

**Testimony of Beth Mellen Harrison  
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**Before the Committee on Housing & Neighborhood Revitalization  
Council of the District of Columbia**

**Public Hearing Regarding:**

**B23-0074  
“Low Income Housing Tax Credit  
TOPA Exemption for Transfers of Interest Act of 2019”**

**October 2, 2019**

Faced with the District’s rapid gentrification, the Legal Aid Society of the District of Columbia<sup>1</sup> has long supported policies that seek to preserve affordable housing. We believe it is important to ensure that laws such as the Tenant Opportunity to Purchase Act (TOPA) remain robust and effective. It is with this in mind that we urge the Committee to proceed with caution regarding Bill 23-0074, the Low Income Housing Tax Credit TOPA Exemption for Transfers of Interest Act of 2019. Specifically, we believe that the Committee should seek more information regarding the degree to which the problem the bill purports to address is both common and pressing enough to require a legislative solution. Further, if the Committee does move forward with this legislation, it should amend it ahead of mark-up to narrow its language, so that it is carefully tailored and does not weaken TOPA in unnecessary or unintended ways.

TOPA is an important tool for stemming the tide of displacement that can follow in the wake of gentrification. The law allows tenants facing the sale of their property to partner with an affordable housing developer to preserve their homes. Affordable housing developers, in turn, often seek Low Income Housing Tax Credit (LIHTC) financing for TOPA deals in order to fund rehabilitation while preserving affordable rents.

B23-0074 would create a new exemption to TOPA for certain LIHTC-related transactions. As we understand it, the concern is that without the exemption, owners risk losing control of their properties as a result of restructuring or transfers of interests that are necessary to renew or maintain LIHTC financing. If this risk of losing ownership becomes too great, some developers may be discouraged from seeking LIHTC financing altogether.

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<sup>1</sup> The Legal Aid Society of the District of Columbia was formed in 1932 to “provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs.” Over the last 87 years, tens of thousands of the District’s neediest residents have been served by Legal Aid staff and volunteers. Legal Aid currently works in the areas of housing, family law, public benefits, immigration, and consumer protection. More information about Legal Aid can be obtained from our website, [www.LegalAidDC.org](http://www.LegalAidDC.org), and our blog, [www.MakingJusticeReal.org](http://www.MakingJusticeReal.org).

Legal Aid’s position is that any narrowing of TOPA should be based on a strong record (and not simply a few anecdotes) that a new exemption is needed. If the Committee moves forward with this bill, Legal Aid recommends narrowing it in several ways, detailed below, to focus on the problem at hand.

### **Legal Aid Urges the Committee to Seek More Information About the Problem That the Bill Is Designed to Solve**

In order to determine whether a new LIHTC TOPA exemption is needed and the proper scope for any such exemption, it is critical for this Committee to examine the interaction between LIHTC financing and TOPA and the particular problems alleged. Legal Aid urges this Committee to seek more information – through the public hearing process and by convening DHCD and interested parties in discussions after the hearing – to determine if a problem actually exists and whether it threatens affordable housing preservation in the District. Understanding the scope of any problem also will inform how this Committee should narrow and tailor the proposed bill in order to ensure a new exemption does not become a broader loophole.

Legal Aid recognizes that LIHTC provides a critical source of financing to help preserve affordable housing and prevent displacement, including in the context of TOPA deals.<sup>2</sup> LIHTC properties only guarantee affordable rents for families with incomes at 50 or 60 percent of area median income (AMI) – and only for some units. The overwhelmingly majority of the families that Legal Aid works with have far lower incomes, often at 30 percent of AMI or below. Legal Aid nonetheless has seen LIHTC financing benefit our clients in at least two respects: 1) by funding the purchase of rent control properties through TOPA, allowing for rehabilitation and the preservation of current rents for current tenants, and 2) by preserving rents that are accessible to families seeking to place vouchers or other tenant-based subsidies.

The purported need for a new LIHTC TOPA exemption stems from the typical structure of these deals. A developer seeking LIHTC financing first purchases an existing property, typically through a partnership or limited liability corporation (LLC), and then must be approved for tax credits. The developer then seeks investors, who will provide cash for rehabilitation in exchange for the tax credits. While these investors then join the partnership or LLC and gain ownership interests, the developer – often referred to as the project sponsor/developer – typically retains a controlling ownership interest and maintains actual control of the property. TOPA already contains an exemption that applies to this stage, where investors join to make capital contributions and receive tax benefits.<sup>3</sup>

LIHTC financing comes with two distinct periods of affordability requirements. The available tax credits can be claimed during an initial 10-year period, tied to a 15-year “credit” or

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<sup>2</sup> Our testimony focuses on the use of LIHTC financing to purchase and rehabilitate existing properties, the scenario in which Legal Aid has the most experience, and not on new construction.

<sup>3</sup> D.C. Code § 42-3404.02(c)(2)(H).

“compliance” period. During the compliance period, the owner must meet affordability requirements or risk losing the tax credits. After the tax credits and compliance period end, the owner still must meet the same affordability requirements for another 15 years. This “extended use” period is enforced through a restrictive covenant recorded on the land when the tax credits are awarded.

Because the tax credits end at the 10-year mark and compliance ends at the 15-year mark, it is typical for investors to exit the partnership or LLC at this time. The owner then faces three basic choices – seek new financing and new investors (and perform new rehabilitation on the property) via LIHTC, seek new financing through non-LIHTC sources, or simply carry on through the extended use period. If new LIHTC financing is sought, the owner typically will want to transfer the property to a new entity in order to qualify for acquisition credits (which are in addition to rehabilitation credits).<sup>4</sup> New LIHTC financing also may be sought at the 30-year mark, when the extended use period ends. Any of these scenarios involves a transfer of ownership interests that potentially triggers TOPA and is not fully covered by the existing LIHTC TOPA exemption.

The policy question for the Council is whether these types of transfers of ownership interests should trigger TOPA. DHCD and some developers, including affordable housing developers, believe this type of exemption is necessary to protect the ownership and investment interests of developers. They believe developers may not continue to seek LIHTC financing up front or new LIHTC financing at the 15-year or 30-year mark if it may result in loss of control of the property. They also will likely note that tenants had the opportunity to exercise TOPA rights, choose a developer, and opt into the LIHTC affordability regime when a new owner first put LIHTC financing in place.

Legal Aid is not in a position to opine on these potential risks and how developers may react. We are aware of situations where new LIHTC financing has helped to rehabilitate existing LIHTC properties. We also are aware of at least one situation where a new owner refused to seek new financing at the 15-year mark and the property then fell into significant disrepair – when Sanford Capital bought Belmont Crossing.

What we do know from working with tenant associations and other groups of tenants is that TOPA is a powerful tool for tenants seeking a voice in what happens to their homes. Before this Committee limits TOPA rights by adding a new exemption, developers and others should come forward to create a strong record before this Committee that a problem exists and that failing to address it will impact the preservation of affordable housing.

### **If the Bill Moves Forward, Legal Aid Supports Narrowing the Scope of the Exemption and Ensuring a Notice of Transfer Is Provided**

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<sup>4</sup> To qualify for new acquisition credits and maximize new LIHTC financing, a current owner typically will have to transfer title to the property and/or transfer 100 percent of the interest in the current ownership entity to a new legal entity, even if the current owner then maintains a controlling interest in the new ownership entity.

If the Committee decides to move forward with the bill, Legal Aid believes it should be revised to focus tightly on two situations: 1) existing LIHTC properties where investors are exiting the ownership entity, and 2) existing LIHTC properties where the owner is seeking new LIHTC financing for purposes of rehabilitation, either at the 15- or 30-year mark. In both of these situations, any transfer of ownership interests is not intended to transfer actual control of the property – meaning the project sponsor/developer selected at the prior point when tenants were offered TOPA rights will remain in place. Any such transfer also is arguably necessary in order to secure LIHTC financing for ongoing and needed rehabilitation, which in most cases will be in the interest of tenants at the property.

While the text of TOPA does not address whether a reallocation of interests among existing owners constitutes a “sale,” the D.C. Court of Appeals recently issued a decision holding that it does not. In *Williams v. Kennedy*, several owners of a rental property transferred their interests to the remaining owners of the property without providing the tenant with TOPA rights, and the tenant then challenged these transactions.<sup>5</sup> The Court of Appeals concluded that when existing owners (including partners in a partnership or joint venture) reallocate their interests in a property but do not bring in a new owner, those transactions do not constitute “sales” and a tenant’s TOPA rights are not triggered.<sup>6</sup> This decision should cover the situation of LIHTC investors exiting a partnership or joint venture and transferring their interests back to the project sponsor/developer with the controlling interest.

To ensure the statute is clear, the situation of exiting investors could be addressed by adding a new exemption mirroring the existing LIHTC TOPA exemption:

The transfer of interests in a partnership or limited liability company that owns an accommodation as its sole or principal asset; provided, that the sole purpose of the transfer is to remove one or more limited partners or investor members who have made capital contributions and received tax benefits pursuant to section 42 of the United States Internal Revenue Code of 1986 approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42), or a comparable District program.

Legal Aid recognizes that it is challenging to formulate statutory language to focus narrowly on the second situation described above, where an existing LIHTC owner seeks new LIHTC financing. The current bill attempts to do so by limiting the exemption to existing LIHTC properties already subject to an extended use agreement, where the credit period has expired and the property will remain or become subject to an extended use period following the transfer.

While this will cover situations where actual control is not transferred, it also would cover traditional sales – for example, if Sanford Capital had purchased Belmont Crossing at the 15-year mark when the credit period had expired. It also would cover transfers that occur without new LIHTC financing, or situations where the project sponsor/developer exits and actual control of the property changes. Legal Aid sees no reason these types of transactions should be exempt from TOPA. Whenever both ownership interests and actual control of a property transfer to a

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<sup>5</sup> *Williams v. Kennedy*, 211 A.3d 1108 (2019)

<sup>6</sup> *See, id.* at 1111-12.

new owner, even within the context of LIHTC, tenants should have the right to purchase. This ensures that tenants can have some say in which entity gains ownership and control of the property and how that new entity will ensure ongoing affordability and protect tenants' rights.

Legal Aid recommends narrowing the current bill by adding three new requirements. First, the bill should specify that the remaining or new extended use period, following the exempt transfer, is at least 10 years. Second, the bill should specify that before and after the transfer the owner will be controlled by the same entity or person. Finally, the bill should specify that the sole purpose of the transfer is to secure new LIHTC financing for purposes of rehabilitation, i.e. to qualify for and enter a new credit period for this purpose. Adding these additional requirements will ensure that the exemption is limited to transactions that will result in both long-term affordability and new financing for rehabilitation, without resulting in a real change in ownership.

Legal Aid recommends the following specific additions (underlined text) and deletions (strike-through text):

- (O) A transfer of interests in an entity that owns a housing accommodation, or a transfer of title to a housing accommodation, if each of the following conditions is satisfied:
- (i) immediately prior to the transfer the housing accommodation is subject to, ~~and following such transfer the housing accommodation will remain or will become subject to,~~ an extended low income housing commitment, as that term is defined in Section 42 of the United States Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2189; 26 U.S.C. § 42) or a comparable District program, ~~and;~~
  - (ii) the credit period, as defined in Section 42, for the housing accommodation has ended;
  - (iii) immediately following the transfer the housing accommodation will for a term of not less than ten years either remain subject to an existing or become subject to a new extended low-income housing commitment;
  - (iv) before and after the transfer the owner of the housing accommodation will be controlled, directly or indirectly, by the same person or entity; and
  - (v) the sole purpose of the transfer is to qualify for and enter a new credit period, as defined in Section 42, for purposes of rehabilitation of the housing accommodation.

Finally, the Committee should ensure that the owner of the property is required to provide a Notice of Transfer to tenants when claiming the exemption. (The bill as currently drafted requires this.) The Notice of Transfer alerts tenants to the owner's claim and provides them with an opportunity to challenge this claim through an administrative or court process. This acts as a

check on any bad actors that might seek to exploit a new exemption for improper purposes. The Committee also may want to use this opportunity to consider whether more information should be required in a Notice of Transfer, including a focus on real-life consequences for tenants such as whether the controlling owner and/or property manager will change and whether current affordability requirements will be affected. For complex transactions such as these, the Notice of Transfer can nearly incomprehensible and does not do an adequate job alerting tenants to these potential concerns.

### **Conclusion**

Thank you for this opportunity to testify. We look forward to continuing our dialogue with DHCD and this Committee about whether the current bill should move forward and ways to narrow it.