



Councilmember Anita Bonds

1 A PROPOSED RESOLUTION

2 _____
3 IN THE COUNCIL OF THE DISTRICT OF COLUMBIA
4 _____

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

10 RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
11 resolution may be cited as the “Low Income Housing Tax Credit TOPA Exemption for Transfers
12 of Interest Emergency Declaration Resolution of 2020”.

13 Sec. 2. (a) B23-0074, the Low Income Housing Tax Credit TOPA Exemption for
14 Transfers of Interest Act of 2019 was introduced by Chairman Mendelson at the request of the
15 Mayor on January 16, 2019. The bill was referred to the Committee on Housing and
16 Neighborhood Revitalization on January 22, 2019, and the Committee held a public hearing on
17 the bill on October 2, 2019. The bill was discussed at length among tenant advocates, staff at the
18 Department of Housing and Community Development, and affordable housing providers in the
19 District of Columbia, who all reached consensus on the legislation. B23-0074 is scheduled for
20 mark-up on July 27, 2020.

21 (b) The Low-Income Housing Tax Credit provides equity financing that subsidizes the
22 acquisition, construction, and rehabilitation of affordable rental housing for low- and moderate-
23 income tenants. Since the mid-1990s, the LIHTC program has supported the construction or
24 rehabilitation of over 2 million affordable housing units nationally.

25 (c) LIHTC works by the federal government issuing tax credits to state and territorial
26 governments. LIHTC-funded affordable housing projects must meet a gross rent test, which
27 requires that rents do not exceed 30 percent of either 50 or 60 percent of AMI, depending upon
28 the share of tax credit rental units in the project.

29 (d) LIHTC tax credits leverage the self-interest of private investors who infuse much
30 needed capital directly into local affordable housing. A LIHTC project partnership allocates
31 investors 99 percent of the tax credits generated over a 10-year period and federal tax law
32 requires that these investments have a compliance period of 15 years. Thereafter, the investors
33 may withdraw from the investment and deploy their capital into new or newly renovated
34 affordable housing.

35 (e) In the District of Columbia, the LIHTC life-cycle has become complicated by the
36 District's Tenant Opportunity to Purchase Act ("TOPA"), which requires an owner of a rental
37 housing accommodation to give tenants an offer of sale before selling the accommodation. In
38 most buildings, TOPA can be an important tool in preventing tenant displacement, maintaining
39 affordable housing, promoting home ownership, and protecting the homes of tenants. However,
40 particularly in lower income buildings, with TOPA comes a very real risk that market rate
41 investors might successfully outmaneuver and outbid affordable housing developers and then try
42 to buy-out low- to moderate-income tenants with lucrative cash offers that appear to have short-
43 term benefits, but in the long run usually result in tenant displacement and the loss of affordable
44 housing.

45 (f) TOPA may potentially be triggered when as required by federal LIHTC law, a new
46 tax entity is created after 15 years when a housing provider renews LIHTC tax credits or
47 recapitalizes in order to continue to maintain the building as affordable housing. It is at this point

48 the continued affordability of a building is threatened if market rate investors outbid affordable
49 housing developers, cease the affordability of the project, and entice tenants to leave with cash
50 buyouts, and then proceed to convert the building into luxury apartments.

51 (g) Currently, District law is unclear whether TOPA offers are required during a LIHTC
52 renewal or similar recapitalization, as unlike in standard TOPA sales, the affordable housing
53 accommodation remains under the control of the same entity and only new non-management
54 investors leave or enter the new entity. The legislative history of TOPA from 40 years ago
55 indicates that the intent of TOPA was to provide tenants an opportunity to purchase their homes
56 when the ownership of a building actually changes, but not when the ownership effectively stays
57 the same and only the corporate entity changes “on paper” to comply with federal LIHTC
58 requirements.

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

68 (i) Furthermore, the resolution of this problem has become even more essential with the
69 current public health emergency arising from the COVID-19 pandemic. Even when a clear
70 TOPA exemption exists, prior to closing a transaction owners still must provide tenants a 90-day

71 Notice of Transfer. COVID-19 has further interfered with the ability of affordable housing
72 developers to complete LIHTC deals that finance these affordable housing projects, as during the
73 public health emergency all TOPA deadlines have been tolled.

74 (j) Because of all of these complications to the effective production and preservation of
75 affordable housing in the District through LIHTC tax credits, affordable housing developers and
76 private investors in affordable housing are potentially deterred from creating and preserving
77 affordable housing through LIHTC tax credit transactions.

78 (k) Finally in example, the continued financial and physical viability of an active LIHTC
79 affordable housing project in Ward 6 in Southwest DC is currently jeopardized unless remedial
80 legislation clarifying the law is passed without delay. With the passage of this emergency
81 legislation, TOPA clarity will be provided to affordable housing developers and investors alike,
82 and the obstacles for title insurance companies to issue title insurance and close the planned
83 transaction will be removed. This will then make funds available for needed reinvestment and
84 upgrades at this Southwest DC affordable housing accommodation. This emergency legislation
85 remedies these impasses by clarifying TOPA law in a narrow set of LIHTC and similar
86 transactions.

87 Sec. 3. The Council of the District of Columbia determines that the circumstances
88 enumerated in section 2 constitute emergency circumstances making it necessary that the LIHTC
89 TOPA Exemption for Transfers of Interest Emergency Amendment Act of 2020 be adopted after
90 a single reading.

91 Sec. 4. This resolution shall take effect immediately.