

Real Estate Trends

REAL ESTATE FINANCING

Tenant Opportunity to Purchase Acts

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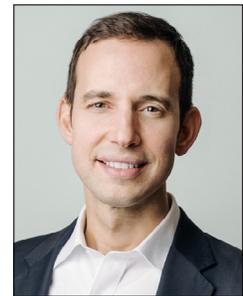
It is a familiar story: investors see promise for lucrative development in a neighborhood that is ripe for appreciation or already gentrifying. Landlords, often ones with older buildings that may be in need of extensive repairs, see the newfound investor interest in the area as an ideal opportunity to sell their rental stock. They sell their buildings to buyers who upgrade units and increase rents. Rising rents attract further investment in the area.

What were once affordable units become too expensive for the current tenants. New wealthier tenants move in, and the original tenants get outpriced and displaced. Some versions of this cycle have played out in areas throughout the country and across the globe.

There is a chronic need, especially in many of America's large cities, for affordable housing. But the question of how to accommodate investment and development, on the one hand, and keep housing affordable for low and middle-income tenants, on the other hand, can pose unique



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challenges.

While tenants can materially benefit when increased investment and new amenities enhance the quality of their neighborhoods, increases in rents and the cost of local goods and services can outpace what tenants are able to afford, leaving tenants with few options other than relocating.

Municipalities have sought to address this phenomenon in different ways, ranging from rent regulation to zoning restrictions to tax incentives for affordable housing. A small but growing number of cities are attempting to do so by adopting tenant opportunity to purchase acts ("TOPAs") that afford tenants an opportunity to buy their own buildings.

Under a TOPA, tenants have the first right to purchase their building if the owner lists it for

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sale or receives an offer from a third-party buyer (See Wilfred Chan, *What If We Made It Easier for Renters to Buy Their Buildings?*, Curbed (March 8, 2023)).

The goal of TOPA laws is to prevent urban displacement and preserve affordability. By giving tenants leverage over the sale of their building, TOPAs aim to give tenants a potential path to homeownership, bargaining power to negotiate with prospective third-party owners about the condition of their buildings and the terms of their tenancies, and ultimately a means for them (including low-income, elderly, and other vulnerable tenants) to stay in their homes (See *What is the Tenant Opportunity to Purchase Act or TOPA?*, Mi Casa Inc., (last visited May 2, 2025)).

Chicago is the latest city to pass TOPA legislation. The Tenant Opportunity to Purchase Block (606) District Pilot Program, more popularly known as the Northwest Side Preservation Ordinance, was hotly contested but overwhelmingly approved by a majority of Chicago's City Council in September 2024 (See Ariel Parrella-Aureli, *Law Allowing Renters To Buy Their Apartments In Gentrifying NW Side Neighborhoods Gets Update*, Block Club Chicago (Dec. 12, 2024). The pilot program went into effect in March 2025 and builds off a prior Chicago ordinance that charges developers a demolition surcharge within specified areas (See *Northwest Side Preservation Ordinance*, Chicago.gov (last visited May 3, 2025)). The Northwest Side Preservation Ordinance operates similarly to TOPA laws enacted or proposed in other cities, although it is currently limited to a specified district in Chicago.

Under the ordinance's Program Rules (Chicago.gov (Feb. 2025)), the owner of a tenanted property must give the tenant association (or, if no tenant association exists, then each individual tenant) notice of the owner's intent to sell.

The tenants must receive the notice of intent to sell at least 30 days prior to listing the property for properties with one to four units, and 60 days prior to listing for properties of five units or more.

The owner must also give the tenant association (or, if no tenant association exists, then each individual tenant) notice of any third-party offer to purchase the property (including a copy of any third-party purchase agreement and specified information regarding the property) within five days for properties with one to four units, and within 10 business days for properties of five units or more.

Unless the property has fewer than three rental units, only a tenant association can exercise the right of refusal. After receiving notice of a third-party offer, the tenants have (i) if there are one or

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two units, 15 days to exercise their right of first refusal, (ii) if there are three or four units, 30 days to form and register a tenant association representing at least 50% of the tenants and to have the tenant association exercise its right of first refusal, and (iii) if there are five or more units, 90 days to form and register a tenant association representing at least 75% of the tenants and to have the tenant association exercise its right of first refusal.

If the tenants exercise this right of first refusal, they have a guaranteed period to conduct due diligence and secure financing – specifically, 60 days for properties with one to four units, and 120 days for properties of five units or more.

However, the tenants must deliver financial assurances to the owner within three to five

business days—a lender’s preapproval letter or financial statement evidencing ability to close in the case of properties with one to four units, and a lender’s letter of interest or intent to evidence the pursuit of financing in the case of properties with five or more units—and a deposit in the amount of up to five percent of the purchase price if required by the owner. The tenants’ deposit is forfeited if they fail to act in “good faith.”

The tenants may also elect to assign their right of first refusal or purchase agreement to a third-party representative, which may be a private or governmental entity. Failure of any party to comply with the ordinance’s rules can result in fines against the non-compliant party. Similar to other TOPA laws, the ordinance has exemptions for properties and scenarios that do not trigger TOPA, like assisted housing, public housing, and buildings on which a lender is foreclosing (Chi., Ill., Mun. Code chapter 5-11 (2025)).

To assess the practical benefits and challenges of TOPAs, it is helpful to look at the data from Washington, D.C., which has the oldest TOPA laws in the country. The D.C. Policy Center recently released a report analyzing D.C.’s TOPA, which was first enacted in 1980 to address a rental housing crisis (See Yesim Sayin & Emilia Calma, *TOPA’s Promise and Pitfalls* (March 13, 2025)). There are four possible outcomes of the TOPA process: (i) the tenants purchase the building and convert it to a condominium, (ii) the tenants purchase the building and convert it into a co-op, (iii) the tenants assign their rights to a third party, either the original buyer or a new landlord of their choice, or (iv) the tenants do nothing or waive their rights, and the owner’s original sale proceeds.

Approximately 95% of TOPA cases in D.C. have concluded with the tenants’ assignment of their rights. This option can be quite favorable to tenants as it allows them to negotiate tangible benefits that

they choose from the significant bargaining power the TOPA statute provides.

Taking on the responsibility of building ownership is challenging and requires a high level of engagement and coordination on the part of the tenants. If the tenant association instead assigns its rights to a third party, the tenants can either (i) choose a nonprofit partner or affordable housing developer aligned with their interests to be the new landlord (See Roshan Abraham, *The Unfulfilled Potential of D.C.’s ‘Tenant Opportunity To Purchase’ Law*, Next City (Dec. 14, 2023), or (ii) negotiate with interested buyers for building repairs, rent concessions, and cash buyouts, and assign their rights to the buyer with the most favorable offer.

Many developers would prefer empty units so they can perform any renovations they want without having to deal with existing tenants. For low-income tenants, a cash buyout from an interested buyer can be especially enticing.

In D.C., there are instances of these payments being as high as \$100,000 for each tenant (See Sayin & Calma, *supra*). While much less common, in the rare instances where tenant associations actually buy the building themselves, a TOPA can afford tenants a path to homeownership that might otherwise be inaccessible to them.

While a TOPA can have substantive benefits for tenants, it can also have very real drawbacks and transaction costs in practice. Most notably, TOPAs can create major delays in the sale process.

A buyer’s interest in, or ability to consummate, the sale could be seriously diminished or evaporate entirely in the time it takes the owner to give notice, wait for the tenants to form an association, exercise their right of first refusal, conduct their diligence, and obtain financing—a process during which neither the original buyer nor any subsequent buyer has any certainty that it will even be able to realize on its bid.

In D.C., TOPA proceedings delay transactions by 5.3 months on average, and in some cases have delayed sales by up to 420 days (See Sayin & Calma, *supra*). A delay of that length could easily kill even a highly buyer-friendly deal.

All of this also assumes no legal disputes arise. Should the parties begin litigation during the TOPA process, it could delay a transaction for years. The lengthy TOPA process also makes appealing buyer-friendly options (like a forward 1031 exchange) impossible and can tie up buyer earnest money deposits for months on end. Adding further complications, title companies are also more hesitant to insure TOPA purchases due to their increased risks.

TOPA laws also create multi-faceted issues with financing for all parties involved. These laws create a high degree of uncertainty, which is generally anathema to lenders. Financing commitments and interest rate locks are necessarily time-limited, and interest rates can fluctuate significantly during TOPA's extended timeline. This limits the availability and increases the cost of financing (See Sayin & Calma, *supra*).

The District of Columbia does not have dedicated funding to support tenant TOPA purchases, and it is difficult for tenant associations to secure acquisition or permanent financing without support from the District (See Sayin & Calma, *supra*). Lenders often consider affordable housing to be risky, making them less likely to extend loans to tenant associations (See Chan, *supra*). Without financing, low- and middle-income tenants have no way to obtain the funds needed to purchase and operate the building on their own.

The uncertainties associated with TOPAs also make lenders less willing to extend loans to tenants' assignees, loans which they often need in order to make the repairs and improvements the tenants demand in exchange for their cooperation.

The scope of D.C.'s TOPA also creates challenges. This TOPA's broad definition of a "sale" means it is also triggered by recapitalizations, refinancings, and certain ownership transfers, "even if control and management of the building remain unchanged" (See Sayin & Calma, *supra*). Equity partners are less likely to invest given their exit may by itself trigger TOPA requirements.

Overall, the data indicates that all of the foregoing issues with D.C.'s TOPA have actually decreased investor interest in D.C.'s multifamily housing market (*Id.*). Fewer sales and the burdens that TOPA imposes on buyers may hurt property values. Developers are less likely to build housing in areas where it is difficult to sell or where there is downward pressure on pricing, even if those areas are most in need of new housing.

A bill to create a TOPA regime in New York was first introduced in the State Senate in 2021, and has experienced renewed interest as housing has become a critical issue in the 2025 mayoral race (See Celia Young, *Could a Proposed Bill To Help New York Tenants Buy Their Building Finally Become Law?*, Brick Underground (March 28, 2025)).

The bill is largely modeled after D.C.'s TOPA but has some key differences. Unlike D.C.'s, New York's TOPA would come with a dedicated pool of funding to assist tenants with building purchases (Chan, *supra*).

The New York legislation would also "only allow tenants to assign their TOPA rights to a nonprofit or public housing provider" (*Id.*). It is unclear how the TOPA would play out in high-density areas of the state like New York City or whether the TOPA would be limited to specific neighborhoods, like it is in Chicago. In light of the significant implications of such a regime for the affected housing market, any such legislation warrants a careful and thoughtful analysis.