

A RESOLUTION

23-500

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

July 28, 2020

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

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

Sec. 2. (a) The Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of 2019, as introduced on January 16, 2019 (Bill 23-74, was referred to the Committee on Housing and Neighborhood Revitalization (“Committee”) on January 22, 2019, and the Committee held a public hearing on the bill on October 2, 2019. 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, all of whom have reached consensus on the legislation. Bill 23-74 was marked up on July 27, 2020.

(b) 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. Since the mid-1990s, the LIHTC program has supported the construction or rehabilitation of over 2 million affordable housing units nationally.

(c) Under LIHTC, the federal government issues tax credits to state and territorial governments. LIHTC-funded affordable housing projects must meet a gross rent test, which requires that rents do not exceed 30% of either 50 or 60% of area median income, depending upon the share of tax credit rental units in the project.

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

(e) In the District, the LIHTC life cycle has become complicated by the District's Tenant Opportunity to Purchase Act of 1980 ("TOPA"), which requires an owner of a rental housing accommodation to give tenants an offer of sale before selling the accommodation. 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. However, particularly in lower income buildings, with TOPA comes a very real risk that market rate investors might successfully outmaneuver and outbid affordable housing developers and then try to buyout 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.

(f) TOPA may potentially be triggered when, as required by federal LIHTC law, a new tax entity is created after 15 years when a housing provider renews LIHTC 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, entice tenants to leave with cash buyouts, and then proceed to convert the building into luxury apartments.

(g) 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 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.

(h) 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 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.

(i) 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. The COVID-19 pandemic 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.

(j) Because of all of these complications to the effective production and preservation of affordable housing in the District through LIHTC tax credits, affordable housing developers and

**ENROLLED ORIGINAL**

private investors in affordable housing are potentially deterred from creating and preserving affordable housing through LIHTC tax credit transactions.

(k) For example, the continued financial and physical viability of an active LIHTC affordable housing project in Ward 6 is currently jeopardized unless remedial legislation clarifying the law is passed without delay.

(l) With the passage of this emergency legislation, TOPA clarity will be provided to affordable housing developers and investors alike, and the obstacles for title insurance companies to issue title insurance and close the planned transaction will be removed. This will then make funds available for needed reinvestment and upgrades at the Ward 6 affordable housing accommodation.

(m) Emergency legislation is necessary to remedy these impasses by clarifying TOPA law in a narrow set of LIHTC and similar transactions.

Sec. 3. The Council of the District of Columbia determines that the circumstances enumerated in section 2 constitute emergency circumstances making it necessary that the Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Emergency Amendment Act of 2020 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.