



Office of the Mayor

ACTION CALENDAR

March 10, 2020

Revised for Policy Committee
March 18, 2021

To: Honorable Members of the City Council

From: Mayor Jesse Arreguín

Subject: Tenant Opportunity to Purchase Act, Adding BMC Chapter 13.89

RECOMMENDATION

1. Adopt a first reading of an ordinance adding Berkeley Municipal Code Chapter 13.89, the Tenant Opportunity to Purchase Act (TOPA), that will take effect on final adoption with an implementation start upon completion of Administrative Regulations and funding of related program costs; and
2. Direct the City Manager to take all necessary steps to implement this chapter including, but not limited to:
 1. Developing Administrative Regulations;
 2. Preparing an implementation strategy;
 3. Identifying resources to align databases from Finance, Planning, and the Rent Board to accurately reflect the properties that would be subject to TOPA;
 4. Determining necessary staffing for program administration and hearing officers for adjudication and hiring staffing to support the program upon implementation;
 5. Timelines for project “roll-out”;
 6. Determining appropriate amount of funding needed to support the acquisition of TOPA properties and identify funding sources;
 7. Quantifying an annual program budget and referring such program costs to the June 2021 Budget process.

SUMMARY

TOPA 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 will apply to all rental properties in Berkeley, subject to a number of exemptions:

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.

TOPA sales have longer escrow periods in order to provide tenants time to organize, engage technical assistance, form an organization that would qualify for financing, and obtain the necessary financing to close a transaction. In order to incentivize owners to participate in a TOPA sale, 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. Transactions from the previous 12 months, including asking vs. sales price and days on the market, were gathered from the MLS and provided in Attachment 2.

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.

BACKGROUND

Since 2015, Mayor Arreguin and community-based organizations such as the East Bay Community Law Center (EBCLC), Bay Area Community Land Trust, Northern California Land Trust (NCLT) and tenants' rights organizations have been researching TOPA's effectiveness as an anti-displacement strategy in Berkeley, to be paired with a robust Small Sites acquisition program.

On February 14, 2017, Mayor Arreguin introduced a Council item entitled "*Small Sites Acquisition Program and Tenant Opportunity to Purchase Act*"² which among other provisions, referred to the City Manager to:

Review and develop an ordinance modeled after Washington D.C.'s Tenant Opportunity to Purchase Act that offers existing tenants the first right of refusal when property owners place rental property on the sale market, which can be transferred to a qualifying affordable housing provider.

On May 30 and November 28, 2017, the Berkeley City Council adopted the "*Affordable Housing Action Plan*"³ which included a referral to staff to develop a Tenant Opportunity

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&usq=AOvVaw3u4K_b2vbj9BZ2J41dWjql

² https://www.cityofberkeley.info/.../2017-02-14_Item_18b_Small_Sites_Acquisition.aspx

³ https://www.cityofberkeley.info/.../2017-11-14_Item_26_Implementation_Plan_for_Affordable_Housing.aspx

to Purchase Ordinance (TOPA) modeled after a Washington DC law that was enacted in 1980. On June 11, 2019, City staff returned to Council with an Information item⁴ that outlined its research and discussed the administration and implementation requirements. This item was referred to the Agenda & Rules Committee for scheduling at a future Council meeting. On September 24, 2019, the information item was included on the Consent Calendar with an action of “received and filed”.

Since the last date of Council action, the Mayor’s Office has been working to develop a TOPA ordinance, which has been drafted by the East Bay Community Law Center (EBCLC), with a diverse group of stakeholders including EBCLC, the Northern California Community Land Trust (NCLT), Bay Area Community Land Trust (BACL), tenant advocates, legal professionals that specialize in tenant rights, experts familiar with the Washington DC policy and its implementation history, and City of Berkeley staff from the City Attorney’s Office, Planning Department, HHCS, Finance and the Rent Board.

Additionally, in September 2019, City Planning staff and the East Bay Community Law Center applied for a grant from the San Francisco Foundation as part of the Partnership for the Bay’s Future initiative. The Grant purpose was to be used for technical assistance to jurisdictions for projects focused on protection and preservation of affordable housing that result in measurable benefits for tenants. Staff applied for the grant in response to the Berkeley City Council directive, in part, to develop a TOPA policy as part of the City’s Housing Action Plan (HAP), adopted in 2017.

On February 4, 2020 the San Francisco Foundation officially announced the awards, one being the City of Berkeley and the East Bay Community Law Center, for the purposes of developing a Tenant Opportunity to Purchase ordinance and a Local Housing Preference Policy.⁵

On March 4, 2020, the TOPA Ordinance was heard before the Land Use Policy Committee. There were well over 50 community comments, both in favor and against the policy as proposed. Policy Committee members provided feedback and questions to the Mayor’s Office and team. It was clear that there was a greater need to seek more feedback from property owners and create more educational materials. Over the last year, the team has been intentional with outreach that included multiple conversations with the Berkeley Property Owners’ Association (BPOA); a lengthy presentation/Q&A session with Berkeley Neighborhoods Council, which reached members of neighborhood associations across the City; and working with Councilmembers to host neighborhood meetings in D3 and D4 (McGee Spaulding Neighbors in

⁴ https://www.cityofberkeley.info/.../2019-06-11_Item_50_Referral_Response_Tenant_Opportunity_to_Purchase.aspx

⁵ <https://sff.org/partnership-for-the-bays-future-marks-one-year-anniversary/>

Action). Additional groups that were contacted, including North and South Berkeley NOW, declined a presentation because they viewed the policy as outside of their scope of advocacy. BRIDGE Realtors request and met with the Mayor but delivered no substantive comments to the original submittal. The Mayor, with support from the TOPA team, held a Forum on Zoom that included the capacity for chat and email inbox for the event to address attendees' questions. Importantly, the Ordinance has been rewritten to improve clarity, reflecting the core concepts while revising timelines, based on stakeholder input. Additionally, the feedback from last year's LUPC meeting and feedback received over the last year has informed more modifications to the policy (such as removing the appraisal provision, limiting disclosures on the front end of the process, defining exemptions and modifying the permanent affordability restrictions (See Attachment 5).

CURRENT SITUATION AND ITS EFFECTS

Housing Affordability and Regional Impacts

At the end of 1998, just before State-mandated vacancy decontrol took effect, the average rent in Berkeley's 20,000 apartments built before 1980 was \$720 a month. Twenty years later the average rent for these same units is \$1,956. If rents had risen only by the rate of inflation, they would average \$1,150 a month. In the last five years alone, rents have increased by 50 percent. Similarly, in 2000 the median home price in Berkeley was \$380,000, rising to \$704,000 in 2013 and by 2019 it had reached \$1,300,000.⁶

Rents in Berkeley and the greater Bay Area continue to rise, with low vacancy rates.⁷ Future trends are indicating additional loss of naturally occurring affordable housing, according to the County of Alameda Regional Analysis of Impediments to Fair Housing Choice (IFHC). As an example: for decades, a 13-unit complex on Solano Ave. housed a mix of residents — including, teachers, business owners and a 96-year-old woman. The property is rent-controlled and subject to Berkeley's eviction protections, but the owners invoked the Ellis Act that permits full-building evictions if the property is removed from the rental market altogether (the owners intend to convert the building to a "tenancy-in-common" and sell the units at market rates).⁸

Anecdotal research, received from local real estate brokers, when the policy was presented in 2020, indicate a desire to increase returns on investment as well as concerns about buyers moving away from the multi-unit property market.⁹ Due to rent control, tenant protections and eviction laws some owners are looking to sell multi-unit

⁶ [Housing for a Diverse, Equitable and Creative Berkeley, July 16, 2019](#)

⁷ <https://www.huduser.gov/portal/publications/pdf/OaklandCA-comp-17.pdf>

⁸ <https://www.berkeleyside.com/2019/12/10/theyve-been-evicted-from-a-north-berkeley-building-now-they-want-to-buy-it-with-help-from-a-land-trust>

⁹ <https://www.fool.com/millionacres/real-estate-market/articles/8-real-estate-market-predictions-2020/>

properties, however existing tenant rents impact the sales price. Some of the methods being utilized to raise rents, and therefore increase the property value for sale, include paying tenants to move out of the building, evictions for cause (when a case can be made), owner-move-in evictions, and Condo/Tenants-in-Common conversions.

Economic Factors

The COVID-19 crisis makes the passage of TOPA even more important and timely. As properties become distressed, some rental property owners will exit the rental market. TOPA could present opportunities for tenants or qualified organizations to purchase and stabilize those buildings, mitigating the potential displacement risk that was borne out in the 2008 recession. Moreover, TOPA builds on the passage of SB 1079, which was passed during the pandemic to give occupants of distressed properties priority in purchasing these dwellings as they enter foreclosure.¹⁰

The Bay Area's economic growth and a high demand for housing, this growth is causing housing prices to rise that displaces low-income residents. As seen throughout the IFHC report, low-income residents tend to also be minority residents. Therefore, continued growth of the region could lead to more displacement of minority residents and increased segregation unless certain actions are taken to encourage economic and racial/ethnic integration and access to stable affordable units in a range of sizes.

Contributing factors affecting disproportionate housing needs include:

- Lack of private investments in specific neighborhoods
- The availability of affordable units in a range of sizes
- Displacement of residents due to economic pressures
- Limited supply of affordable housing within neighborhoods
- Lack of economic support for low income home ownership

The National Low-Income Housing Coalition (NLIHC) *2020 Out of Reach Study* listed the Bay Area region as one of the least affordable areas in the United States. To be able to afford a two-bedroom market rate unit in Alameda County, a household would need to earn \$49.23/hour over \$102,000 annually ("housing wage"). Comparatively, the average housing wage for California is \$36.96/hour or \$77,000 annually.

Regional Policy 6, as recommended by the IFHC, is to:

Increase homeownership among low- and moderate-income households by allocating funds for homeownership programs that support low- and moderate-income households. This would include down payment assistance, first time home buyer programs, Mortgage Credit Certificate, below market rate (BMR) homeownership programs and financial literacy and homebuyer education

¹⁰ <https://calmatters.org/commentary/my-turn/2020/10/the-affordable-housing-crisis-is-about-to-get-worse-heres-a-policy-that-will-help-renters/>

classes. There is also a requirement to promote the programs and any other existing programs through marketing efforts.¹¹

National Research on Ownership

While today's economy is strong and job growth high, there is a growing gap between rates of economic growth and the levels of income. Wages can be growing but not at the same rate as the economy. Many low to middle income people do not have enough money to cover the basic needs due to rising costs – especially in housing. These lower earnings lead to fewer assets and less wealth. For most Americans the greatest source of their wealth is their home, but home ownership is considerably lower than in past decades. Among African Americans, home ownership has decreased to a 60-year low.¹²

Providing ownership options for tenants is a mechanism to sustain affordability. According to the *Urban Institute's Opportunity and Ownership Project*, creating ownership within existing rental units provides opportunities for low income renters that will keep their housing costs stable over many years. They suggest that, rather than providing housing subsidies at the Federal and State level for new construction, investing in existing housing would provide many more units at an affordable level (new construction – especially in a good economy – is increasingly expensive).¹³

Further academic analysis from the *Joint Center for Housing Studies, Harvard University* states: "Public policies attempt to subsidize these barriers to home buying for low-income people through tax policies, grants and other strategies. Current policies are, at best, inefficient and inequitable, and, at worst, ineffective. A more systematic approach would adhere to a set of operating principles including achieving scale, focusing on moving renters to ownership, targeting subsidies to underserved populations, creating incentives for repayment, and maximizing efficiency".¹⁴

City of Berkeley Housing Policies and TOPA Opportunity

Housing production in Berkeley has accelerated but there remains a significant unmet need for affordable housing for low-income people. Compared to Berkeley's 2014-2022 Association of Bay Area Governments' ("ABAG") Regional Housing Needs Allocation (RHNA) goals, between January 1, 2014 and December 31, 2019, Berkeley permitted 128% of its above moderate income allocation (+120% AMI), 23% of its moderate income allocation (81-120% AMI), 4% of its low income allocation (51 - 80% AMI), and

¹¹ <http://www.acgov.org/cda/hcd/documents/Draft-AI-Combined2019-10-24.pdf>

¹² <http://wbur.org/hereandnow/2020/02/10/job-economy-middle-class>

¹³ <https://www.urban.org/sites/default/files/publication/46626/411523-Promoting-Homeownership-among-Low-Income-Households.PDF>

¹⁴ <https://www.jchs.harvard.edu/sites/default/files/hbti-08.pdf>

21% of its very low income (31 - 50% AMI) and extremely low income allocation (less than 30% AMI).

| Progress towards 2022 RHNA Approved Building Permits | | | | | | | | | |
|--|-----------------|------|------|------|---------------------|--------------------------|----------------|--|--|
| | RHNA Allocation | 2017 | 2018 | 2019 | Total Units to Date | Percent of Goal Achieved | Remaining RHNA | | |
| VLI (<50% AMI) | 532 | 15 | 10 | 11 | 112 | 21% | 420 | | |
| LI (51%-80% AMI) | 442 | 0 | 0 | 0 | 17 | 4% | 425 | | |
| MOD (81-120% AMI) | 584 | 0 | 0 | 0 | 137 | 23% | 447 | | |
| BMR Total | 1558 | 15 | 10 | 11 | | | | | |
| Above MOD | 1401 | 26 | 32 | 403 | 1790 | 128% | -389 | | |
| Total | 2959 | 26 | 272 | 330 | 414 | | | | |

ABAG and MTC are in the process of developing Plan Bay Area 2050, the region’s Transportation Plan and Sustainable Communities Strategy, which will identify where growth should be concentrated and how to ensure that the Bay Area is affordable, equitable, sustainable and resilient for the future. The Plan will be aligned with the Regional Housing Needs Allocation (RHNA) which will take into account the number of affordable housing units for which each community is responsible for and the number of units required for each income level. Preservation of existing housing is a policy strategy already proposed in the draft Blueprint. In February 2021, the Association of Bay Area Governments, released updated RHNA requirements to address the needs from 2023 through 2031. The following table shows Berkeley’s allocation requirement for this time period.

| Jurisdiction | VERY LOW INCOME (<50% of Area Median Income) | LOW INCOME (50-80% of Area Median Income) | MODERATE INCOME (80-120% of Area Median Income) | ABOVE MODERATE INCOME (>120% of Area Median Income) | TOTAL |
|-------------------------------|--|---|--|--|--------|
| ALAMEDA COUNTY | | | | | |
| Alameda | 1,421 | 818 | 868 | 2,246 | 5,353 |
| Albany | 308 | 178 | 175 | 453 | 1,114 |
| Berkeley | 2,446 | 1,408 | 1,416 | 3,664 | 8,934 |
| Dublin | 1,085 | 625 | 560 | 1,449 | 3,719 |
| Emeryville | 451 | 259 | 308 | 797 | 1,815 |
| Fremont | 3,640 | 2,096 | 1,996 | 5,165 | 12,897 |
| Hayward | 1,075 | 617 | 817 | 2,115 | 4,624 |
| Livermore | 1,317 | 758 | 696 | 1,799 | 4,570 |
| Newark | 464 | 268 | 318 | 824 | 1,874 |
| Oakland | 6,511 | 3,750 | 4,457 | 11,533 | 26,251 |
| Piedmont | 163 | 94 | 92 | 238 | 587 |
| Pleasanton | 1,750 | 1,008 | 894 | 2,313 | 5,965 |
| San Leandro | 862 | 495 | 696 | 1,802 | 3,855 |
| Unincorporated Alameda County | 1,251 | 721 | 763 | 1,976 | 4,711 |
| Union City | 862 | 496 | 382 | 988 | 2,728 |

Housing affordability is the first objective of the *Housing Element of the City of Berkeley General Plan*. Policy H-1 - Extremely Low, Very Low, Low, and Moderate-Income Housing sets the goal of increasing housing affordable to residents with lower incomes and outlines a number of actions to achieve this goal, including encouraging incentives for affordable housing development.¹⁶

The Berkeley City Council, in the referenced *Housing Action Plan* (HAP), stated support for Non-profit housing developers and Community Land Trust acquisition of property to stabilize rents through a Small Sites Program. Two such recent transactions, at 2321-2323 Tenth Street and 1640 Stuart Street, have resulted in maintaining 16 units at below-market rates. This policy also stated consideration for the creation of limited and non-equity cooperatives affiliated with a democratic community land trust. This program was initially funded through Measure U1 tax receipts with an option of also utilizing Housing Trust Fund resources.

Until 1996, Berkeley condominium conversions provided the tenants a first right to purchase their unit, as did policies in Santa Monica whose policy was more far reaching.

TOPA working group members estimate that approximately 42% of all Berkeley residential properties would fall under TOPA. This estimate was based on an analysis of the property type, homeowner exemption and number of units from the 2018/2019

¹⁶ https://www.cityofberkeley.info/Planning_and_Development/Home/General_Plan_-_Housing_Element.aspx

Alameda Property Tax roll. It is not reflective of the total **number** of units that would benefit from a TOPA Ordinance. (See Attachment 3).

Washington D.C. TOPA

Washington D.C. passed the Tenant Opportunity to Purchase Act (TOPA) in 1980. This policy regulates the conversion of use, sale and transfer of rental housing. Tenants have the first right of refusal to purchase their buildings and also can assign their rights to third parties, such as affordable housing developers. The impact of this policy has been immense with approximately 30% of annual multi-unit sales going through the TOPA process. Since 2002, this policy has helped preserve over 3,500 units of affordable housing, 2,000 of which have been preserved since 2013.¹⁷ The growing impact of TOPA is due to massive and sustained increases in DC's Housing Production Trust Fund, collaborative efforts to identify and harness other funding/financing, as well as sustained support for the community based organizations that help tenants understand and exercise their TOPA rights.

In order to fund the program, Washington DC dedicates at least \$10M per year in Housing Trust Fund (HTF) allocations directly to TOPA purchases, and usually much more. DC's FY2021 budget included \$100 million for HPTF, a slight decrease from the previous year due to the budget impacts of the pandemic. TOPA purchases are often financed initially through the city's Housing Preservation Fund, which leverages at least \$10 million of public funds annually with additional private and or philanthropic funds to provide loans.¹⁸

TOPA has also helped to create many limited equity cooperatives (LECs) in DC, which currently number 4,400 units across 99 buildings.¹⁹ The DC Limited Equity Cooperative Task Force, formed in 2018, came out with recommendations in October 2019 to increase the number of LEC units in DC by 45% by 2025 (additional 2000 units). TOPA will be a major vehicle to create these additional units. The task force has also identified how to improve/expand existing policy, financing and technical assistance to support the health of existing and future LECs. This work has been further fleshed out by a March 2020 report on LECs by the Coalition for Nonprofit Housing and Economic Development which showed that the median share of DC LEC residents who are people of color is 75%.²⁰

Finally, TOPA has led to the creation of hundreds of tenant associations across Washington, DC. Many of these tenant associations were the main leaders and

¹⁷ https://www.dcfpi.org/wp-content/uploads/2013/09/9-24-13-First_Right_Purchase_Paper-Final.pdf

¹⁸ <https://dhcd.dc.gov/service/housing-preservation-fund>

¹⁹ <https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/Greysteel-%20D.C.%20Multifamily%20Market%20Statistics.pdf>

²⁰ https://cnhed.org/wp-content/uploads/2020/10/Creating-and-Sustaining-Limited-Equity-Cooperatives-in-Washington-DC_REV.pdf

organizers in creating the DC Tenants Union in 2019.²¹ The Tenants Union is focused on supporting rent control and other tenant protection policies and plans to build power and solidarity across tenant associations from different parts of the city. (See Attachment 4)

San Francisco COPA²²

In April 2019, the San Francisco Board of Supervisors passed, by a unanimous vote, the Community Opportunity to Purchase Act (COPA). COPA is designed to stabilize communities by preventing displacement and preserving affordable housing and applies to the sale or marketing of buildings with three or more legal residential units, or vacant land on which three or more residential units may be developed “by right”. It gives qualified non-profit organizations a right of first offer prior to the property going on the market and a right of first refusal when the owner has a bona fide offer from a potential buyer.

Nonprofit buyers have a limited time (25 days) to work with tenants, secure financing and present a formal offer to purchase the building. Nonprofit buyers and their agents in San Francisco have expressed these timeframes are insufficient, even with the additional resource of San Francisco’s Housing Accelerator Fund which streamlines the process. Recent articles are indicating challenges to the prescribed timeframes.²³ While a seller is not required to accept the offer, the qualified nonprofit also has a right of first refusal on any subsequent third-party offer. At closing, deed restrictions are placed on the building restricting the building to affordable housing for the life of the building with a mean value of rents not to exceed 80% AMI.

The building could eventually be transferred to tenant ownership under a Limited Equity Cooperative or other model, as long as permanent affordability deed restrictions are maintained. The ordinance includes incentives, including partial exemption from the City’s transfer tax and the potential for qualified nonprofits to facilitate sellers’ efforts to obtain federal tax benefits.

San Francisco will set aside \$40M – 90M in a specific MOHCD fund to support first time home buyers and its Small Sites Program that could also support the COPA ordinance. This fund provides resources for deposits, down payments and bridge loans until permanent financing is in place.

Oakland TOPA

Inspired by the Moms-for-Housing advocates, on January 30, 2020 at the Oakland City Council’s Rules and Legislation Committee meeting, a TOPA ordinance was introduced

²¹ <https://www.streetsensemedia.org/article/dc-residents-launch-a-city-wide-tenant-union-in-hopes-to-foster-solidarity-across-the-district/#.XjSX3j2ZOt8>

²² <https://sfmohcd.org/community-opportunity-purchase-act-copa>

²³ <https://www.sfchronicle.com/bayarea/article/City-officials-want-landlord-to-delay-sale-of-76-15002958.php>

and was scheduled for a vote in the Community and Economic Development Committee in March 2020. This vote was scheduled for the week that COVID shelter-in-place went into effect, so the policy never went to committee and was slowed down further by COVID emergency response. Oakland Mayor Libby Schaaf has already expressed support for the ordinance.

The Oakland ordinance has been developed since 2017 by a group of community land trusts, tenant advocacy organizations, including ACCE (of which Moms 4 Housing is a project), and the East Bay Community Law Center, whose draft ordinance for Berkeley provided a foundation for Oakland's ordinance. The Oakland ordinance largely mirrors Berkeley's TOPA .

The political will for TOPA in Oakland was prompted by Moms 4 Housing — a group of homeless women who took over an empty, investor-owned house in West Oakland for two months before they were evicted and arrested. Their actions garnered national attention and symbolize the Bay Area's housing and homelessness crisis.

Since the eviction of the Moms 4 Housing, the property owner has agreed to negotiate to sell the house to the nonprofit Oakland Community Land Trust. They have also agreed to give the land trust or other nonprofits a chance to buy dozens of other single-family homes it owns in Oakland.

Minneapolis TOPA

In fall 2019, Minneapolis City Council conducted a Study Session, hosting officials and TOPA housing organizers from Washington D.C. to learn more about DC's TOPA law. The City then brought on consultants to study other TOPA policies, and make recommendations about a TOPA policy for the Minneapolis context. In January 2021, Coalition for Nonprofit Housing and Economic Development and LISC Twin Cities published their research report, "Opportunity to Purchase Options for the City of Minneapolis." The City has also discussed tenant organizing support for the policy with Inquilinx Unidxs por Justicia (United Renters for Justice, which also goes by the abbreviation IX), a tenant organizing group that has already worked with groups of tenants to purchase their buildings in Minneapolis.

Massachusetts State TOPA

In January 2021, a state bill that would enable local jurisdictions to pass opportunity to purchase ordinances successfully passed both houses of the Massachusetts state legislature, but was ultimately vetoed by Governor Charlie Baker (R-MA). As of February 2021, this policy has been redrafted and re-filed in the MA House and Senate.²⁵ A coalition led by the Massachusetts Association of Housing Cooperatives had been working on the policy for over four years, beginning with conversations in both Boston and Somerville. The policy was then introduced as a state enabling act in early

²⁵ <https://malegislature.gov/Bills/192/SD1672>

2017 with many local activists championing the policy. The policy did not move forward in its first two-year legislative session, but was reintroduced in the state legislature in 2019 and championed by Boston Mayor Marty Walsh and his Chief of Housing, the Mayor of Somerville and many councilors, then-At-Large City Councilor for Boston Ayanna Pressley (now Representative D-MA 7th District). This time around, the coalition expanded to involve more community land trusts like Boston Neighborhood CLT and Chinatown CLT, Fenway Community Development Corporation and the statewide CDC umbrella, Massachusetts Law Reform Institute and other legal advocates, larger nonprofit developers, and several mayors, which continues to champion the version currently in the legislature.

New York State TOPA

At the end of January 2020, New York State Sen. Zellnor Myrie, who represents Central Brooklyn, announced that he is in the process of drafting new legislation that would give tenants the first right to buy their landlord's property should it come up for sale. Myrie stated that "Landlords who claim they will be unable to keep their buildings in good repair or cover the cost of capital improvements" would have an opportunity, in the New York rent-regulated market, to "keep tenants in their homes, create a path to ownership and maintain buildings,"

This Tenant Opportunity to Purchase Act is said to be modeled after right-of-first-refusal statutes in Washington D.C., and its drafters have also reached out to Berkeley TOPA for guidance.²⁶

Financing for TOPA projects

Financing for TOPA projects is expected to be provided from a combination of city subsidies, the private capital of tenants, and loans from community-oriented banks and lending institutions like credit unions, CDFIs, local banks, future public banks and others. In this sense, TOPA effectively leverages both private and public financing in advancing permanent affordability.²⁷

Subsidies

In order to make TOPA effective and responsive to the full scale of anticipated community needs²⁸, the City will need to enlarge the current Small

²⁶ <https://therealdeal.com/2020/01/31/bill-make-landlords-give-tenants-first-shot-to-buy-buildings/>

²⁷ While financing percentages of each project may vary substantially according to building costs, tenant resources, and subsidy availability a combination of these financing streams is expected to be a part of most if not all TOPA projects.

²⁸ 2019 real estate transaction data for Berkeley show that approximately 250 multi-unit buildings (duplexes and up) sold. Assuming similar sales volume and that a similar percentage (32%) of tenant groups exercise their right to purchase as under the D.C. ordinance we anticipate potentially 80 projects annually, with a greater number of smaller unit buildings participating than occur in DC.

Sites Program (SSP), or create a new fund, to a minimum of \$10-15 million dollars per year and reconfigure SSP guidelines to align with TOPA. While TOPA projects can benefit from existing streams of affordable housing funding, the scale of community need far outweighs the existing funding sources. As demonstrated by the case of the D.C. TOPA, it was only with substantial financing added to its Housing Production Trust Fund that the ordinance became an effective way to prevent and fight displacement - DC has an annual \$116M for their Housing Production Trust Fund (HPTF), with a minimum of \$10M set aside for TOPA projects. However, D.C. typically spends more out of its HPTF on TOPA - in FY2018, DC spent close to \$22.5M on TOPA acquisition projects with additional funds for rehab in some instances (449 units over 9 projects). Without similar enhancement of SSP, or another funding source, TOPA will not be able to produce the necessary impactful levels of affordability needed to meet the crisis, particularly for those of very-low, low and moderate income who may not be able to leverage their own private capital to get a loan.

Private Capital of Tenants

Single family home households and tenants of multi-unit buildings with mixed income units would be able to purchase buildings on their own or with smaller amounts of subsidy involved because these tenants will most likely be able to pay a higher debt service coverage ratio in order to obtain a mortgage from an institutional lender to acquire a property. This could allow higher income tenants with private capital to assist lower income tenants with less capital by securing a blanket mortgage to purchase the building for mutual benefit. This would also benefit “missing middle” income tenants who may not be able to purchase homes on their own, in the current market, but might have enough private capital saved to contribute to the purchase of their building.

Loans from Institutional Lenders

Many banks are willing to work with re-sale restricted properties such as those created by TOPA, the majority of which are local commercial lenders, credit unions, cooperative banks, and Community Development Finance Institutions (CDFIs).²⁹ However, even mainstream primary lenders have told community partners (NCLT & BACLT) that there is no inherent obstacle to lending to resale restricted properties such as a community land trust (CLT)³⁰ or limited equity housing cooperative (and LEHC) since they are valid forms

²⁹ [For example Clearinghouse CDFI, Community Bank of the Bay, National Housing Trust, Capital Impact Partners, Heritage Bank \(formerly Presidio Bank\), and the Local Initiatives Support Corporation \(LISC\).](#)

³⁰ https://www.lisc.org/media/filer_public/f0/e0/f0e07be0-1ca5-4720-b78c-3a0d7a0181dd/022519_white_paper_community_land_trusts.pdf

of California non-profit corporation. In fact, many mainstream primary lenders have provided CLT loans for single family homes.³¹ Additionally, there is nothing to prevent newly formed tenant organizations from acquiring property collectively as it is not uncommon for lenders to process and begin underwriting loan applications from newly formed corporate entities during the acquisition phase. While the most common form of ownership is an LLC, there have also been many instances of newly created 501(c)3 non-profit corporations like the non-profit public³² or mutual benefit³³ corporation, the legal entity that is the basis of the limited equity housing cooperative, which have been successful in acquiring loans.³⁴

An important factor to note is that the loans that would be provided to TOPA tenants are commercial loans, not consumer loans, because the borrower is not a natural person, but rather a corporate entity (even though the owners of the entity will be owner-occupants of the property), which means they are for a shorter term of 10-15 years. The loan approval process for such commercial loans, from lenders willing to loan on such re-sale restricted properties, tends to range from 90 to 120 days depending on the lender & lender type (e.g. CDFIs tend to take longer). The most limiting factor in this estimate is the ability of the borrowing entity (the tenant group) to timely respond to lender's underwriting requests. This variable can be dramatically improved and streamlined with a robust technical assistance program through the City and Supportive Partners.

The most important considerations for an institutional lender in underwriting a loan for a tenant organized entity (including LEHCs³⁵) will be:

Repayment of the Loan: First and foremost, the lender will look at the fair market value of the underlying property (that there is adequate loan to value ratio); and secondly, they look at net operating income of the property, and that there is adequate debt service coverage ratio. In other words, the primary underwriting is of the property itself, similar to how a lender would look at a residential rental property.

Viability & Validity of the Borrowing Entity: As stated above, the lender can start the loan review and underwriting process while the entity is still

³¹ http://www.freddiemac.com/singlefamily/land_trust_mortgages_faq.html, <https://groundedsolutions.org/tools-for-success/resource-library/mortgage-financing-options>

³² http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CORP§ionNum=5151.

³³ https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=CORP&division=2.&title=1.&part=3.&chapter=&article=

³⁴ [For example: Derby Walker House in Berkeley, California and Columbus United in San Francisco CA.](#)

³⁵ <https://groundedsolutions.org/sites/default/files/2018-11/Limited%20Equity%20Co-ops%20by%20Community%20Land%20Trusts.pdf>

being formed. However, they will require that the Articles of Incorporation have been filed to start the process. A condition of loan closing will be that the entity is duly formed (i.e. that the Secretary of State has approved the Articles, typically a 30-day process; and that all other governing docs, such as by-laws, have been finalized). This condition being met will also be necessary for the entity to properly take title.

Stability of Property/Asset Management: This is determined by the capacity of the tenants to manage and maintain the property, fill vacancies, properly budget income & expenses for the property. In self-managed properties, banks will look to the experience of the individuals, their internal property management plan, and any partnerships/alliances with outside property management firms or organizations. A second option is for the tenant organization to hire a professional property management firm, which can be an expedient way to secure loan approval and get through the acquisition process, while a tenant group develops the skills and leadership necessary to self-manage in the future.

Credit enhancements, supporting partners and other backstop mechanisms: Many existing resident initiated purchases that were structured in models such as LEHC's and limited equity condominiums overcame underwriting challenges through backstop mechanisms such as a Community Land Trust, other organizational partner and/or municipality providing a credit enhancement such as a loan guarantee or co-signature on the primary mortgage.

ALTERNATIVE ACTIONS CONSIDERED

No Action

Taking no action could, over time, further reduce naturally occurring affordable housing. It would also take away an opportunity for lower income tenants to participate in the ownership of their residence and increase their personal wealth – the historic driver of lower to middle class wealth creation.³⁶

No Action would direct Housing Trust Fund, Measure U1 and other assets primarily to the construction of new affordable housing projects that can cost up to 4 times more than the conversion of existing property to permanent affordable housing. It would also require no investment of other City General Fund/Other Resources in administrative implementation and oversight. It could also lead to further speculation on rental properties by investors and corporations (in light of the pandemic and a possible

³⁶ <https://www.cato.org/publications/policy-analysis/exploring-wealth-inequality#poverty-matters-not-inequality>

recession). This, in turn, could fuel gentrification and displacement of low-income communities of color as it did after the 2008-2010 recession.³⁷

Support the Repeal of Costa Hawkins

For over twenty years, the Costa-Hawkins Rental Housing Act (*California Civil Code Sections 1954.50-1954.535*) has impacted California renters and the affordability of housing. A statewide law backed by the real estate industry that passed in 1995, Costa-Hawkins ties the hands of cities when it comes to protecting tenants and stabilizing rents:

- Cities can't pass vacancy control; if a tenant leaves or is forced out of a rent-controlled unit, a landlord can raise the rent to whatever the market will bear upon new tenancy;
- Cities can't extend rent control to any rented condominiums, single-family homes, and any new housing built after 1995.

Since Costa-Hawkins passed, tenants have paid ever increasing rents and been forced from their communities or into homelessness due to high housing costs. Additionally, since the Great Recession, roughly tens of thousands of single-family home rentals have been purchased by investors all across the state and nationwide.

On October 27, 2015, the Berkeley City Council unanimously adopted a resolution calling on the Governor and State Legislature to repeal the Costa-Hawkins Rental Housing Act.³⁸

Costa-Hawkins was also a key part of a 2009 court decision, *Palmer v. the City of Los Angeles* that found that the imposition of local inclusionary housing requirements for rental housing was in conflict with Costa-Hawkins. In 2017, former Governor Jerry Brown signed AB 1505 to restore the ability for California cities to require developers include affordable units in new rental projects. Additionally, in 2019 the State passed historic legislation, AB 1482, which implemented a cap on rents for non-controlled units of 5% plus CPI, and just cause for eviction statewide. These protections will apply to most housing units not currently deed restricted or controlled, including those exempt from rent control under Costa-Hawkins.

There has been movement among tenant rights advocates to repeal Costa Hawkins to give cities the option to expand and strengthen rent control policies. However, California

³⁷ <https://nextcity.org/daily/entry/2008-was-disaster-heres-how-california-should-respond-save-affordable-homes>

³⁸ https://ci.berkeley.ca.us/.../2015-10-27_Item_16_Urging_the_State_Legislature.aspx

voters rejected reform in recent years – through Proposition 10, in 2018 and Proposition 21 in 2020.³⁹

While any future statewide rent control legislation might provide some relief to tenants, it is still unknown as to what properties would be included and what level of rent increases would be allowed. Any future rent stabilization legislation would not give tenants an option to participate in the ownership of their properties nor would there be deeded restrictions to provide rent stabilization for years into the future.

Rely on Regional Policy

The current need for deed restricted affordable units in Alameda County is 51,732 according to California Housing Partnership and cooborated in the recent RHNA allocation.⁴⁰ Much work is being done on the regional level to address this crisis. In January 2019, the Metropolitan Transportation Commission (MTC) released the *CASA Compact: A 15-Year Emergency Policy Package to Confront the Housing Crisis in the San Francisco Bay Area*.⁴¹ This report was the product of over two years of stakeholder meetings with elected officials, builders, affordable housing developers and other housing professionals to study the root causes and develop solutions to the region’s housing crisis. The CASA Compact provides a roadmap for regional action on housing affordability. It recommends a series of policies and programs to Produce, Preserve and Protect housing and renters in the Bay Area (known as “the 3P’s” framework). Preservation of existing naturally occurring affordable housing as a key strategy and the plan recommended a variety of regional funding sources to help acquire and rehabilitate existing housing to preserve affordability. One bill that come out of the CASA process, AB1487 (2019, Chiu), established the Bay Area Housing Finance Agency (BAHFA), a shared initiative of The Association of Bay Area Governments (ABAG) and MTC, which offers financing and policy support across the “3Ps”.⁴² ABAG and MTC are considering the placement of a regional housing finance measure on a future ballot. Alameda County Measure A1, the county affordable housing bond approved by voters in 2016, has provided new resources to create new affordable units. Approximately 1,000 new units are in some stage of development. The bond could yield approximately 3,500 affordable units countywide.

While this work is promising, it has a long horizon and the need to maintaining existing affordable housing units is immediate.

³⁹ <https://la.curbed.com/2018/1/12/16883276/rent-control-california-costa-hawkins-explained>

⁴⁰ <https://1p08d91kd0c03rlxhmhtydpr-wpengine.netdna-ssl.com/wp-content/uploads/2019/05/Alameda-HNR-2019-Final.pdf>

⁴¹ https://mtc.ca.gov/sites/default/files/CASA_Compact.pdf

⁴² <https://mtc.ca.gov/about-mtc/what-mtc/bay-area-housing-finance-authority-bahfa>

Investor Only TOPA Application

An “investor only” approach would craft a TOPA ordinance that would apply to owners with a 50% or greater ownership position in 3 or more rental units within the City of Berkeley.

There is great difficulty in identifying what properties would fall under this approach. Many investors create Limited Liability Companies (LLCs) for legal protection. Without review of the underlying documents, the City would not know the make-up of ownership and whether one or more owners own greater than 50% in each individual property in an LLC or LLCs. There are also many properties that are owned in Trust. The beneficiaries of these trusts could own different percentages of each property and in this situation trust documents would need to be obtained and analyzed for each property owned. While it might be possible to create a database that would identify all rented properties in Berkeley and the ownership entities, the ownership participation and owner names associated with properties could be impossible and could change from property to property.

This approach would require significant resources for enforcement, for a City agency to determine who has a 50% or more ownership interest in every rental property, and to count up the number of rental units owned by each owner to determine which properties TOPA applies to. This could cause confusion by tenants and owners as to the basic question of whether TOPA applies to a given property and could undermine TOPA’s effectiveness and usefulness overall.

When analyzing the number of properties that would fall under an Investor Only TOPA, recent property tax rolls were reviewed and sorted by ownership name/entity. The applicability standard with this approach would yield approximately 1/3 the potential properties that would fall under a TOPA ordinance. (See Attachment 2)

San Francisco COPA Model

The San Francisco COPA model would provide a first right to purchase to nonprofit qualified organizations. Tenants do not have a say in the nonprofit provider that will own their building and there are no pathways for tenant ownership or democratic control by the tenants once the property changed hands. SF COPA does not provide the facilitated resident ownership models as does the Berkeley TOPA Ordinance.

Timeframes to respond to exercise the COPA are short and have resulted in lost opportunities.⁴³ Incentives that are available to sellers that participate in the SF COPA have been used as a model for the TOPA Ordinance in Berkeley.

⁴³ [SF Chronicle, City Officials Want Landlord to Delay Sale](#)

SF COPA does have some valuable elements which have been incorporated into the TOPA ordinance in Berkeley, such as a right of first offer and accompanying incentives to sellers who accept the initial offer, as well as a vetting process for qualified affordable housing organizations who can purchase.

The SF COPA makes more sense given the rental housing stock in San Francisco is generally larger buildings. Utilizing a SF COPA Model for Berkeley would result in 50% fewer TOPA opportunities than the Investor Only TOPA application.

CONSULTATION/OUTREACH OVERVIEW AND RESULTS

City Staff Research

As part of the 2017 referral to the City Manager to create a TOPA policy, City staff in the Health, Housing and Community Services Department (HHCS) conducted research and interviews with a variety of stakeholders about TOPA policy and implementation including:

- Apartment and Office Building Association of Metropolitan Washington
- City of Los Angeles, Office of the Chief Legislative Analyst
- City of San Francisco, Office of Supervisor Sandra Lee Fewer
- DC Association of Realtors
- East Bay Community Law Center
- Housing Counseling Services (City-funded technical assistance provider)
- Latino Economic Development Corporation (City-funded technical assistance provider)
- Washington, DC Department of Housing and Community Development, Rental and Sales Division

The research that staff presented at the Council meeting informed the development of this ordinance.

Tenant Outreach and Focus Groups

In addition to a number of TOPA workshops conducted for Berkeley community members over the years, EBCLC designed and conducted tenant-centered focus groups in 2019 for the purpose of eliciting feedback on key provisions of the TOPA Ordinance to inform policy proposals. EBCLC identified key questions, had a purposeful recruitment strategy during which they reached out to a number of tenant organizations to gauge interest in participating, and prepared participants via orientations beforehand to provide background on TOPA and answer any questions. Two focus groups were held with a total of nine participants, and there was a post-focus group survey with additional questions.

With the exception of one homeowner participant, all focus group participants were Berkeley tenants and included three Section 8 voucher holders and almost all were low-income, with varying levels including 80% of AMI, 50% of AMI, and 30% of AMI and below. Participants lived in property types ranging from multi-family to single family, an ADU and senior housing. Out of the four people of color, two identified as Latino/Hispanic, one as Black/African American, and one as Asian/Pacific Islander. An even spread of ages from 25 to 60+ years of age were represented with five participants identifying as female, three as male, and one as non-binary. All participants had some form of high school education, six having at least a bachelor's degree.

Tenants were engaged through presentations, simulations, and written feedback on two core provisions of TOPA: timelines and permanent affordability restrictions. The decision points for the timelines included eliciting feedback on the amount of time it would take to submit a statement of interest and submit an offer. To perform these milestones, tenants were advised that they would need to organize a tenant meeting, gather financial information, and decide on ownership type. The results showed that tenants needed more time across all property types. Considerations for timelines that were raised during focus groups included the time necessary for tenants to build consensus, gather financial information, receive guidance on options of assigning rights vs. purchasing, and learning about first-time homeownership, including a cost-benefit analysis.

Participants identified the following supportive service needs: City-sponsored workshops, financial assistance in the form of subsidy and financial advising, centralized forms and documents regarding a clear articulation of TOPA rights and process, legal assistance, and mediation services especially for multi-family homes. Overall, tenants were excited about the prospect of being able to purchase or assign their rights to an affordable housing organization. However, tenants would like to ensure that non-profits are held to a high standard of care.

Permanent affordability requirements for all TOPA projects were presented, as well as the major trade-offs of equity building and future affordability. Participants were asked for their impressions on the fairness of permanent affordability in exchange for the bundle of rights that TOPA provides to tenants. Overall, there was a strong sense from participants that they would want to use the TOPA rights to buy the property they live in primarily for the purpose of staying there, and that keeping the property affordable for future generations was more important than individual profit gain or reaping a high appreciation on the property. All of the participants agreed that permanent affordability is a critical component of TOPA.

General feedback from the focus groups demonstrated that there is support for a TOPA policy, although it is contingent on resources such as financial and technical assistance.

There is a strong sense among low-income tenants that technical and financial assistance are necessary for them to exercise their TOPA rights.

The focus groups, despite the small sample size, provided useful feedback to inform the policy. EBCLC, NCLT, and BACLT, with the support of the Partnership for the Bay's Future Challenge Grant Fellow, continued reaching out over the last year to more residents and groups, especially those representing low-income people of color and particularly groups most impacted by the displacement crisis, to do outreach and solicit feedback (see Attachment 5). As described in Attachment 5, nuanced conversations in this ongoing outreach continued to shape policy provisions, including modifications made to permanent affordability provisions to balance the goals of creating more permanently affordable housing, and opening up benefits of homeownership to those who may have faced barriers.

Lender/financing overview

The TOPA working group has contacted the following banks and lending institutions in recent months: Clearinghouse CDFI, Community Bank of the Bay, National Housing Trust, Capital Impact Partners, Heritage Bank (formerly Presidio Bank), Enterprise Community Partners, Low-Income Investment Fund and the Local Initiatives Support Corporation (LISC). Early conversations with these lenders, as reflected previously, indicate that there is interest in funding TOPA projects so long as they meet the necessary requirements (as detailed in the 'Financing for TOPA' section above). Again, in the case of most lenders, they do not offer 30-year consumer loans for these types of projects, but instead offer the more typical 10-15 year term commercial-residential acquisition loans. However, TOPA working group members have been in conversation with several of these lenders who have interest in creating a new/hybrid type of consumer/commercial loan geared towards the owner-occupants of LEHC properties. This would ideally be a fully amortized 30 year loan, backed by the types of investments which offer the more favorable interest rates typical of consumer (owner-occupied) mortgages. With a solid potential demand for more of these types of loans through TOPA, there could be the momentum needed to persuade lenders to advance this concept.

Research of rental sales professionals

Real estate professionals from four different organizations were interviewed and asked about asking vs. sales price and also length of time the properties were on the market, including escrow time. Additionally, several online resources and articles were reviewed to greater understand buyers of multi-tenant properties and market speculation expectations for 2020. Comments gathered directly from real estate professionals included:

- Berkeley/Oakland property is seen as a safe investment because selling prices don't usually go below asking prices
- Due to rent control, tenant protections and eviction laws investors are looking to move out of property ownership in Berkeley/Oakland
- It is difficult to make improvements on properties due to inability to raise rents and recoup improvement investment costs
- Property desirability depends on tenant occupation, property condition, cash flow, location and zoning (depending on buyers intended use)
- Selling time is longer and price is lower for multi-unit properties with rent-controlled units because it is difficult to make profitable returns on investment
- Larger companies that buy multi-unit properties are often looking to redevelop

Property sale and time on the market, gathered from the MLS, is included in Attachment 2.

During stakeholder outreach, specifically meetings with the Berkeley Property Owners Association (BPOA), several multi-unit real estate brokers provided input to the TOPA team and they provided valuable input on the need for greater clarification and other policy changes. Many of their suggestions have been incorporated in the updated ordinance (see Attachment 1).

RATIONALE FOR RECOMMENDATION

Taking no action or waiting for significant changes in state rental laws or for more affordable housing production will continue to exacerbate the housing affordability crisis. The need to provide more options for low income tenants is immediate.

Increasing affordable housing is a policy priority for Berkeley. The most cost-effective way to do so is creating sustained affordability within existing housing stock. The recommendation to apply TOPA to all properties with the exception of Single Family/Owner Occupied Residences including those with ADUs, will at least **triple** the number of units that could be made available to tenants under TOPA (compared to other options that were considered). This policy would provide ownership opportunity for low income tenants or stabilize rents, keeping their housing cost affordable for generations. Furthermore, maximizing the number of units that could invoke the TOPA policy would justify the City's investment of resources for purchase, administration and enforcement.

Legislation of a Tenant Opportunity to Purchase Act (TOPA) has inherent and significant benefits for tenants, including:

- Effective anti-displacement tool by giving tenants options to stay in their home
- Creates pathways to homeownership for tenants, thereby helping low-income families of color to have permanency in Berkeley and build equity

- Stabilizes rents and keeps rental properties from converting to market-rate
- Levels the playing field for tenants and affordable housing developers by providing an opportunity for them to purchase properties, and incentivizing owners to sell to them when the owner is ready
- Provides Tenants empowerment and control of their housing
- Preserves existing, naturally occurring affordable units
- Creates more affordable housing by converting rental properties to deed-restricted permanently affordable properties
- Provides an opportunity for tenants to stay in their homes without fear of eviction

Future regional housing policy will require greater accountability for housing production and more requirements to provide affordable units. Converting existing housing stock to affordable units could help Berkeley meet these required housing goals.

IMPLEMENTATION, ADMINISTRATION AND ENFORCEMENT

Optimally, the goal for the TOPA policy to be in full force and effect would be following funding in the June 2020 Budget process. In order to meet that goal, additional work must be completed:

- Develop Administrative Regulations. The fellow awarded to the Planning Department by the San Francisco Foundation for the Bay's Challenge Grant will be working with the East Bay Community Law Center in developing the Administrative Regulations and Implementation Plan for the TOPA Ordinance.
- Database development. A consultant should be hired to create an accurate database of all rental properties that will support many other existing programs, such as the Rental Housing Safety Program, Measure U1, Below Market Rate units and measuring RHNA goals. This could be accomplished in much the same manner as the database for short term rentals.
- Program administration, oversight and enforcement. Adequate funding to support the administration, oversight and enforcement must be identified, departmental oversight needs to be confirmed and staff hired.
- Funding for Program Costs. Quantifying adequate project costs, that would be included in a budget referral, are a component of the required actions contained herein. The City must be prepared to fully fund the program however, future State and regional housing incentives and regional philanthropy could help offset City investment and such opportunities should be followed and pursued by the City Manager and the administering body.

REVIEW OF EXISTING PLANS, PROGRAMS, POLICIES AND LAWS

TOPA aligns with the Berkeley plans, programs, policies and laws in the following way:

City of Berkeley 2019-2020 Strategic Plan

- Create affordable housing and housing support services for our most vulnerable community members
- Champion and demonstrate social and racial equity Foster a dynamic, sustainable and locally based economy

Housing Element of the General Plan

Objectives

- Housing Affordability. Berkeley residents should have access to quality housing at a range of prices and rents. Housing is least affordable for people at the lowest income levels, and City resources should focus on this area of need.
- Maintenance of Existing Housing. Existing housing should be maintained and improved.
- Fair and Accessible Housing. The City should continue to enforce fair housing laws and encourage housing that is universally accessible.
- Public Participation. Berkeley should continue to improve the role of the neighborhood residents and community organizations in housing and community development decision making.

Policies and Actions

- Policy H-1 Affordable Housing. Increase the number of housing units affordable to Berkeley residents with lower income levels.
- Policy H-2 Funding Sources. Aggressively search out, advocate for, and develop additional sources of funds for permanently affordable housing, including housing for people with extremely low incomes and special needs.
- Policy H-3 Permanent Affordability. Ensure that below market rate rental housing remains affordable for the longest period that is economically and legally feasible.
- Policy H-4 Economic Diversity. Encourage inclusion of households with a range of incomes in housing developments through both regulatory requirements and incentives.
- Policy H-5 Rent Stabilization. Protect tenants from large rent increases, arbitrary evictions, hardship from relocation and the loss of their homes.
- Policy H-6 Rental Housing Conservation and Condominium Conversion. Preserve existing rental housing by limiting conversion of rental properties to condominiums.
- Policy H-7 Low-Income Homebuyers. Support efforts that provide opportunities for successful home ownership for residents and workers in the City of Berkeley.
- Policy H-8 Maintain Housing. Maintain and preserve the existing supply of housing in the City.

Affordable Housing Action Plan adopted November 28, 2017:

High Priority #2: Develop an ordinance modeled after Washington D.C.'s Tenant Opportunity to Purchase Act (TOPA) that offers existing tenants the first right of refusal when property owners place rental property on the sale market, which can be transferred to a qualifying affordable housing provider.

Rent Stabilization and Eviction for Good Cause Ordinance

In June 1980, Berkeley residents passed the City's comprehensive rent stabilization law known as the Rent Stabilization and Eviction for Good Cause Ordinance (BMC Chapter 13.76). The Ordinance regulated most residential rents in Berkeley and provided tenants with increased protection against unwarranted evictions and is intended to maintain affordable housing and preserve community diversity. However, in 1995, the California Legislature enacted Costa-Hawkins Rental Housing Act. Since that time owners may now set a market rent for most tenancies once a new tenant occupies a unit. While there are some tenants that remain in previous units under the Berkeley Rent Stabilization Ordinance, their rents increase by a set percentage annually. Landlords of rent stabilized units are motivated to get their long tenants to move out, therefore putting these tenants at risk of eviction. TOPA aligns with the spirit of the 1980 law in that it would stabilize the rents in TOPA acquired properties.

Housing for a Diverse, Equitable and Creative Berkeley: Proposing a Framework for Berkeley's Affordable Housing

Referred to the Housing Advisory Commission, Measure O Committee, and Homeless Services Panel of Experts in July 2019, the proposed Framework presents a vision for affordable housing policy and proposes aligning funding streams with existing and new programs. It is intended to guide the work of City Commissions and the Council in implementing Measure U1, Measure O and Measure P and City housing policies. The Framework also sets an ambitious goal of 30% of all housing being dedicated as subsidized affordable housing. Among the many policies and programs recommended, it specifically calls out the acquisition and preservation of existing housing and democratic ownership and control. These strategies are identified as key to preventing displacement, preserving affordability and building wealth. TOPA is also called out as a policy strategy. The Framework is under review by Commissions and has not been adopted by the City Council.

Regional Policies

ABAG and MTC are developing a regional transportation and land use plan to address the region's housing crisis through 2050. Along with determining the allocation by city, it is also looking at revenue generation and financing methods to support the need for low

income housing. TOPA could help Berkeley meet its low-income regional allocation and there is also a possibility that funds generated through ABAG policy, especially through the Bay Area Housing Finance Agency (BAHFA, described above) could help fund some TOPA projects in the future.

FINANCIAL IMPLICATIONS

Revenue impact of Incentive to Sellers

Based on transactions from November 1, 2018 to November 30, 2019, 245 multi-unit residential (including mixed use) properties transferred hands for a total of \$9.65M in base transfer tax revenue. Half of the base transfer tax from these properties is approximately \$4.825M; this would be the amount the City would forgo with the TOPA program.

| | |
|--|----------|
| Total Base Transfer Tax from November 2018 to November 2019 from multi-unit residential properties | \$ 9.65M |
| Eligible amount for TOPA rebate (1/2 of transfer tax) | \$ 4.83M |

| % participation in TOPA | Revenue Loss in Millions |
|-------------------------|--------------------------|
| 100% | \$ 4.83 |
| 50% | \$ 2.41 |
| 25% | \$ 1.21 |
| 10% | \$ 0.48 |

The City currently has a Seismic Retrofit Refund Program which provides refunds for voluntary seismic upgrades to residential properties. Up to one-third of the base 1.5% transfer tax may be refunded on a dollar-for-dollar basis. This program applies to structures that are used exclusively for residential purposes, or any mixed-use structure that contains two or more dwelling units.

If 50% of the base transfer tax is returned to sellers via the TOPA program, this will have a negative impact on the Seismic Retrofit Refund Program. It should also be noted that the Planning Department is making an effort to enhance the seismic program to include other qualifying measures (regarding energy efficiency) that require a

permit. The amount available for rebate to the new buyer would be reduced due to the lower base amount once TOPA is implemented.

Cost for Administration, Education, Outreach and Purchase Support

Council can consider additional policies to support TOPA acquisitions that would supplement current funding sources such as: Small Sites Program, Measure U1 tax receipts, Housing Trust Fund and other government resources that might come in the future. One consideration would be the establishment of a Housing Accelerator Fund similar to that established in San Francisco. Acquisition support could include, but not be limited to, purchase deposits, appraisals, down payment assistance, capital improvements and capital reserves.

Additional resources for implementation, administration, enforcement and adjudication are being referred to the City Manager to determine the appropriate level of funding to support the program:

- Cost of administration (including notices, database management, rental cost history and adjustments for non-ownership units)
- Cost of tenant education/outreach/purchase support/adjudication

The estimates below draw on D.C.'s workload experience and tenant participation rate to generate expected staffing needs. Berkeley and D.C. could have a comparable number of sales each year covered under TOPA, but D.C.'s housing stock features much larger buildings that require more organizing and technical assistance support.

Budget estimates are broken down into 2 priorities:

1. Ongoing staffing support for Supportive Partners
2. Pre-development and project management needs for Qualified Organizations

Staff for "Supportive Partners" (i.e. technical assistance, on-going)

Berkeley's TOPA requires tenants to work with a Supportive Partner in order to exercise their rights to purchase under the policy. Supportive partners function in a supportive role to assist tenants in exercising their rights. This may include education, outreach, organizing, supporting tenants through the purchase, connecting tenants to resources, and counseling tenants on first-time homeownership and collective ownership structures.

Washington D.C. funds the equivalent of 8 FTE staff to provide direct outreach and resident organizing support under TOPA, which is broadly comparable to the scope of work envisioned for the Supportive Partners. This level of staffing support provides assistance for 30 transactions per year. Given the slightly reduced

organizing workload with smaller buildings, we anticipate a need going forward for 6 FTE staff in order to adequately and professionally support the anticipated number of tenant groups exploring their TOPA rights and either purchasing or assigning their rights. Expected costs for 6 FTE staff positions for Supportive Partners. Salary costs vary but an anticipated average cost of \$125,000/year per FTE assuming a salary of between \$60,000 to \$75,000 plus taxes, benefits and insurance was assumed for estimating.

Total: 6 FTE at \$125,000 each = \$750,000/year once TOPA has been fully implemented and mature. Initial “ramp-up” is estimated at 2 – 3 FTE.

Costs for pre-development work and project management needs of Qualified Organizations (on-going)

An essential part of the program is sufficient project management capacity at the Qualified Organizations to support the development of TOPA projects. Again, referring to the D.C. model, the City helps support the project management capacity via developer fees. Since this capacity was built up over 40 years of TOPA implementation, it is anticipated that Berkeley will need to support start-up capacity and allow for ongoing support through pre-development funds related to specific TOPA projects.

For the first year of TOPA, Qualified Organizations will need to be able to request pre-development funds of ~\$25,000 per project from the City. The City’s existing pre-development loan process provides an excellent model for covering the out of pocket costs of projects, but typically does not cover the staffing and project management costs at that phase.

Due to the unique nature of TOPA project staffing, close work with residents is expected to be a substantial portion of the development workload. If there is a large volume of TOPA projects at once, the Qualified Organizations will likely need a mechanism to advance a portion of developer’s fees to cover early-stage project management. This could mean that Qualified Organizations serving Berkeley may each need a project manager staff to support the volume of projects.

ENVIRONMENTAL SUSTAINABILITY

Creating and preserving affordable housing in Berkeley will allow lower income individuals and families to live closer to transit and to their workplaces, reducing greenhouse gas emissions. Preserving and refurbishing existing housing stock is an important environmental strategy, as reuse/repair/refurbishment of materials avoids spending resources on a new building construction, and the disposal of construction debris. Finally, increasing affordable housing in Berkeley will make the City more economically and racially equitable, which is a goal in Berkeley’s *Resilience Strategy*.

CONTACT PERSON

Mayor Jesse Arreguín 510-981-7100

Attachments:

1. Ordinance (revised)
2. MLS Property Sale Information
3. Berkeley Properties and TOPA Applicability
4. DC Apartment Buildings and TOPA
5. Community Outreach on TOPA and Responsive Policy Changes