



Kate Harrison
Councilmember, District 4

ACTION CALENDAR
November 28, 2023

To: Honorable Members of the City Council

From: Councilmember Harrison

Subject: Adopt Berkeley Municipal Code Chapter 13.89: Community/Tenant Opportunity to Purchase Act

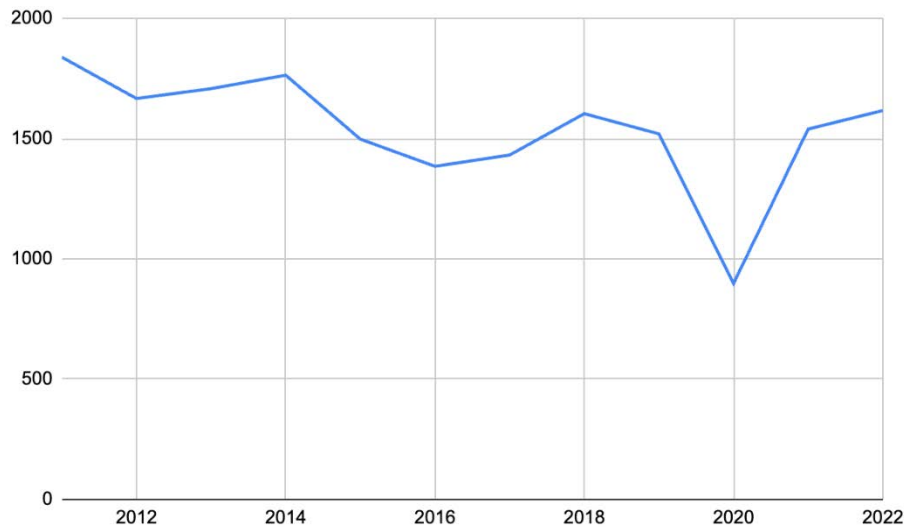
RECOMMENDATION

Adopt Berkeley Municipal Code Chapter 13.89: The Community/Tenant Opportunity to Purchase Act (COPA/TOPA).

CURRENT SITUATION AND RATIONALE FOR RECOMMENDATION

The City of Berkeley continues to grapple with enduring housing affordability and displacement crises, leaving increasingly limited prospects for property ownership and wealth accumulation amongst residents. In Berkeley, 58% of residents are renters. Berkeley residents who have been historically and institutionally marginalized based on race, income, and immigration status face the most barriers to wealth accumulation and property ownership. Discriminatory practices, often supported and/or facilitated by financial institutions and government policy, such as redlining, inequitable use of eminent domain, and ongoing demolition of affordable housing has led to disproportionate rates of displacement, housing injustice, and poverty among Black, Brown, Indigenous, and immigrant communities.

The preservation of affordable housing is key to reaching the housing and equity goals codified in Berkeley's recently adopted 2023-2031 Housing Element and strategic plan. Properly designed, the Community/Tenant Opportunity to Purchase Act (COPA/TOPA) can be an effective strategy to help break the cycle of displacement from multi-family housing by converting naturally affordable housing into permanently affordable units. Unfortunately, our City is losing affordable housing according to data from a *Berkeleyside* study. The number of one bedroom rent controlled units have decreased over the last 11 years by approximately 220 units, one of the reasons why renting in Berkeley has become increasingly more burdensome.



of 1 bedroom rent controlled units in Berkeley

COPA/TOPA not only serves to stabilize housing for existing tenants and safeguard affordable housing units in Berkeley, it can also open avenues for tenants to embark on first-time homeownership through land trusts that convert rental property to ownership units. It is imperative to underscore that nothing about COPA/TOPA prevents property owners from seeking fair market value for their properties. In fact, it can benefit property owners by offering various cost-saving benefits through tax refunds and reduced relocation fees.

Attachment D provides a flowchart depicting the proposed process. In summary, the proposed legislation:

- **Excludes buildings with four-units or less that are owner-occupied** except for the financial incentive, which gives any property owner who sells to existing tenants a transfer tax refund.
- **Requires property owners to notify existing tenants (with the exception of four-unit and smaller owner-occupied buildings) of their intent to sell** between 20 and 45 days (depending on property size) in advance of putting the property on the market.
- **Allows existing tenants to express interest in purchasing the property** within the 20 or 45 days of notice.
- Requires tenants to create a tenant organization and select a supportive partner, or, alternatively, formally transfer their rights to a qualified nonprofit, and **make a formal offer, depending on property size, within another 30, 60 or 90 days** starting from the date the statement of interest is submitted.

- **Allows property owners to reject the offer** within a time frame suggested by California State standards,¹ however, this time frame is ultimately decided through buyer/seller negotiation. If the property owner rejects the offer or if the offer period expires, **the property owner may take the property to market.**
- **In buildings of more than four-units, COPA/TOPA requires the property owner to notify tenants or qualified nonprofits that issued a first offer of the market offer.** Expanding this requirement to smaller buildings will be assessed in year 4.
- **Requires qualified organizations to match the substantive terms of the market offer within 10 or 30 days** (depending on property size).²
- **Gives the property owner discretion to decide whether to accept the offer from the tenants or the qualified nonprofit.** The property owner is not compelled to sell their property to existing tenants or a qualified nonprofit, nor are they discouraged from selling it at market price.
- **Provides a financial incentive to property owners to sell to existing tenants or qualified nonprofits by refunding 50% of the city's base transfer tax,** excluding the additional share voted on in Measure P.³
- **Supports tenant organizations by providing technical guidance and educational resources.** Financial assistance may be offered upon the development of guidelines by the City Manager. Nothing in the ordinance commits the City Council to providing a specified level of funding for acquiring properties.

BACKGROUND

COPA/TOPA was first introduced to Council in 2020 by Mayor Arreguin and referred to the Land Use, Housing, and Economic Development Policy Committee. After significant public input, Council Committee members recommended revisions to the legislation and planned to review it January of 2021, addressing budgetary, administrative, and outreach recommendations. However, due to the COVID-19 pandemic and subsequent lockdown, Council priorities shifted and, while agendaized once in March and once in April of 2021, action was not taken by Committee members until May of 2021. At that time, COPA/TOPA passed through Committee with a 2-1 vote with a positive recommendation on the condition of additional revisions. On January 27, 2022, the Mayor conducted an informational work session regarding COPA/TOPA to provide a

¹ California Department of Real Estate, "Chapter 20: Basic Contract Provisions and Disclosures in a Residential Real Estate Transaction," *California Real Estate Reference Book*, <https://dre.ca.gov/files/pdf/refbook/ref20.pdf> (accessed November 1, 2023).

² Substantive terms include purchase price, time to close, and contingencies.

³ 50% of the City's total base transfer tax refund is .75% of the sale price. For a house sold at \$1.8 million, the amount of the base transfer tax would be \$27,000, of which 50% is \$13,500. "Property Transfer Tax," City of Berkeley, <https://berkeleyca.gov/city-services/report-pay/property-transfer-tax> (accessed October 9, 2023).

forum for the public, Council, and staff to convey their thoughts about the proposed policy. COPA/TOPA has not yet been put to a vote.

Councilmember Harrison's Office has since conducted significant outreach in collaboration with the NAACP, faith groups, senior centers, housing justice organizations, law centers, property owners, and tenant advocacy groups. Councilmember Harrison has also worked with the City Attorney's office to develop a revised version of COPA/TOPA based on the concerns and recommendations of our diverse community.

A factor that became apparent during our outreach is that, in addition to providing property owners full discretion choosing to whom they sell their properties, COPA/TOPA can also provide extensive cost saving benefits to property owners. On top of providing a transfer tax refund explained below, when a property owner sells to existing tenants, they are no longer obligated to cover relocation costs. In the case of owner move-in evictions, landlords must pay \$18,011 to any tenant household that has lived in the residence for one year or more. Moreover, the landlord may also have to pay an additional \$6,000 to any tenant household that is low-income, disabled, elderly, includes children, or tenancies that began prior to 1999.⁴ Under COPA/TOPA, property owners can save on legal, real estate and renovation expenses.

Overview of Policy Differences Between the Proposed 2022 and 2023 COPA/TOPA

To respond to salient community concerns shared by tenants, property owners, and nonprofit partners alike, the proposed ordinance includes the following revisions and additions:

1. Expanded exemptions for owner-occupied properties;
2. Changed Right-of-First-Refusal to only be applicable to properties of more than four-units; smaller properties to be considered after assessment of the initial program;
3. Altered requirements for smaller properties;
4. Revised timelines for notice, offer, and close period for all properties;
5. Added a lifelong lease provision;
6. Clarified that properties with one-unit may only be purchased/sold under TOPA to sitting tenants with or without the assistance of a tenant organization;
7. Added provisions for anti-speculation.

Exemptions for Owner-Occupied Properties

⁴ City of Berkeley, "Tenant Relocation and Repairs," City of Berkeley, <https://berkeleyca.gov/doing-business/operating-berkeley/landlords/tenant-relocation-repairs> (accessed November 1, 2023).

One of the most significant concerns that emerged during earlier hearings was the potential issues for owner-occupied properties. It is important to acknowledge that many Black, Brown, Indigenous and low-income people are small property owners who live in their property in Berkeley and that these small properties may be one of their only sources of generational wealth accumulation.

The policy as redrafted intends to foster a more equitable housing environment for communities that have endured significant discrimination by exempting bona fide owner-occupied triplexes and quadruplexes (in addition to owner-occupied duplexes and single-family homes as called for in the original legislation).

Smaller Properties

To address concerns raised by smaller property owners who may not have the immediate resources to implement this policy, the following section excludes implementation of Section 13.89.110, Right of First Refusal, for smaller units (four or fewer units) and only adds that requirement to those properties upon a showing of results from application of COPA/TOPA to larger properties. The Right of First Refusal provision for will take effect for larger properties on January 1, 2024 and only come into effect for properties or four or fewer units on January 1, 2027 pending analysis and findings mandated by chapter 13.89.200. In the interim, non-owner-occupied smaller properties (four or fewer units) will be subject to the Right of First Offer. The limitation of right of first refusal to larger properties is intended to balance the rights of existing tenants with the needs of smaller property owners, who may not have the resources to afford the ongoing process necessary to fairly administer COPA/TOPA, and to give the City and qualified tenant organizations needed experience with administering COPA/TOPA.

The policy that was proposed in 2022 granted full exemption to single-family homes under TOPA, regardless of whether they were currently occupied by a tenant. In the current policy, tenant-occupied single-family homes are now included within TOPA's scope, while continuing to exempt owner-occupied and vacant single-family homes or single-family homes that are a person's primary residence. This exemption mechanism aims to balance the interests of owners and of existing tenants.

Revised Timeline for Notice, Offer, and Close Periods

Councilmember Harrison's office also considered the impact longer timelines may have on smaller property owners. For many smaller property owners, time is money, and to wait between six months and a year to close on their property, is not a feasible financial option. In the revised ordinance, the timelines for each step of the TOPA process have shifted based on the concerns of many smaller property owners, shortening many of them and clarifying that instead of a dictated timeline for close of properties, tenant purchasers must match the substantive terms of the third-party market offer including

price, timeline to close, and contingencies.

	2022 Policy	2023 Policy
Offer Period	<ul style="list-style-type: none"> • 90 days for two-unit property • 120 days for three+ unit properties 	<ul style="list-style-type: none"> • 30 days for one-unit property • 60 days for two – four-unit properties • 90 days for five+ unit properties
Close Period	<ul style="list-style-type: none"> • 60 days for two-unit property • 120 days for three+ unit properties 	<ul style="list-style-type: none"> • 30 days for one-unit property • 60 days for two – four-unit properties • 90 days for five+ unit properties
Right of First Refusal – Accept Offer	<ul style="list-style-type: none"> • 10 days for two-unit properties • 30 days for three+ unit properties 	<ul style="list-style-type: none"> • 10 days for one-unit property • 30 days for two+ unit properties
Right of First Refusal - Close	<ul style="list-style-type: none"> • 90 days for two-unit properties • 120 for three+ unit properties 	<ul style="list-style-type: none"> • Must match terms of third-party offer including price, timeline to close, and contingencies.

Lifelong Lease Provision

The Lifelong Lease Provision intends to maintain tenant protections for tenants who are not interested in purchasing their current residence, but want to still live there. The lifelong lease ensures that if another tenant/s or qualified nonprofit purchase the property, the tenant/s who want to remain there, are protected in doing so.

Provisions for Anti-Speculation

To prevent speculation, under which tenants purchase a property with the intention of selling it in the very short term for profit, the ordinance includes an Anti-Speculation penalty aimed at furthering the intention of COPA/TOPA as an anti-displacement and homelessness prevention mechanism. These provisions apply to properties not subject to an affordability covenant with the City of Berkeley (because those will remain affordable even on sale). Section 13.89.190 lays out these provisions; in brief, the ordinance includes language to prohibit and penalize this behavior, including:

- An affirmative agreement by tenant-owners to not engage in speculation.

- Placing a temporary restrictive covenant on the title to ensure the city is notified of property resales. The covenant will expire after the three-year anti-speculation period ends.
- Requiring an annual owner-occupancy certification to prove residency for the first three years, and
- Application of a 10-20% penalty on any profits for properties sold in less than three years, depending on the transaction date.

The combined strategy that penalizes wrongful behavior and mandates reporting, encourages accountability and transparency while creating a financial deterrent for those who may leverage the policy in bad faith. The anti-speculation section protects property owners, qualified nonprofits, and tenants who are operating in accordance with the principles of this policy.

FISCAL IMPACTS OF RECOMMENDATION

This policy requires funding for administration, implementation, and enforcement. Councilmember Harrison's office submitted a budget referral that was delayed to the AAO1, which will be considered in December 2023.⁵ The budget referral includes funding for:

- One Health, Housing, and Community Services (HHCS) Coordinator to develop education and outreach materials, assist and direct qualified organizations through the COPA/TOPA process, complete monitoring and data analysis to improve the policy and acquisition capacity needs.
- A portion of a Deputy City Attorney II position to manage any potential disputes or violations and support Tenant Organizations when necessary.
- Qualified organization capacity support for up to two projects a year, to assist tenants as they engage in the COPA/TOPA process.

Community Development Project Coordination for acquisition capacity, outreach, and administrative needs (HHCS)	1 FTE - \$220,676* ⁶ *Includes \$4,500 to support office, technology, and training needs
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⁵ City of Berkeley, "City Council Meeting Agenda - Item 26 - Referring \$579,000 to the June 2023 Ballot," April 11, 2023, [https://berkeleyca.gov/sites/default/files/documents/2023-04-11%20Item%2026%20Referring%20\\$579,000%20to%20the%20June%202023.pdf](https://berkeleyca.gov/sites/default/files/documents/2023-04-11%20Item%2026%20Referring%20$579,000%20to%20the%20June%202023.pdf) (accessed October 31, 2023).

⁶ An additional 1 FTE for a Community Development Project Coordinator was included in the original budget referral for programmatic capacity needs, namely, for identifying vacant or mostly vacant properties so that the City could more effectively partner with nonprofit housing providers to increase affordable housing stock. The funding request for the 1 FTE in the HHCS department will be delayed until fiscal year 2025, to allow COPA/TOPA programming to stabilize capacity and processes. Once COPA/TOPA is fully functioning, an additional HHCS FTE will be needed; funding has been requested in the budget process.

Deputy City Attorney II	0.35 FTE - \$101,884
Qualified organization capacity support for two additional projects per year (in addition to existing allocation of \$100,000 to the Bay Area Community Land Trust)	\$50,000

The initial direct fiscal impact is estimated at \$373,000 per year. With a considerable nexus with housing equity and the City's Small Sites Program, the City may also be able to leverage funds from the Measure U1 tax, the Housing Trust Fund, Measure O, and Measure M Empty Homes (Vacancy) Tax.

In addition, to the extent that properties are refunded one-half of the base transfer tax, or 0.75% of the property value, for each project valued at a price of \$2 million, the amount of transfer tax foregone by the City would be \$15,000. To illustrate the scope of the figures, the associated foregone transfer tax for a \$1.8 million single-family residence would be \$13,500. For a 21-unit building, which is the largest building that has sold in Berkeley within the two years (November 2021 – November 2023), the amount of foregone property tax if sold under TOPA would be \$40,000.⁷

ENVIRONMENTAL SUSTAINABILITY

This budget referral has no effect on environmental sustainability.

CONTACT PERSON

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ATTACHMENTS

- A. Revised BMC Chapter 13.89: Community/Tenant Opportunity to Purchase Act
- B. Comparison of Revised BMC Chapter 13.89 with 2022 Version
- C. 2022 Budget Referral: "Referring \$579,000 to the June 2023 Budget Process for Staffing Costs Associated with Acquisition of and Prevention of Displacement from Multifamily Housing"
- D. COPA/TOPA Timeline Chart

⁷ MLS Listings, "Property Listing 1," <https://www.mlslistings.com/Search/Result/ec6ddea7-ee1b-4620-9c3a-25190c068d1f/1> (accessed November 1, 2023); Redfin, "Property Listing 2," <https://www.redfin.com/CA/Berkeley/1626-Dwight-Way-94703/home/95473170> (accessed November 1, 2023).