.



Legal Aid Society
OF THE DISTRICT OF COLUMBIA

MAKING JUSTICE REAL

**Testimony of Beth Mellen Harrison
Supervising Attorney, Housing Law Unit
Legal Aid Society of the District of Columbia**

**Before the Committee on Housing & Neighborhood Revitalization
Council of the District of Columbia**

Public Hearing Regarding:

B23-0074

**“Low Income Housing Tax Credit
TOPA Exemption for Transfers of Interest Act of 2019”**

October 2, 2019

Faced with the District’s rapid gentrification, the Legal Aid Society of the District of Columbia¹ has long supported policies that seek to preserve affordable housing. We believe it is important to ensure that laws such as the Tenant Opportunity to Purchase Act (TOPA) remain robust and effective. It is with this in mind that we urge the Committee to proceed with caution regarding Bill 23-0074, the Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of 2019. Specifically, we believe that the Committee should seek more information regarding the degree to which the problem the bill purports to address is both common and pressing enough to require a legislative solution. Further, if the Committee does move forward with this legislation, it should amend it ahead of mark-up to narrow its language, so that it is carefully tailored and does not weaken TOPA in unnecessary or unintended ways.

TOPA is an important tool for stemming the tide of displacement that can follow in the wake of gentrification. The law allows tenants facing the sale of their property to partner with an affordable housing developer to preserve their homes. Affordable housing developers, in turn, often seek Low Income Housing Tax Credit (LIHTC) financing for TOPA deals in order to fund rehabilitation while preserving affordable rents.

B23-0074 would create a new exemption to TOPA for certain LIHTC-related transactions. As we understand it, the concern is that without the exemption, owners risk losing control of their properties as a result of restructuring or transfers of interests that are necessary to renew or maintain LIHTC financing. If this risk of losing ownership becomes too great, some developers may be discouraged from seeking LIHTC financing altogether.

¹ The Legal Aid Society of the District of Columbia was formed in 1932 to “provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs.” Over the last 87 years, tens of thousands of the District’s neediest residents have been served by Legal Aid staff and volunteers. Legal Aid currently works in the areas of housing, family law, public benefits, immigration, and consumer protection. More information about Legal Aid can be obtained from our website, www.LegalAidDC.org, and our blog, www.MakingJusticeReal.org.

Legal Aid's position is that any narrowing of TOPA should be based on a strong record (and not simply a few anecdotes) that a new exemption is needed. If the Committee moves forward with this bill, Legal Aid recommends narrowing it in several ways, detailed below, to focus on the problem at hand.

Legal Aid Urges the Committee to Seek More Information About the Problem That the Bill Is Designed to Solve

In order to determine whether a new LIHTC TOPA exemption is needed and the proper scope for any such exemption, it is critical for this Committee to examine the interaction between LIHTC financing and TOPA and the particular problems alleged. Legal Aid urges this Committee to seek more information – through the public hearing process and by convening DHCD and interested parties in discussions after the hearing – to determine if a problem actually exists and whether it threatens affordable housing preservation in the District. Understanding the scope of any problem also will inform how this Committee should narrow and tailor the proposed bill in order to ensure a new exemption does not become a broader loophole.

Legal Aid recognizes that LIHTC provides a critical source of financing to help preserve affordable housing and prevent displacement, including in the context of TOPA deals.² LIHTC properties only guarantee affordable rents for families with incomes at 50 or 60 percent of area median income (AMI) – and only for some units. The overwhelmingly majority of the families that Legal Aid works with have far lower incomes, often at 30 percent of AMI or below. Legal Aid nonetheless has seen LIHTC financing benefit our clients in at least two respects: 1) by funding the purchase of rent control properties through TOPA, allowing for rehabilitation and the preservation of current rents for current tenants, and 2) by preserving rents that are accessible to families seeking to place vouchers or other tenant-based subsidies.

The purported need for a new LIHTC TOPA exemption stems from the typical structure of these deals. A developer seeking LIHTC financing first purchases an existing property, typically through a partnership or limited liability corporation (LLC), and then must be approved for tax credits. The developer then seeks investors, who will provide cash for rehabilitation in exchange for the tax credits. While these investors then join the partnership or LLC and gain ownership interests, the developer – often referred to as the project sponsor/developer – typically retains a controlling ownership interest and maintains actual control of the property. TOPA already contains an exemption that applies to this stage, where investors join to make capital contributions and receive tax benefits.³

LIHTC financing comes with two distinct periods of affordability requirements. The available tax credits can be claimed during an initial 10-year period, tied to a 15-year “credit” or

² Our testimony focuses on the use of LIHTC financing to purchase and rehabilitate existing properties, the scenario in which Legal Aid has the most experience, and not on new construction.

³ D.C. Code § 42-3404.02(c)(2)(H).

“compliance” period. During the compliance period, the owner must meet affordability requirements or risk losing the tax credits. After the tax credits and compliance period end, the owner still must meet the same affordability requirements for another 15 years. This “extended use” period is enforced through a restrictive covenant recorded on the land when the tax credits are awarded.

Because the tax credits end at the 10-year mark and compliance ends at the 15-year mark, it is typical for investors to exit the partnership or LLC at this time. The owner then faces three basic choices – seek new financing and new investors (and perform new rehabilitation on the property) via LIHTC, seek new financing through non-LIHTC sources, or simply carry on through the extended use period. If new LIHTC financing is sought, the owner typically will want to transfer the property to a new entity in order to qualify for acquisition credits (which are in addition to rehabilitation credits).⁴ New LIHTC financing also may be sought at the 30-year mark, when the extended use period ends. Any of these scenarios involves a transfer of ownership interests that potentially triggers TOPA and is not fully covered by the existing LIHTC TOPA exemption.

The policy question for the Council is whether these types of transfers of ownership interests should trigger TOPA. DHCD and some developers, including affordable housing developers, believe this type of exemption is necessary to protect the ownership and investment interests of developers. They believe developers may not continue to seek LIHTC financing up front or new LIHTC financing at the 15-year or 30-year mark if it may result in loss of control of the property. They also will likely note that tenants had the opportunity to exercise TOPA rights, choose a developer, and opt into the LIHTC affordability regime when a new owner first put LIHTC financing in place.

Legal Aid is not in a position to opine on these potential risks and how developers may react. We are aware of situations where new LIHTC financing has helped to rehabilitate existing LIHTC properties. We also are aware of at least one situation where a new owner refused to seek new financing at the 15-year mark and the property then fell into significant disrepair – when Sanford Capital bought Belmont Crossing.

What we do know from working with tenant associations and other groups of tenants is that TOPA is a powerful tool for tenants seeking a voice in what happens to their homes. Before this Committee limits TOPA rights by adding a new exemption, developers and others should come forward to create a strong record before this Committee that a problem exists and that failing to address it will impact the preservation of affordable housing.

If the Bill Moves Forward, Legal Aid Supports Narrowing the Scope of the Exemption and Ensuring a Notice of Transfer Is Provided

⁴ To qualify for new acquisition credits and maximize new LIHTC financing, a current owner typically will have to transfer title to the property and/or transfer 100 percent of the interest in the current ownership entity to a new legal entity, even if the current owner then maintains a controlling interest in the new ownership entity.

If the Committee decides to move forward with the bill, Legal Aid believes it should be revised to focus tightly on two situations: 1) existing LIHTC properties where investors are exiting the ownership entity, and 2) existing LIHTC properties where the owner is seeking new LIHTC financing for purposes of rehabilitation, either at the 15- or 30-year mark. In both of these situations, any transfer of ownership interests is not intended to transfer actual control of the property – meaning the project sponsor/developer selected at the prior point when tenants were offered TOPA rights will remain in place. Any such transfer also is arguably necessary in order to secure LIHTC financing for ongoing and needed rehabilitation, which in most cases will be in the interest of tenants at the property.

While the text of TOPA does not address whether a reallocation of interests among existing owners constitutes a “sale,” the D.C. Court of Appeals recently issued a decision holding that it does not. In *Williams v. Kennedy*, several owners of a rental property transferred their interests to the remaining owners of the property without providing the tenant with TOPA rights, and the tenant then challenged these transactions.⁵ The Court of Appeals concluded that when existing owners (including partners in a partnership or joint venture) reallocate their interests in a property but do not bring in a new owner, those transactions do not constitute “sales” and a tenant’s TOPA rights are not triggered.⁶ This decision should cover the situation of LIHTC investors exiting a partnership or joint venture and transferring their interests back to the project sponsor/developer with the controlling interest.

To ensure the statute is clear, the situation of exiting investors could be addressed by adding a new exemption mirroring the existing LIHTC TOPA exemption:

The transfer of interests in a partnership or limited liability company that owns an accommodation as its sole or principal asset; provided, that the sole purpose of the transfer is to remove one or more limited partners or investor members who have made capital contributions and received tax benefits pursuant to section 42 of the United States Internal Revenue Code of 1986 approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42), or a comparable District program.

Legal Aid recognizes that it is challenging to formulate statutory language to focus narrowly on the second situation described above, where an existing LIHTC owner seeks new LIHTC financing. The current bill attempts to do so by limiting the exemption to existing LIHTC properties already subject to an extended use agreement, where the credit period has expired and the property will remain or become subject to an extended use period following the transfer.

While this will cover situations where actual control is not transferred, it also would cover traditional sales – for example, if Sanford Capital had purchased Belmont Crossing at the 15-year mark when the credit period had expired. It also would cover transfers that occur without new LIHTC financing, or situations where the project sponsor/developer exits and actual control of the property changes. Legal Aid sees no reason these types of transactions should be exempt from TOPA. Whenever both ownership interests and actual control of a property transfer to a

⁵ *Williams v. Kennedy*, 211 A.3d 1108 (2019)

⁶ *See, id.* at 1111-12.

new owner, even within the context of LIHTC, tenants should have the right to purchase. This ensures that tenants can have some say in which entity gains ownership and control of the property and how that new entity will ensure ongoing affordability and protect tenants' rights.

Legal Aid recommends narrowing the current bill by adding three new requirements. First, the bill should specify that the remaining or new extended use period, following the exempt transfer, is at least 10 years. Second, the bill should specify that before and after the transfer the owner will be controlled by the same entity or person. Finally, the bill should specify that the sole purpose of the transfer is to secure new LIHTC financing for purposes of rehabilitation, i.e. to qualify for and enter a new credit period for this purpose. Adding these additional requirements will ensure that the exemption is limited to transactions that will result in both long-term affordability and new financing for rehabilitation, without resulting in a real change in ownership.

Legal Aid recommends the following specific additions (underlined text) and deletions (strike-through text):

(O) A transfer of interests in an entity that owns a housing accommodation, or a transfer of title to a housing accommodation, if each of the following conditions is satisfied:

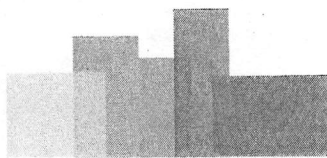
- (i) immediately prior to the transfer the housing accommodation is subject to, ~~and following such transfer the housing accommodation will remain or will become subject to,~~ an extended low income housing commitment, as that term is defined in Section 42 of the United States Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42) or a comparable District program, ~~and;~~
- (ii) the credit period, as defined in Section 42, for the housing accommodation has ended;
- (iii) immediately following the transfer the housing accommodation will for a term of not less than ten years either remain subject to an existing or become subject to a new extended low-income housing commitment;
- (iv) before and after the transfer the owner of the housing accommodation will be controlled, directly or indirectly, by the same person or entity; and
- (v) the sole purpose of the transfer is to qualify for and enter a new credit period, as defined in Section 42, for purposes of rehabilitation of the housing accommodation.

Finally, the Committee should ensure that the owner of the property is required to provide a Notice of Transfer to tenants when claiming the exemption. (The bill as currently drafted requires this.) The Notice of Transfer alerts tenants to the owner's claim and provides them with an opportunity to challenge this claim through an administrative or court process. This acts as a

check on any bad actors that might seek to exploit a new exemption for improper purposes. The Committee also may want to use this opportunity to consider whether more information should be required in a Notice of Transfer, including a focus on real-life consequences for tenants such as whether the controlling owner and/or property manager will change and whether current affordability requirements will be affected. For complex transactions such as these, the Notice of Transfer can be nearly incomprehensible and does not do an adequate job alerting tenants to these potential concerns.

Conclusion

Thank you for this opportunity to testify. We look forward to continuing our dialogue with DHCD and this Committee about whether the current bill should move forward and ways to narrow it.



CNHED

Coalition for Nonprofit Housing and Economic Development

**Testimony of Scott Bruton, Vice President for Housing Policy
Coalition for Nonprofit Housing and Economic Development
Committee on Housing and Neighborhood Revitalization**

Public Hearing on

**B23-0074 Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act
of 2019**

October 2, 2019

John A. Wilson Building

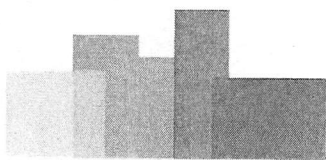
Room 500

Good morning Chairperson Bonds and members of the Committee. My name is Scott Bruton. I am the Vice President for Housing Policy at the Coalition for Nonprofit Housing and Economic Development (CNHED). The Coalition's 140 member organizations fund, finance, produce, preserve, and provide affordable housing and neighborhood-based economic development in the District of Columbia. I am here today regarding B23-0074 the Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of 2019.

The intent of the bill is to exempt owners of multifamily rental properties that are participating in the federal Low Income Housing Tax Credits (LIHTC) program from having to comply with sale requirements in the Tenant Opportunity to Purchase Act (TOPA). For existing properties, LIHTC provides acquisition and rehabilitation financing in exchange for affordable housing covenants that maintain rent levels affordable to households with incomes at 50 or 60 percent of area median income (AMI). Almost all existing properties that come under LIHTC covenants do so through tenant associations exercising their TOPA rights to partner with a developer for this purpose. The developer usually then forms a limited liability corporation (LLC) to purchase the property. The developer then seeks investors, who will provide capital for acquisition and rehabilitation in exchange for tax credits. The developer then becomes the general partner and the tax credit investor becomes the limited partner in a new partnership for the purpose of attaining both LIHTC acquisition and rehabilitation credits. TOPA already contains an exemption that applies to this stage, where investors enter a partnership to qualify for LIHTC.¹

LIHTC financing comes with two distinct periods of affordability requirements. The tax credit investor claims their credits during the first ten years of the initial fifteen-year compliance period. During this period, the investor must monitor the general partner to make sure that they are complying with the affordability requirements or risk losing the tax credits. After the tax credits and compliance period end, the developer must meet the same affordability requirements for an extended use period of another fifteen years, for a total affordability period of thirty years.

¹ D.C. Code § 42-3404.02(c)(2)(H).



CNHED

Coalition for Nonprofit Housing and Economic Development

Tax credit investors typically exit the partnership at the fifteen-year mark, and the developer then decides whether to seek new LIHTC financing and a new tax credit investor (and perform new rehabilitation on the property), or carry on through the extended use period with another type of financing or no refinancing. If the developer seeks new LIHTC financing, they also will have to transfer the property to a new entity created by itself and the new tax credit investor in order to qualify for acquisition credits. Either scenario involves a transfer of ownership interests that potentially triggers TOPA and is not covered by the existing LIHTC TOPA exemption.

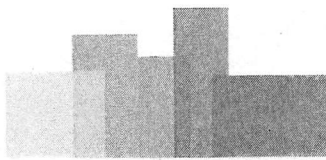
CNHED is in favor of the following two requirements in the original bill. First, the housing accommodation must be subject to a tax credit extended use agreement immediately prior to the transfer. Second, the owner of the property must provide a Notice of Transfer to tenants when claiming this exemption.

CNHED recommends amending the bill to deal with two types of events. First, exempting from TOPA LIHTC properties where the tax credit investor (the limited partner) is leaving the ownership entity. Second, exempting from TOPA LIHTC properties for which a developer (the general partner) is creating a new ownership entity to take on new LIHTC financing and a new tax credit investor for the purpose of rehabilitation at either the fifteen- or thirty-year mark. In both the first and second type of event, the transfer of ownership interest does not transfer actual control of the property from the developer that tenants selected in the TOPA process, which led to the original LIHTC investments and affordability covenants. The first type of event is the normal process of the LIHTC program and would not change the entity controlling the property, for which the tenants originally voted. The second type of event is intended to secure additional LIHTC financing fifteen years after the previous round for the purposes of rehabilitation, which would not change the controlling entity for which the tenants originally voted and would improve conditions at the property.

Regarding the first type of event, where the tax credit investor exits the partnership, while TOPA does specify whether a change in interests among owners in a partnership classifies as a “sale,” the DC Court of Appeals recently decided that it does not. In a recent court case, several owners of a rental property transferred their interests to the remaining owners of the property without providing the tenant with TOPA rights, and the tenant then challenged these transactions.² The Court of Appeals concluded that when existing owners (including partners in a partnership or joint venture) reallocate their interests in a property but do not bring in a new owner, those transactions do not constitute “sales” and a tenant’s TOPA rights are not triggered.³ While this decision should cover the situation of LIHTC investors exiting a partnership or joint venture and transferring their interests to the developer/general partner, the bill could assure clarity by adding

² Williams v. Kennedy, 211 A.3d 1108 (2019)

³ See id. at 1111-12.



CNHED

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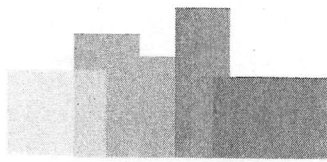
a new exemption similar to the existing LIHTC TOPA exemption in D.C. Code § 42-3404.02(c)(2)(H).

Regarding the second type of event, CNHED believes that the TOPA exemption should be limited to a situation where the developer/general partners is taking on a new tax credit investor/limited partner in order to access a new round of LIHTC financing for rehabilitation. The bill, as currently written, has a broader TOPA exemption, for any LIHTC property already subject to an extended use agreement, where the credit period has expired, and the property will remain or become subject to an extended use period following the transfer. This broader exemption would cover not only transfers where controlling interest is not transferred but also traditional sales. For example, under current law, if a tax credit investor chooses to push out a developer/general partner for poor performance, taking on a new general partner triggers TOPA. Under the original language of this bill, pushing out a general partner and taking on a new one would be exempt from TOPA. The tenants would then be subject to a new entity running the property that they had not chosen as part of the TOPA process that resulted in the conversion to LIHTC. Whenever both ownership interests and actual control of the property transfer to a new developer/general partner, tenants should be able to exercise their TOPA rights.

To limit the TOPA exemption in the second type of event to developers/general partners taking on a new investor and tax credits for rehabilitation, CNHED recommends amending the current bill by adding three new requirements. First, the bill should specify that immediately following the transfer the housing accommodation must remain subject to an extended use agreement for at least ten years, or it must be subjected to a new recorded covenant under either the tax credit program or a comparable DC program, also for a period of at least ten years. Second, the bill should specify that before and after the transfer the owner will be controlled by the same entity or person. Finally, the bill should specify that the sole purpose of the transfer is to secure new LIHTC financing for purposes of rehabilitation. These additional requirements will ensure that the exemption is limited to transactions that will result in both long-term affordability and new financing for rehabilitation, without resulting in a real change in ownership.

The following excerpt of the relevant section of B23-0074 demonstrates CNHED's recommendations for adding the three requirements detailed above, with proposed revisions in red:

(O) A transfer of interests in an entity that owns a housing accommodation, or a transfer of title to a housing accommodation, if each of the following conditions is satisfied: (i) immediately prior to the transfer the housing accommodation is subject to, ~~and following such transfer the housing accommodation will remain or will become subject to,~~ an extended low income housing commitment, as that term is defined in Section 42 of the United States Internal Revenue Code of 1986,



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approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42) or a comparable District program; ~~and~~; (ii) the credit period, as defined in Section 42, for the housing accommodation has ended; (iii) immediately following the transfer the housing accommodation will for a term of not less than ten years either remain subject to an existing or become subject to a new extended low-income housing commitment; (iv) before and after the transfer the owner of the housing accommodation will be controlled, directly or indirectly, by the same person or entity; and (v) the sole purpose of the transfer is to qualify for and enter a new credit period, as defined in Section 42, for purposes of rehabilitation of the housing accommodation.

The purpose of adding these requirements to access the TOPA exemption is to facilitate the ability of the developer/general partner to retain control of the property, if they are willing to re-syndicate the tax credits at the beginning of the second fifteen-year extended use agreement period or to take on new tax credits and a new thirty-year extended use agreement at the end of the initial thirty-year extended use agreement. Either outcome would require the property owner to rehabilitate the property to improve conditions and extend its usable life. The second outcome, which would start a new thirty-year extended use agreement, would provide the added benefit to the District of maintaining the LIHTC affordable housing restrictions on the property. Without this proposed exemption, developers could be discouraged from seeking new LIHTC financing, because they fear that the restructuring or transfer of interests that are necessary to re-syndicate LIHTC financing would trigger TOPA and lead them to lose ownership of the property.

The Committee also should consider exempting from TOPA one other type of event that affects a small number but possibly growing number of LIHTC deals that include a partnership between a nonprofit and a for-profit as the general partner. The Committee should consider exempting from TOPA the removal of the for-profit developer from the ownership entity at year fifteen, if the nonprofit developer is exercising a right of first refusal that was contained in the agreement approved by a tenant association during the TOPA process.

Thank you for the opportunity to testify.

**TESTIMONY SUBMITTED TO THE DC COUNCIL
COMMITTEE ON HOUSING & NEIGHBORHOOD REVITALIZATION**

REGARDING B23-0074

**Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of 2019
October 2, 2019**

John A. Wilson Building, Room 500

For 30 years Community Preservation and Development Corporation (CPDC) has provided affordable housing for families and seniors in Washington, DC and offered an array of resident services. We currently have over 2600 units in the District. CPDC develops vibrant communities through innovation and partnership where residents can grow and thrive. With our recent affiliation with Enterprise, we provide greater opportunity for low-income families, thanks to the continued affordability of 12,000 homes in the Mid-Atlantic, and the provision of services that are even more responsive to the needs of residents.

We support changes in the TOPA legislation proposed by the administration. The change would allow properties financed with Low Income Housing Tax Credits (LIHTC) to be more easily refinanced in year 15 of the compliance period. This will allow the extension of the affordability for a property and the ability to raise millions of dollars in equity by qualifying for acquisition tax credits. We also support legislative clarifications recommended by CNHED.

Many affordable developers like CPDC make considerable continued investment in our properties to operate and provide programs for the residents. A tax credit refinancing requires us to technically sell the property to another entity which we control to qualify for low income housing tax credits for acquisition, but in doing so, with the current legislation, we run the risk of losing the property altogether along with our years of investment. With the change we can more confidently and quickly proceed with the refinancing and renovation.

This legislative change is direct benefit to residents and the District. The more easily a LIHTC property can be renovated, the more quickly the residents can benefit from unit upgrades and property improvements. The legislation will also benefit the District in that HPTF dollars can be stretched further. Simply put, if we the affordable housing developers can raise more equity through this legislative change, then we need less in HPTF funds while providing extended affordability.

Thank you for the opportunity to testify.

Suzanne Welch

Vice President, Real Estate



**Community Preservation and Development
Corporation,
an affiliate of Enterprise**

92020 885-9559 swelch@cpd.org



Affordable Housing

Resident Life

Youth Services

Reentry Housing

**Testimony of James D. Knight
President
Jubilee Housing, Inc.
Before
COUNCILMEMBER ANITA BONDS, CHAIR
COMMITTEE ON HOUSING AND NEIGHBORHOOD REVITALIZATION**

**The Low Income Tax Credit TOPA Exemption for Transfers of Interest Act of 2019
B23-0074
Wednesday, October 2, 2019**

Good morning Chairperson Bonds and members of the Committee. My name is James Knight and I have been serving as the President and CEO for Jubilee Housing for 17 years. I also presently serve on the District's Housing Production Trust Fund Advisory Board, and Jubilee is an active member of CNHED. In all of these capacities, I am pleased that you are holding a hearing on this important legislative proposal which creates a narrow TOPA exemption for affordable housing that is being recapitalized with Low Income Housing Tax Credits (LIHTC).

Let me give a brief explanation of Jubilee Housing's work and then add additional comments on this particular piece of legislation. .

Founded in 1973, Jubilee Housing's mission is to provide safe, affordable housing and supportive services for residents with low-incomes living in the Adams Morgan, Columbia Heights, and Mount Pleasant neighborhoods of the Nation's Capital. Jubilee Housing serves more than 600 individuals and families annually and has been a model for programs around the country seeking effective responses to the urban affordable housing crisis. More than bricks and mortar, Jubilee Housing builds diverse communities that create opportunities for everyone to thrive.

Jubilee Housing understands that, as Bryan Stevenson of the Equal Justice Initiative says, "The opposite of poverty is not wealth. In too many places, the opposite of poverty is justice." Jubilee Housing strives to create "justice housing," which is affordable to those who need it most, located in neighborhoods with resources such as quality schools, grocery stores, and transportation, and near support that enables us all to succeed. Housing that offers these fundamentals promotes justice and fosters greater equity among D.C. residents.

Jubilee Housing has partnered with several tenant associations who have exercised their rights under TOPA and assigned those rights to Jubilee. This process has enabled Jubilee to help preserve more than 250 units of deeply affordable housing, insuring that existing residents are able to afford newly renovated homes in highly desirable neighborhoods, fostering racial and socioeconomic equity and inclusion in the geographic heart of the District.

Jubilee has also experienced firsthand how this powerful preservation tool can be exploited. In a similar transfer, where Jubilee was admitting the LIHTC investor into the project for the purpose of renovating it for

its existing residents, a developer attempted to use the recapitalization event to take the property and redevelop it as luxury condos.

The present legislation will make it more difficult for rogue influences to subvert TOPA for private gain, and it will make it more efficient for affordable housing owner/developers using LIHTC to preserve at risk properties from being lost to the market.

Specifically, the legislation will streamline the process that allows an existing LIHTC owner to admit a new LIHTC investor to syndicate credits and redevelop the property, extending its affordability for a minimum of 15 additional years. The legislation preserves TOPA rights in all other transfers or sales and continues to ensure that tenants have the ability to exercise their rights when their building is offered for sale or otherwise being transferred to another entity.

We support this intent and offer a few clarification that we believe further narrow the exemption while preserving the intent of streamlining LIHTC recapitalization efforts.

1. First, we think it is important that exempted transactions commit to two important outcomes: i) extending the life of the property thru improvements and renovations, ii) extending the affordability for another 15+ years. While we think the legislation accomplishes the second outcome as written, however, we would like to see an affirmative requirement to provide substantial physical improvements added.
2. Second, we think it is important to limit the exemption to transactions where the controlling entity remains the same before and after the transfer. Any other arrangement constitutes a material change in controlling party and should trigger a right for tenants to approve a new controlling entity.

TOPA is a very important law that gives tenants an opportunity for increased self-determination when the property they live in is being sold. We should be very sensitive to any proposed changes that would in any way limit or reduce tenants' right under the law, and insure that such changes are as focused and narrow as possible.

We believe that this legislation, with the aforementioned clarifications, strikes a solid balance between supporting tenants' rights, dissuading subversive market forces, and streamlining the preservation of LIHTC based affordable housing.

**Testimony of Michelle Owens and The Non-Profit Community Development Corporation
of Washington, DC Inc. by Walter Johnston
Before the Committee on Housing and Neighborhood Revitalization
On Bill 23-0074, "Low Income Housing Tax Credit Exemption for Transfers of Interest Act
of 2019"
Wednesday, October 2, 2019**

Good morning Chairperson Bonds and members of the Committee on Housing and Neighborhood Revitalization. I appreciate the opportunity to appear before you today to present testimony on the "Low Income Housing Tax Credit Exemption for Transfers of Interest Act of 2019", Bill 23-0074.

My name is Walter Johnston and I am appearing on behalf of the Non-Profit Community Development Corporation of Washington, DC, Inc. (NPCDC) and its Managing Director, Michelle Owens, who was unable to arrange her schedule to appear.

NPCDC is a 501(c)(3), founded in 1994, whose principal mission is initiating, sponsoring, and operating housing and economic development projects that create economic stability and upward mobility for low-income families in the Washington, DC metropolitan area. We presently manage and operate some 500 units of affordable rental housing and developed the Heights of Columbia, a mixed-income, mixed-use building located in Columbia Heights, which has helped spur community redevelopment on the edge of the newly renovated business district of 14th Street, NW.

The legislation that you consider today is very simple and critically important for organizations, such as NPCDC, to continue to build and promote healthy, affordable rental housing units across the District of Columbia. Bill 23-0074 amends Section 402(c)(2) of the Tenant Opportunity to Purchase Act of 1980, effective September 10, 1980 (D.C. Law3-86; D.C. Official Code Section 42-3404.02(c)(2).

Bill 23-0074 makes changes to the Tenant Opportunity to Purchase Act (TOPA) exemption given to affordable property owners transferring ownership interests as long as the ownership entity remains committed to providing long-term low-income housing at the property. This is critically important for small non-profit low-income property owners such as us that

**Testimony of Michelle Owens and The Non-Profit Community Development Corporation
of Washington, DC Inc. by Walter Johnston
Before the Committee on Housing and Neighborhood Revitalization
On Bill 23-0074, "Low Income Housing Tax Credit Exemption for Transfers of Interest Act
of 2019"
Wednesday, October 2, 2019**

wish to maintain affordable housing in the district beyond the usual 15-year syndication period that is associated with Low Income Housing Tax Credits. This bill will ensure that when an investor is ready to transition out of a low-income deal at the end of syndication, the original development group can continue to operate the property under existing conditions while continuing the commitment to low-income housing, without triggering a costly and competitive TOPA process. Without this important legislation, the property would be subjected to sale, leading to higher cost housing and fewer available subsidy dollars that could otherwise be used to develop further affordable housing options throughout the District.

Chairman Bonds, as you are aware, a sizable portion of our residents are unable to afford the already rising costs of housing in the District of Columbia, indeed in the whole of the Washington Metropolitan Region. Implementation of the legislation before you today will allow organizations like NPCDC to continue our commitment to low cost housing in the District.

NPCDC is in support of the proposed modification to Bill 23-0074 and we encourage this committee and the Council of The District of Columbia to enact it.

I thank you for your consideration and I will be pleased to respond to any questions you may have.



71 "O" Street, NW
Washington, DC 20001
Tel: (202) 797-8806
Fax: (202) 797-1867
Web: www.some.org

**Testimony of Nechama Masliansky, Senior Advocacy Advisor,
SOME, Inc. (So Others Might Eat)
To the Committee on Housing & Neighborhood Revitalization
On B23-74, "Low Income Housing Tax Credit TOPA Exemption
for Transfers of Interest Act of 2019"**

Good afternoon, Chairperson Bonds and members of the Committee. My name is Nechama Masliansky, and I am Senior Advocacy Advisor at SOME, Inc. (So Others Might Eat). SOME is an interfaith, nonprofit organization that for 49 years has provided comprehensive services to District residents who are homeless or at risk of homelessness. We have developed approximately 25 sites that currently house 900 adults and 390 children, and we are developing additional housing.

SOME has extensive involvement with the LIHTC program and is very interested in the issue of streamlining the TOPA process as it relates to the transfer of ownership at the expiration of the initial tax credit compliance period. We have reviewed the testimony of CNHED, Legal Aid Society, and Jubilee Housing and conferred with SOME's counsel, Rick Eisen, who has had extensive involvement in the TOPA/LIHTC process as counsel to SOME and several other nonprofits, counsel to tenant associations, and as a title insurance agent. We agree with the positions stated in their testimony about the benefits of the bill and the need to modify it. We do have several additional points to make.

We suggest that the language proposed by CNHED in subsections (iv) and (v) be modified in two respects. First, we agree with CNHED's suggestion that the exercise of a right of first refusal by a nonprofit corporation should be made subject to the same requirements as the other transfers covered by the exemption and have inserted language in black in subsection (iv) that would accomplish that purpose. Second, we propose that "sole" purpose be modified to "primary" purpose in subsection (v); there may be some secondary purpose that would otherwise make the exemption inapplicable.

(O) A transfer of interests in an entity that owns a housing accommodation, or a transfer of title to a housing accommodation, if each of the following conditions is satisfied: (i) immediately prior to the transfer the housing accommodation is subject to, ~~and following such transfer the housing accommodation will remain or will become subject to,~~ an extended low income housing commitment, as that term is defined in Section 42 of the United States Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42) or a comparable District program; ~~and~~ (ii) the credit period, as defined in Section 42, for the housing accommodation has ended; (iii) immediately following the transfer the housing accommodation will for a term of not less than ten years either remain subject to an existing, or become subject to a new, extended low-income housing commitment; (iv) before and after the transfer the owner of the housing accommodation will be controlled, directly or indirectly, by the same person or entity or the new owner will be a nonprofit corporation that is exercising a right of first refusal that was previously approved by the tenant organization; and (v) the sole/primary purpose of the transfer is to qualify for and enter a new credit period, as defined in Section 42 or a comparable District program, for purposes of rehabilitation of the housing accommodation.

We note that the December 21, 2018 Memorandum from Jeffrey DeWitt to Chairman Mendelson inaccurately describes the bill in its current form in two respects. The Memorandum states that the bill eliminates the requirement that the owner notify the tenants of the transfer and the bill requires the Mayor's office to sign off on the exemption. As far as we can tell, the existing notice

requirements to tenants are unchanged by the bill and we do not believe that they should be changed. In addition to the reasons stated by CNHED and Legal Aid that giving notice to the tenants helps make sure that the process is not being abused, it is also critical from a title insurance perspective. No sale/transfer will go through if the new buyer/transferee cannot obtain a title insurance policy that insures that TOPA has been complied with. The language in the existing law that gives the tenants 45 days to organize and file a notice of intent to object and precludes any objection if the 45-day deadline is missed is what the title insurance industry relies on in providing title insurance in transfers under the existing LIHTC exemption; undoubtedly, that would be the continuing practice under this new TOPA exemption.

Also, as far as we can tell, the bill also does not require the Mayor's office to sign off on the exemption nor do we believe that it should. While a government sign off would undoubtedly be welcomed by the title insurance industry as an additional safeguard that all requirements for the exemption have been met, it would also impose a new level of delay and uncertainty. If such a requirement were to be added, it should tie in with the 45-day review period for the tenants, i.e., any failure of the District to reject the exemption within 45 days would be deemed an approval of it.

Finally, we note that this bill would have no impact one way or another on the initial transfer of the property from the entity that acquires the property to the entity that will own the property under the **initial** LIHTC covenant. Those transactions will continue to be governed by subsection (H). Because of the narrow existing language in H, SOME had to seek and obtain special legislation to be exempt from TOPA for its Anna Cooper House rehabilitation (the property has to be transferred from SOME to a new LIHTC entity controlled by SOME). The need for that special legislation would not have been affected by this bill. The reason there will be no impact on initial transfers is because this bill only addresses the recapitalization after the expiration of the initial tax credit period. There is still a need to expand subsection H to cover situations where fee simple title is transferred as opposed to only an interest in the tax credit entity. We propose that subsection H be amended as follows:

(H) The transfer of interests in a partnership or limited liability company that owns an accommodation as its sole or principal asset or the transfer of the fee simple title to the property by the ownership entity; provided, that the ~~sole~~primary purpose of the transfer of interests is to admit to the existing partnership or limited liability company one or more limited partners or investor members who will make capital contributions and receive tax benefits pursuant to section 42 of the United States Internal Revenue Code of 1986 approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42) ("LIHTC"), or a comparable District program, or to transfer the fee simple title to the property to a newly formed partnership or limited liability company controlled, directly or indirectly, by the same person or entity as the transferor where the sole purpose of the transfer is to admit to ownership one or more limited partners or investor members who will make capital contributions and receive tax benefits pursuant to LIHTC;

This language modifying subsection H would have obviated the need for the Anna Cooper House special legislation and would have avoided the problems Jubilee Housing encountered in the Maycroft situation which also required special legislation to address it.

We are happy to address any follow-up questions on any of these points. Thank you.

Nechama Masliansky nmasliansky@some.org

Restoring Hope & Dignity One Person at a Time

SOME is an interfaith, community-based organization established to help the poor and homeless of our nation's capital.
SOME is a 501(c)(3) organization and contributions are tax-deductible. Federal ID #23-7098123.
Please remember SOME in your will or estate plan.

Attachment #6 - Fiscal Impact Statement


Government of the District of Columbia
Office of the Chief Financial Officer



Jeffrey S. DeWitt
Chief Financial Officer

MEMORANDUM

TO: The Honorable Phil Mendelson
Chairman, Council of the District of Columbia

FROM: Jeffrey S. DeWitt
Chief Financial Officer 

DATE: July 24, 2020

SUBJECT: Fiscal Impact Statement – Low Income Housing Tax Credit TOPA
Exemption for Transfers of Interest Amendment Act of 2020 (including
emergency and temporary versions of the bill)

REFERENCE: Bill 23-74, Committee Print, Temporary Bill, and Emergency Bill,
provided to the Office of Revenue Analysis on July 22, 2020

Conclusion

Funds are sufficient in the fiscal year 2021 through fiscal year 2024 budget and financial plan to implement the legislation.

Background

The legislation exempts¹ from the Tenant Opportunity to Purchase Act² (TOPA) certain low-income housing tax credit (LIHTC)³ redevelopment projects. It also clarifies that TOPA Notices of Transfer must include changes in management, current rents, or affordability requirements that result from the transfer.

To be exempt from TOPA, a title transfer or transfer of interest for a LIHTC property (or a property with a comparably restrictive covenant as a result of a federal or District program), must fall within one of the following categories:

¹ By amending Section 402(c)(2) of the Tenant Opportunity to Purchase Act of 1980, effective September 10, 1980 (D.C. Law 3-86; D.C. Official Code § 42-3404.02(c)(2)).

² The Tenant Opportunity to Purchase Act of 1980, effective September 10, 1980 (D.C. Law 3-86; D.C. Official Code § 42-3404 et. seq.)

³ Authorized by Section 42 of the United States Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42).

The Honorable Phil Mendelson

FIS: "Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Amendment Act of 2020", Bill 23-74, Committee Print, Temporary Bill, and Emergency Bill, provided to the Office of Revenue Analysis on July 22, 2020.

- 1) The LIHTC credit period has ended, the controlling ownership (direct or indirect) in the property will not change, and the restrictions on the property will last at least another 10 years and be as restrictive as LIHTC requirements;
- 2) The sole purpose of the transfer is to allow for the exit of one or more limited partners or investor members who have made capital contributions and received tax benefits through LIHTC or a similar District or federal program; or
- 3) The sole purpose of the transfer is to qualify for and enter into a new LIHTC credit period in order to rehabilitate the housing accommodation, as long as the controlling ownership (direct or indirect) does not change before and after the transfer.

Financial Plan Impact

Funds are sufficient in the fiscal year 2021 through fiscal year 2024 budget and financial plan to implement the legislation. The legislation could create additional work for the Department of Housing and Community Development (DHCD), such as educating the public on the new law and handling disputes related to it, but DHCD staff can handle the work without additional resources.

Attachment #7 - Legal Sufficiency Determination



OFFICE OF THE GENERAL COUNSEL

Council of the District of Columbia
1350 Pennsylvania Avenue NW, Suite 4
Washington, DC 20004
(202) 724-8026

MEMORANDUM

TO: Councilmember Anita Bonds

FROM: Nicole L. Streeter, General Counsel *NLS*

DATE: July 27, 2020

RE: Legal Sufficiency Determination for B23-074, Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Amendment Act of 2020

The measure is legally and technically sufficient for Council consideration.

This bill would amend section 402 of the Tenant Opportunity to Purchase Act of 1980, effective September 10, 1980 (D.C. Law 3-86; D.C. Official Code § 42-3404.02) ("TOPA"), to clarify that for the purposes of TOPA, the following transfers of interest would not be considered a sale:

- Where the credit period for a property that received a tax credit subject to section 42 of the Internal Revenue Code (26 USC § 42) ("LIHTC program") has ended, the direct or indirect controlling interest in the property will not change, and the property will receive a new tax credit and begin a new 10-year tax credit period with terms at least as restrictive as under the LIHTC program;
- Where a transfer of interest occurs solely so that a limited partner or capital investor who has made contributions and received tax benefits under the LIHTC program or a comparable District or federal program can exit; and
- Where the sole purpose of the transfer is to enter a new LIHTC period in order to rehabilitate a property and the direct or indirect controlling interest will not change.

Additionally, the bill clarifies the information that is required in a TOPA Notice of Transfer.

I am available if you have any questions.

Attachment #8 - Comparative Redline

Comparative Redline

D.C. Official Code § 42-3404.02

(c)(2) For the purposes of subchapters IV and V of this chapter, and notwithstanding anything to the contrary herein, the term “sell” or “sale” shall not include:

“(O) A transfer of interest in an entity that owns a housing accommodation or a transfer of title to a housing accommodation, if each of the following conditions is satisfied:

“(i) The credit period, as defined in section 42(f) of the United States Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42(f)), for the housing accommodation has ended;

“(ii) Immediately prior to the transfer the housing accommodation
is subject to:

“(I) An extended low-income housing commitment, as that term is defined in Section 42(h)(6)(B) of the United States Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42(h)(6)(B)); or

“(II) A comparable restrictive covenant as a result of a federal or District program with occupancy, rent, and income requirements at least as restrictive as under 26 U.S.C. § 42;

“(iii) Before and after the transfer, the owner of the housing accommodation shall be controlled, directly or indirectly, by the same person or entity; and

“(iv) Immediately following the transfer, the housing accommodation shall for a term of not less than 10 years, either remain subject to an existing or become subject to a new extended low-income housing commitment or a comparable restrictive covenant as a result of a federal or District program with occupancy, rent and income requirements at least as restrictive as under 26 U.S.C. § 42.

“(P) The transfer of interests in a partnership or limited liability company that owns an accommodation as its sole or principal asset; provided, that the sole purpose of the transfer is to allow for the exit of one or more limited partners or investor members who have made capital contributions and received tax benefits pursuant to section 42 of the United States Internal Revenue Code of 1986 approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42) or a comparable federal or District program with occupancy, rent and income requirements at least as restrictive as under 26 U.S.C. § 42.

“(Q) A transfer of interest in an entity that owns a housing accommodation or a transfer of title to a housing accommodation, the sole purpose of which is to qualify for and enter into a new credit period, as defined in Section 42 of the United States Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42), for purposes of the

rehabilitation of the housing accommodation; provided that, before and after the transfer, the owner of the housing accommodation shall be controlled, directly or indirectly, by the same person or entity;”.

(d)(3)(A) The Notice of Transfer shall be substantially in the form prescribed by the Mayor and shall provide, at a minimum;

(i) ~~A~~ statement of the rights of the tenant or tenant organization²~~s~~
~~rights~~ under this chapter;

(ii) ~~A~~an accurate description of the transfer containing all material facts, including whether the transfer will result in any changes in management, current rents, or any applicable affordability requirements for the housing accommodation;

(iii) ~~†~~The date of the proposed transfer; and

(iv) ~~†~~The reason, if any, why the owner asserts the transfer may not constitute a sale.

Attachment #9 - Committee Print

COMMITTEE PRINT
COMMITTEE ON HOUSING AND NEIGHBORHOOD REVITALIZATION
JULY 27, 2020
B23-0074

1 A BILL

2
3 IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

4
5
6 To amend the Tenant Opportunity to Purchase Act of 1980 to clarify that under certain limited
7 circumstances, low-income housing tax credit (LIHTC) redevelopment projects do not
8 fall under the requirements of TOPA, and to require that a notice of transfer include
9 certain material facts.

10 BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
11 act may be cited as the “Low Income Housing Tax Credit TOPA Exemption for Transfers of
12 Interest Amendment Act of 2020”.

13 Sec. 2. Section 402 of the Tenant Opportunity to Purchase Act of 1980, effective
14 September 10, 1980 (D.C. Law 3-86; D.C. Official Code § 42-3404.02), is amended as follows:

15 (a) Subsection (c)(2) is amended by adding new subparagraphs (O), (P), and (Q) to read
16 as follows:

17 “(O) A transfer of interest in an entity that owns a housing accommodation
18 or a transfer of title to a housing accommodation, if each of the following conditions is satisfied:

19 “(i) The credit period, as defined in section 42(f) of the United
20 States Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. §
21 42(f)), for the housing accommodation has ended;

22 “(ii) Immediately prior to the transfer the housing accommodation
23 is subject to:

24 “(I) An extended low-income housing commitment, as that
25 term is defined in Section 42(h)(6)(B) of the United States Internal Revenue Code of 1986,
26 approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42(h)(6)(B)); or

27 “(II) A comparable restrictive covenant as a result of a
28 federal or District program with occupancy, rent, and income requirements at least as restrictive
29 as under 26 U.S.C. § 42;

30 “(iii) Before and after the transfer, the owner of the housing
31 accommodation shall be controlled, directly or indirectly, by the same person or entity; and

32 “(iv) Immediately following the transfer, the housing
33 accommodation shall for a term of not less than 10 years, either remain subject to an existing or
34 become subject to a new extended low-income housing commitment or a comparable restrictive
35 covenant as a result of a federal or District program with occupancy, rent and income
36 requirements at least as restrictive as under 26 U.S.C. § 42.

37 “(P) The transfer of interests in a partnership or limited liability company
38 that owns an accommodation as its sole or principal asset; provided, that the sole purpose of the
39 transfer is to allow for the exit of one or more limited partners or investor members who have
40 made capital contributions and received tax benefits pursuant to section 42 of the United States
41 Internal Revenue Code of 1986 approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42) or a
42 comparable federal or District program with occupancy, rent and income requirements at least as
43 restrictive as under 26 U.S.C. § 42.

44 “(Q) A transfer of interest in an entity that owns a housing accommodation
45 or a transfer of title to a housing accommodation, the sole purpose of which is to qualify for and
46 enter into a new credit period, as defined in Section 42 of the United States Internal Revenue

Code of 1986, approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42), for purposes of the rehabilitation of the housing accommodation; provided that, before and after the transfer, the owner of the housing accommodation shall be controlled, directly or indirectly, by the same person or entity;”.

(b) Subsection (d)(3)(A) is amended to read as follows:

“(d)(3)(A) The Notice of Transfer shall be substantially in the form prescribed by the Mayor and shall provide at a minimum:

“(i) A statement of the rights of the tenant or the tenant organization under this chapter;

“(ii) An accurate description of the transfer containing all material facts, including whether the transfer will result in any changes in management, current rents, or any applicable affordability requirements for the housing accommodation;

“(iii) The date of the proposed transfer; and

“(iv) The reason, if any, why the owner asserts the transfer may not constitute a sale.”.

Sec. 4 Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 5 Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December

70 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of
71 Columbia Register.