



Office of the Mayor

01

WORKSESSION

January 27, 2022

To: Honorable Members of the City Council

From: Mayor Jesse Arreguin

Subject: Tenant Opportunity to Purchase Act, Adding B.M.C. Chapter 13.89

INTRODUCTION

The proposed Tenant Opportunity to Purchase Act (TOPA), which would add Chapter 13.89 to the Berkeley Municipal Code, is a policy that empowers tenants to determine the future of their housing when a rental property owner is ready to sell, by giving tenants the opportunity to collectively purchase the property they live in. It does this by creating legal rights for tenants to purchase or assign rights to an affordable housing developer, and providing technical assistance, education, and financing to help make these purchases possible. TOPA provides a way to stabilize existing housing for tenants and preserve affordable housing in Berkeley. It also creates pathways for tenants to become first-time homeowners and facilitates democratic residential ownership.

TOPA requires owners of residential rental property in the City of Berkeley prior to sale or transfer of their property to 1) notice to existing tenants and Qualified Non-Profit organizations (hereinafter "Qualified Organizations") of their intent to sell and 2) give Qualified Organizations the Right of First Offer to express interest and submit an offer to purchase. The ordinance also confers a Right of First Refusal to Qualified Organizations to match third party offers submitted.

Ultimately, the property owner may reject any offers from Qualified Organizations and accept third party offers to sell or transfer the property after the established TOPA timelines. The timelines were designed based on input from Washington D.C and San Francisco which have Opportunity to Purchase laws. In addition, the authors consulted lenders, realtors, and affordable housing developers. The timelines are intended to provide the necessary time for parties to meaningfully exercise their rights to purchase the property.

TOPA sales would have longer escrow periods to provide tenants time to organize, engage in technical assistance, form an organization that would qualify for financing, and obtain the necessary financing to close a transaction. To incentivize owners to participate in a TOPA transaction, owners who sell to tenants or a qualified organization will receive a refund in the amount of the City's portion of the Real Property Transfer Tax (.75%) not including the proportional amount attributed to Measure P.

TOPA applies to the sale or transfer (as defined in the ordinance) of all residential rental properties in the City of Berkeley with the following exceptions:

1. Any Rental Property comprised entirely of owner-occupied Rental Units, including any owner-occupied Single-Family Dwelling;
2. Any Accessory Dwelling Unit (inclusive of any junior Accessory Dwelling Unit) located on the same parcel of an owner-occupied Single-Family Dwelling or owner-occupied Accessory Dwelling Unit;
3. Transfers to family members;
4. Transfers by inheritance;
5. Sale of properties of 4 units or less for the purpose of paying imminently necessary health care expenses of an Owner of the Rental Property.

Owners of rental properties that are exempt can receive the benefit of TOPA incentives if they comply voluntarily with TOPA policies and procedures.

The First Right to Purchase is conferred to tenants, and includes a right of first offer, right of first refusal, and a right for tenants to assign rights to a qualified affordable housing organization. The ability to assign rights benefits tenants who cannot purchase but wish to maintain affordable tenancies. It also benefits affordable housing developers as tenant buy-in is often critical to the successful management of the property. If tenants waive their rights, the list of qualified affordable housing organizations have a second opportunity to purchase the property. Qualified affordable housing organizations are vetted and must meet criteria such as being committed to permanent affordability and democratic residential control.

The policy is designed to preserve existing affordable housing and create new affordable housing for future generations. Any TOPA property that receives City investment would be deed restricted to ensure that the property remains permanently affordable.

Multi-tenant buildings that include a mix of TOPA buyers and tenants who wish to continue renting will be required to ensure tenant protections and the enforcement of tenant's rights. This will prevent any internal displacement caused by the exercising of TOPA rights.

Moving forward a TOPA policy will require detailed Administrative Regulations and a well-funded infrastructure to administer and enforce the policy. There is also a vital need to provide adequate education, legal and technical assistance to tenants as part of the implementation. As such, there is a requirement for tenants to engage a City approved supportive partner to assist in all aspects of the transaction, including submitting the initial offer. Finally, a more robust and vibrant acquisition fund will be required that can work efficiently with the TOPA ordinance. This funding could be accommodated through the Small Sites Program with potential funding coming from

Measure U1 tax receipts, the Housing Trust Fund, and Measure O or through another funding mechanism including grants and future regional subsidy¹.

CURRENT SITUATION AND ITS EFFECTS

The proposed Tenant Opportunity to Purchase Act would advance the following Strategic Plan Priorities:

- create affordable housing and housing support service for our most vulnerable community members.
- champion and demonstrate social and racial equity.

POLICY COMMITTEE REVIEW AND RECOMMENDATION

On March 10, 2020, the Tenant Opportunity to Purchase Act (TOPA) was first presented to the Berkeley City Council's Land Use, Housing and Economic Development Policy Committee. The presentation generated extensive public comment from 61 speakers, equally split between support and opposition. COVID-19 shelter-in-place orders were initiated the following week and, with concurrence by the Policy Committee, the item was placed on the list of Unscheduled Items.

Over the next 12 months, revisions to the policy were made and an updated staff report and draft Ordinance was presented to Policy Committee on March 18, 2021, at which time the Committee heard from 60 public speakers. It was suggested that a special Policy Committee meeting be scheduled at a future date with adequate time allotted for public comment and Committee discussion.

On May 6, 2021, TOPA came back before the Policy Committee, there were 48 public speakers and no discussion from the committee. The item was continued to May 20, 2021.

Prior to the May 20th meeting, Mayor Arreguin proposed amendments (Attachment #1) responding to public input received and addressing implementation issues. The Mayor's proposed amendments were as follows (also contained in Attachment 2):

Exemptions (13.89.050)

- *Clarify that any owner-occupied properties exempt under the ordinance must be the "principal residence" of the owner.*
- *Exempt all Single-Family Homes (SFH) from TOPA except investor-owned SFH properties using a definition based on language in AB 1482 (state rent cap law).*

CA Civil Code Section 1947.12 (AB 1482) defines investor-owned properties as

(i) A real estate investment trust, as defined in Section 856 of the Internal Revenue Code.

(ii) A corporation.

¹ https://www.google.com/url?q=https://abag.ca.gov/sites/default/files/documents/2021-02/Launching%2520BAHFA-Regional%2520Housing%2520Portfolio_2-24-21_v6.pdf&sa=D&source=editors&ust=1615589062074000&usg=AOvVaw3u4K_b2vbJ9BZ2J41dWjql

(iii) A limited liability company in which at least one member is a corporation.

- In addition to exempting Single Family Homes and Accessory Dwelling Units where an owner resides in one of the units as their principal residence, also exempt all owner-occupied Duplex properties where one of the units is the owners' principal residence or that of a family member defined as "Eligible Persons" in Section 13.89.050.B.10.

- Give tenants standing to file a complaint of non-compliance with the City if there is evidence that a property should be covered under TOPA and is not entitled to an exemption.

Right of First Refusal (13.89.100)

Shorten the timelines for the Right of First Refusal process as follows:

- Acceptance of offer:
 - 5 business days all properties (currently 10 or 30 days)
- Close of transaction:
 - 45 days (under 5 units) (currently 90 days)
 - 90 days (5 units or more) with one 30-day extension upon demonstrating that it is diligently pursuing financing or completing other requirements to close the transaction, to be further defined in the Administrative Regulations

Clarifying Language

- Include prior definition of "Sale"
- Right of First Offer Reset:
 - Right of First Offer will not reset unless Owner backs out of sale after escrow has opened.
 - If Tenant or QO backs out of sale after escrow has been opened, then Owner will be exempt from complying with TOPA for 12 months.

Implementation Phase-In

- Delay the effective date of the ordinance until July 1, 2023 so that the program can launch fully resourced This would align decisions on funding implementation with the FY23 budget process and provide sufficient time to fund and implement staffing, acquisition funding, and supportive partners.
- Refer to the FY 2022 Budget process \$100,000 for the purpose of hiring a consultant to:
 - Conduct an Equity Study to inform implementation of TOPA
 - Draft Administrative Regulations
 - Develop the program model
 - Identify staffing and administrative funding needs at time of effective date for successful launch and ongoing administration of the program
 - Evaluate capacities and costs/benefits of various agencies (COB, Housing Authority, Rent Board, potential not-for-profit partners) to launch and administer the program

- *Identify potential ongoing funding sources to support housing purchases and program administration over at least 5 years*
- *Assess other administrative and programmatic needs to support success.*

The Committee made the following recommendation after taking public comment and extensive discussion:

Action: 63 speakers. Discussion held.

M/S/C (Hahn/Robinson) to make a Qualified Positive Recommendation to:

1. Send the item to the full Council incorporating the Mayor's May 20, 2021 amendments with the following revisions:

i. Increasing the Acceptance of Offer timelines for the Right of First Refusal process from 5 days to 14 days;

ii. Adding the possibility of a 30-day extension to the Close of Transaction timelines for the Right of First Refusal process for properties under 5 units;

iii. Clarify that the budget referral of \$100,000 would be for the purpose of hiring "consultants" rather than "a consultant" who would additionally "recommend any adjustments to the policy that may be warranted";

iv. Clarifying that the definition of "children" includes stepchildren, and further referring to Council to consider the possibility of adding nieces and nephews; and v. Referring to Council to consider the possibility of including parents into the imminent healthcare expense provision; and

2. Recommend the City Council consider the possibility of a phased launch of the Ordinance wherein properties over 5 units would be covered first followed by the remainder of other properties after two or three years.

Vote: Ayes – Hahn, Robinson; Noes – Droste.

POLICY CHANGES PROPOSED AFTER MAY 20, 2021 COMMITTEE MEETING

From the May 20, 2021 Committee meeting to the end of 2021, the Mayor has met with the TOPA supporters to discuss further Ordinance modifications. The Mayor has also met with the City Attorney's office regarding specific legal issues including making amendments to reflect the Committee's recommendation and any subsequent proposals, and brought on a CORO Program Fellow to provide research and produce a white paper on the New York City HDFC Co-op structure (Attachment 4).

In order to gain a better understanding of the cost to implement the TOPA policy, City staff produced an overview of an implementation plan, staffing required and ongoing costs to implement (Attachment 5). This information will inform the amount of funding the program will require for administration and the date that the policy will take effect. It

is also one of the responses required of the City Manager in the Policy that was submitted on March 10, 2020 (Attachment 6)

Following feedback from Land Use Committee members, public comments received and meetings with TOPA supporters, the Mayor is proposing the following changes to the TOPA ordinance:

- Exempting non investor-owned Single Family Residences (as defined in AB1482) inclusive of those with an ADU and/or JADU, if that is the Owners only rental property in Berkeley.
- Exempting owner-occupied duplexes if (a) one of the units is the Owner's principal residence and (b) that the property is the Owners only rental property in Berkeley.
- Preserve offer/acceptance and closing timelines for Right of First Refusal as proposed *prior to* May 20, 2021 revisions.
- If Tenant(s)/Qualified Organization(s) back out of a sale after escrow has been opened, Owners would be exempt from TOPA for a fixed 12-month period following escrow cancellation.
- Sale defined as: (a) A transfer in exchange for money or other economic value, including beneficial use of a rental property, (b) change in ownership as defined by the IRS, and (c) multiple transfers of minor interests that result in a transfer of rental property.
- Implementation Phase-In:
 - Notice of Sale to take effect within 30 days following second reading of the Ordinance.
 - Full implementation of all other TOPA provisions to take effect upon adoption of Administrative Regulations. This will phase full implementation of TOPA when there is adequate staffing and funding to launch the program.

There remain two (2) outstanding policy modifications that are under consideration by the office of the City Attorney:

- A speculation fee similar to New York City's HDFC program
- Ensuring that vacant rental properties fall under TOPA and would be offered to Qualified Organizations under the same timelines afforded to QOs in the ordinance.

A revised Ordinance (Attachment 1), dated January 3, 2022, is being reviewed by the City Attorney for form and compliance incorporating the proposed changes, except for the two outstanding policy issues. The City Attorney's office will also include the Land Use Committee's recommended amendments as an option for Council to consider.

ADDITIONAL RESOURCES/FEEDBACK

Since initial submittal in March 2020, there have been several articles written about the benefits of TOPA to tenants and ongoing affordability in communities seeing rapidly

rising property values and rental rates. The following are excerpts are from policy and housing advocates:

LISC

"...existing TOPA and COPA policies and proposals, including how they can advance equity in housing and stabilize communities...."

<https://www.lisc.org/our-resources/resource/advancing-equity-housing-tenant-opportunity-purchase-act/>

PolicyLink

"...strategies that cities can lead to creating equitable housing outcomes for residents by moving privately owned rental housing into tenant or nonprofit ownership to avoid speculation, promote community control, and create permanently affordable housing. It describes what an equitable housing acquisition strategy is, why cities should implement one now, and what are the local capacity, policy, and finance tools needed."

<https://www.policylink.org/resources-tools/housing-acquisition-strategies>

SPUR

"Give tenants, public agencies and affordable housing nonprofits the first opportunity to purchase multifamily buildings or parcels when they are put on the market." See page 24

https://www.spur.org/sites/default/files/2021-05/SPUR_Rooted_And_Growing_Report.pdf

CONTACT PERSON

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Attachments:

1. January 3, 2022 Proposed TOPA Ordinance
2. May 20, 2021 Mayor's Proposed TOPA Amendments
3. May 6, 2021 Revised TOPA Background Report
4. CORO Fellow Research paper, "NYC HDFC Co-op Overview"
5. HHCS Analysis of Staffing and Costs to Implement TOPA
6. March 10, 2020 Original Submittal, Tenant Opportunity to Purchase Act, Report and Ordinance