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## Executive Summary

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This report explores innovative strategies to preserve the stock of naturally occurring affordable housing (NOAH) in Minnesota, which is being lost to investment with coordinating rent increases and disinvestment at a growing rate. Recommendations include financial and non-financial strategies; financial strategies discussed are moral obligation pledges and regional NOAH management, and non-financial strategies are opportunity to purchase and just cause eviction policies. Research on these topics is conducted using both literature and empirical examples of NOAH preservation in other states and municipalities throughout the United States, adapted to fit the unique context of Minnesota.

Moral obligation pledges are a limited credit enhancement that increases the security of tax-exempt private activity bonds. As a result, private investors are willing to purchase the bonds at lower interest rates, which ultimately lowers the cost of NOAH preservation projects. Regional NOAH management offers smaller municipalities with neither the housing stock nor the funding to warrant hiring local managers an opportunity to proactively work on housing preservation initiatives. Collectively hiring a manager for NOAH property and rent- and income-restricted programs keeps costs low, creates a critical new preservation resource, and allows addressment of housing needs that cross municipal boundaries. Opportunity to purchase policies offer property tenants and/or qualified nonprofits the right to purchase a rental property should the existing owner decide to sell. This not only creates opportunities for community ownership and wealth building, but also helps insulate rental tenants from market speculation and rent increases. Just cause eviction policies limit allowable justifications for

evictions and lease terminations to prevent arbitrary tenant displacement. These policies, in combination with other supplementary tenant protections like rent control or right to legal counsel during eviction proceedings, help keep people in their homes until they decide it is in their best interest to move.

## NOAH in Minnesota

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Naturally Occurring Affordable Housing (NOAH) is broadly defined as rental housing that is affordable to households earning a maximum of 50% Area Median Income (AMI) without subsidies, restrictive covenants, or other direct governmental interventions.<sup>1</sup> This affordability is typically attributed to the old age of the rental property and the lack of higher end finishes, which often lead NOAH units to be classified as either Class B or Class C. Unfortunately, NOAH affordability is being lost at an increasingly rapid pace, drawing the attention of government, housing advocates, and affordable housing developers to NOAH preservation as an urgent matter.

NOAH properties lose their affordability for one of two reasons: investment with coordinating rent increases or disinvestment. Investment may include property rehabilitation, upgraded amenities, and changes in ownership, which can result in rent increases that displace current tenants for whom the units are no longer affordable. Disinvestment may include deferred maintenance, unsafe living conditions, and eventual condemnation, which can result in affordable units leaving the market entirely. Representing 75% of all affordable housing in the United States,<sup>2</sup> NOAH property is a critical resource for both low-income families and government entities. Every NOAH unit lost to investment with coordinating rent increases or disinvestment causes tenant displacement and increases the governmental outlays necessary to provide a sufficient number of affordable units. As such, its preservation is critical.

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<sup>1</sup> Family Housing Fund, [The Space Between: Realities and Possibilities in Preserving Unsubsidized Affordable Rental Housing](#) (June 2013).

<sup>2</sup> Harvard Joint Center for Housing Studies, [The State of the Nation's Housing 2009](#) (June 2009).

The NOAH preservation strategies explored in this analysis are not comprehensive. They are merely a sampling of innovative approaches taken or considered by government entities throughout the United States that have potential to succeed in Minnesota. These specific strategies were chosen based on the assumption that neither the State of Minnesota nor its localities will receive a large influx of money for NOAH preservation, and are thus limited in their financial capacity to develop and implement new preservation programs. As such, they are somewhat conservative, grounded in both the hope that more money will be allocated for NOAH preservation at all levels of government and the reality of an ongoing public health crisis and budget negotiation challenges. The \$1 trillion infrastructure bill that recently passed in the United States Senate and now awaits a vote in the House of Representatives includes no housing-related provisions,<sup>3</sup> though the Housing is Infrastructure Act introduced by Congresswoman Waters offers some hope for federal investment.<sup>4</sup>

Given the wide range of needs related to NOAH preservation throughout Minnesota, these strategies are also not necessarily discussed with state-level implementation in mind. For example, what works for cities where gentrification is the largest threat to NOAH will likely be much different than what works for cities where aging housing stocks and disinvestment are the largest threat. The state might instead create toolkits for municipalities interested in pursuing these strategies further at the local level, or perhaps host an opt-in pilot program if municipalities do not have the capacity to do so independently.

Thank you to interviewees Sarah Berke, John Errigo, Daniel Lightfoot, Bill Mague, Gretchen Nicholls, Danilo Pelletiere, Dean Porter-Nelson, Dani Salus, Elizabeth Showalter,

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<sup>3</sup> [Infrastructure Investment and Jobs Act](#), H.R. 3684, 117<sup>th</sup> Cong. (2021)

<sup>4</sup> [Housing is Infrastructure Act of 2021](#), H.R. 4497, 117<sup>th</sup> Cong. (2021)

Charlie Vander Aarde, members of the Minnesota Housing Policy and Legal Teams, and members of the NOAH Working Group for providing valuable perspective and insight about both the general landscape of NOAH preservation in Minnesota and the specific strategies discussed in this report.

## Financial Means of Preserving NOAH

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### Append moral obligation pledges to bonds issued to affordable housing developers

As real estate prices skyrocket in Minnesota's tight rental market, it becomes more difficult for mission-driven developers to access enough liquid capital to compete with market rate developers to develop, acquire, and/or rehabilitate NOAH property. NOAH projects do not charge high rents so they cannot afford high debt service; this means they require more upfront capital than higher rent projects to be financially feasible for developers to pursue. Traditional developers tend to have large equity reserves upon which they can draw to purchase property before mission-driven developers can assemble this capital, which often consists of many sources of funding. These often include tax-exempt private activity bonds (TEBAs) from Minnesota Management and Budget (MMB), Housing Infrastructure Bonds (HIBs) from Minnesota Housing, and Low Income Housing Tax Credits (LIHTCs).

One funding source for mission-driven developers, HIBs, was introduced by the Minnesota Legislature in 2012 to support affordable housing development, acquisition, and rehabilitation.<sup>5</sup> HIBs are limited obligation tax-exempt bonds issued by Minnesota Housing with principal and interest paid from appropriations from the State of Minnesota General Fund.<sup>6</sup> Current qualifying multifamily housing uses relate to permanent supportive housing, low-income senior housing, federally assisted housing, and foreclosed or abandoned property.<sup>7</sup>

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<sup>5</sup> [Minn. Stat. § 462A.37](#)

<sup>6</sup> Minnesota Housing Finance Agency, [Housing Infrastructure Bonds Guide](#) (April 2021).

<sup>7</sup> *Ibid.*

Of these uses, Minnesota Housing prioritizes preservation of federally assisted housing for HIB awards to avoid loss of that assistance.

Many affordable housing advocates propose expanding qualifying uses for HIBs to include NOAH acquisition and rehabilitation. However, allowing HIBs to finance NOAH projects is problematic for two reasons. First, nimble financing sources are necessary for successful NOAH acquisition, but HIBs are only issued once per year around September after projects apply for funding through a consolidated RFP process. There are also limited scenarios in which HIBs can be used for acquisition related to existing qualifying uses. Second, due to the scale of NOAH projects, funding their rehabilitation with HIBs would monopolize state bonding authority and prevent investment in other qualifying uses. Despite the \$100M HIB allocation authorized by the Minnesota Legislature in 2021, the highest amount on record, it is already an oversubscribed funding source that would need dramatic expansion to accommodate NOAH funding needs. Dani Salus of Minnesota Housing notes that many of the NOAH projects interested in utilizing HIBs have between 250 and 600 units and could each potentially require 30 to 100 million dollars of state funding based on their size and the scope of rehabilitation necessary. Allowing these projects to access both TEBA, which are limited by a federal formula, and HIBs leaves little funding left for anything else.

Housing Infrastructure Bonds may not be the answer, but new approaches could be taken to increase access to capital for development, acquisition, and rehabilitation of NOAH units. Bill Mague of Aeon suggests that Minnesota take advantage of the high credit ratings of its state and municipal government entities to provide limited credit enhancements, which he claims are most easily offered through moral obligation pledges. When MMB issues TEBA for

affordable housing development, securing them with a moral obligation pledge allows projects to access more capital from the private market.

There are myriad ways that moral obligation pledges can be structured. “Sometimes the bonds are backed exclusively by the moral obligation of the borrower to repay the bonds, and sometimes they are coupled with other forms of security such as a dedicated revenue stream with a back-up pledge of the borrower or state’s moral obligation to make good on any revenue shortfalls.”<sup>8</sup> This exploration of moral obligation pledges considers affordable housing rental payments the primary revenue stream for debt repayment. Housing developers must typically maintain a reserve equal to one year of debt service on which they can draw in the event of difficulties repaying the investors that purchased the bonds. Through the moral obligation pledge, the government entity that issued the bond promises to replenish the debt service reserve if rental payments are not enough and a draw on the reserve becomes necessary. The State of Minnesota has a AAA credit rating from Fitch and Standard & Poor’s and an Aa1 rating from Moody’s,<sup>9</sup> so investors can be confident the developer will not default. This confidence allows organizations like Aeon to borrow more money from the debt market at cheaper interest rates. The pledge is not legally enforceable, which allows the entity to circumvent federally prescribed bonding limitations. Even so, it holds significant sway with investors because failure to meet the moral obligation can have negative impacts on state or municipal credit ratings. The Minnesota Legislature does not necessarily have to appropriate money at the time of the pledge; it is merely a nonbinding commitment that it will appropriate the money if it becomes necessary.

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<sup>8</sup> Timothy Stratton, “[The Moral Obligation Bond Revisited](#)”, *LinkedIn* (August 2017).

<sup>9</sup> Minnesota Management and Budget, “[Minnesota’s Bond Ratings](#)” (2021).

Minnesota Housing's primary bonding authority is in HIBs. Most HIBs are backed – in addition to the direct pledge of revenues and assets that come from projects funded by the bonds – by a general obligation pledge. This legally enforceable pledge guarantees that Minnesota Housing will use all available resources to repay investors in the event that project revenues and assets are not enough. As such, appending moral obligation pledges to HIBs has no functional value because general obligation pledges are already a more secure credit enhancement. TEBA's from MMB, however, are not backed by general obligation pledges, so moral obligation pledges would have functional value for affordable housing developers. Unlike HIBs, they are also already accessible to NOAH projects and thus would not require a statutory change beyond pledge authorization itself.

Moral obligation pledges are not a perfect solution. First, they are not immediately quantifiable. Government entities cannot be sure how much of the debt service reserve they will need to replenish in any given year as market conditions fluctuate. Years that reserves require more replenishment will likely also be years that government outlays increase in other areas, as with the widespread, multi-sector impact of the COVID-19 pandemic. Second, moral obligation pledges come with less legal liability than the full faith and credit backing on general obligation bonds, but defaulting on them has comparable impact on credit ratings and access to money markets. Even without defaulting, making too many commitments may cause credit rating agencies to lower government entities' credit ratings for fear that all debt service reserves will require replenishment at once and entities will not be able to meet their obligations. Third, some consider circumventing constitutional debt limits to be ethically

suspect.<sup>10</sup> Moral obligation bonds do not require voter approval like general obligation bonds, allowing legislators and public agencies to bypass an important check on their power to manage public funds. Many people opposed to moral obligation pledges argue this falls somewhere on a spectrum between undemocratic and illegal, though they have been upheld as constitutional in most states that underwent litigation.<sup>11</sup>

Despite these shortcomings, moral obligation pledges can be efficient and effective. Simply put, successful acquisition and rehabilitation of NOAH property requires more capital than government entities can provide, and many NOAH units are lost to market rate developers because of it. If the State of Minnesota were to authorize MMB to append moral obligation pledges to TEBA's issued to mission-driven developers, they could more easily find this capital in the private market and more affordable housing projects would pencil out without significant increases in public investment. The Minnesota Constitution allows the contraction of public debt "to refund outstanding bonds of the state or any of its agencies whether or not the full faith and credit of the state has been pledged for the payment of the bonds," which could be interpreted to include debt to fulfill moral obligations.<sup>12</sup> Thus, a statute would likely be sufficient to enable their use.

#### Case Study: State of New York

Moral obligation pledges were developed by John Mitchell - a New York lawyer and the 67<sup>th</sup> Attorney General of the United States under President Nixon - and introduced in the New

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<sup>10</sup> Janice Griffith, "['Moral Obligation' Bonds: Illusion or Security?](#)", *The Urban Lawyer*, 8(1): 54-93.

<sup>11</sup> Ibid.

<sup>12</sup> [Minn. Const. art. XI, sec. 5](#)

York State Housing Finance Agency Act (HFAA) in 1960 when New York voters did not approve bonds to finance an affordable housing project. The moral obligation pledges used by New York were secured by a word of good faith rather than a dedicated revenue stream, so they were not considered debt under state law. As a result, the New York State Housing Finance Agency could issue them without voter approval, easily and speedily expanding the amount of money it could access.<sup>13</sup> It may be that the quick acceptance of moral obligation pledges in New York was the result of a misunderstanding, wherein the state government believed projects funded by bonds to which the pledges were appended would be self-supporting, and investors believed that moral obligations constituted full faith and credit and thus did not consider projects' financial feasibility.<sup>14</sup> This ultimately increased bond marketability in the tax-exempt municipal bond market. Like New York, other states that adopted use of the pledges initially issued them primarily to support the debt of their housing finance agencies.<sup>15</sup> Bonds with moral obligation pledges received higher credit ratings, allowing them to command lower interest rates and reduce the cost of providing housing for low- and moderate-income families.<sup>16</sup>

After the initial success of the New York State Housing Finance Agency, other New York State agencies began using moral obligation pledges to finance their activities. One such agency was the New York State Urban Development Corporation (UDC). The UDC was established in 1968 to address the low-income housing shortage and stimulate urban development and renewal throughout New York. In 1975, after President Nixon declared a moratorium on housing and community development assistance in 1973 and UDC could not service the debt accrued

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<sup>13</sup> Timothy Stratton, "[The Moral Obligation Bond Revisited](#)", *LinkedIn* (August 2017).

<sup>14</sup> Michael Utevsky, "[The Future of Nonguaranteed Bond Financing in New York](#)", *Fordham Law Review*, 45(4): 860-884.

<sup>15</sup> Council of Development Finance Agencies, "[CDFA Spotlight: Moral Obligation Bonds](#)" (n.d.).

<sup>16</sup> Janice Griffith, "['Moral Obligation' Bonds: Illusion or Security?](#)", *The Urban Lawyer*, 8(1): 54-93.

during seven years of uncapped borrowing, it became the first major municipal bond issuer to default since the Great Depression. When approached about fulfilling the moral obligation pledges appended to UDC bonds, New York State became the first public entity to decline. That a state government would fulfill a moral obligation pledge and replenish a debt service reserve was practically considered a guarantee until New York State refused to do so for UDC.<sup>17</sup> As such, the UDC financial crisis was an important nexus event for investors in the bond market and the level of risk they associate with moral obligation pledges. This risk is characterized by “the likely refusal of a state to treat such bonds as full faith and credit obligations when the political and economic burden of carrying such a debt is oppressive, and the declination of the financial institutions to blindly underwrite [moral obligations] if there exists neither a state guarantee or an adequate revenue base to support such bonds.”<sup>18</sup>

Even so, the municipal bond market continues to accept bonds with moral obligation pledges issued by government entities with high credit ratings, assuming that the project financed by the bond is self-supporting. Within approximately one year of the Urban Development Corporation’s default, the market for New York State Housing Finance Agency moral obligation bonds reopened, though with high interest rates. The devastating impact of declining to replenish the debt service reserve for UDC led to more careful and intentional use of the bonds by both New York State and the rest of the country, which ultimately restored investor confidence in their security despite the initial wariness cause by the default. New York State has since established a longstanding record of fulfilling moral obligation pledges, facilitating the complete recovery of bond trustworthiness and value.

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<sup>17</sup> Janice Griffith, “[‘Moral Obligation’ Bonds: Illusion or Security?](#)”, *The Urban Lawyer*, 8(1): 54-93.

<sup>18</sup> *Ibid.*

What can Minnesota Housing learn?

Moral obligation pledges, like anything that interacts with money markets, introduce a new element of risk to the affordable housing finance process. With proper management, however, that risk can be minimized. Limiting the use of moral obligation pledges to affordable housing development, acquisition, and rehabilitation is a large way of doing so. Because the housing market in Minnesota is so competitive and affordable housing is always in high demand, it is unlikely that affordable housing vacancy will surpass expected levels and rental payments will be unable to meet debt obligations. Therefore, the State of Minnesota would be morally obligated to replenish debt service reserves only rarely, if ever. Fitch states that replenishment is unnecessary for most projects that utilize the bonds, including those unrelated to housing.<sup>19</sup> This dramatically reduces the likelihood of default, minimizes government outlays, and allows the State of Minnesota and its municipalities to maintain high credit ratings, all while preserving and expanding the stock of NOAH property.

A cap on moral obligation pledges is also advisable. The New York State Legislature placed dollar ceilings on bonds to which moral obligation pledges were appended for each of its public agencies and repealed unused moral obligation provisions in agencies' enabling legislation after the UDC financial crisis.<sup>20</sup> Other states that utilize moral obligation pledges learned from New York and implemented their own dollar ceilings. For an additional level of security, moral obligation pledges could also be authorized conditionally, such that they only

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<sup>19</sup> Joe Mysak, [Encyclopedia of Municipal Bonds](#) (2012).

<sup>20</sup> Michael Utevsky, "[The Future of Nonguaranteed Bond Financing in New York](#)", *Fordham Law Review*, 45(4): 860-884.

become available to MMB as a financing tool when the statewide housing vacancy rate declines below a specified threshold. Most issues related to the pledges arise when they are overused and undervalued, and this ensures the scope of their use is properly narrow.

## Develop regional consortia to fund inter-jurisdictional NOAH managers

The Low-Income Rental Classification (LIRC), commonly known as 4(d), was introduced in 2014 in an attempt to preserve the affordability of existing housing and incentivize inclusion of affordable units in new housing. 4(d) reduces property tax liability on the qualifying portion of rental housing property; the 1.25% standard class rate is reduced to 0.75% for the first tier of market value,<sup>21</sup> and further reduced to 0.25% for any remaining market value.<sup>22</sup> Property qualifies for the 4(d) class rate if at least 20% of units are project-based Section 8 under the Housing Choice Voucher program; in a qualified low-income housing project receiving Low Income Housing Tax Credits; receiving rental assistance from the USDA Rural Housing Service; or rent- and income-restricted under the terms of government financial assistance.<sup>23</sup> In addition, qualifying units must be occupied by tenants with household income at or below 60% of area or state median income, whichever is more, and rent charged for these units cannot exceed 30% of the 60% figure.<sup>24</sup>

While class 4(d) property can technically no longer be considered NOAH, it achieves the same goal of sustained affordability. However, because 4(d) was developed at the state level but it is implemented and funded at the local level, doing so has variable impacts throughout the state. Some municipalities in Minnesota experience great success imposing affordability covenants on local property through 4(d), particularly those with larger populations and high tax capacity. In fact, several cities in the Twin Cities metropolitan area – including Minneapolis,

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<sup>21</sup> Per the Minnesota Department of Revenue, the “[4d Low Income Rental Housing First-Tier Valuation Limit](#)” is \$174,000 per qualifying unit in assessment year 2021.

<sup>22</sup> [Minn. Stat. § 273.13.25](#)

<sup>23</sup> [Minn. Stat. § 273.128.1](#)

<sup>24</sup> Ibid.

Saint Paul, Saint Louis Park, and Edina – have developed complementary programs that offer additional incentives for participation, such as grants and efficiency upgrade assistance.<sup>25</sup> Meanwhile, municipalities with smaller populations and low tax capacity struggle to embrace 4(d). It is not municipalities with the greatest number of 4(d) properties that are most impacted, but rather those with the greatest assessed 4(d) property values as a portion of all taxable property value. The impact on small municipalities is exponentially larger because their low tax capacity makes each dollar of tax revenue more valuable. There are also challenges of maintaining sufficient affordable rental housing that are not solved by 4(d), especially for municipalities that struggle with NOAH disinvestment rather than investment. This is also common of small municipalities.

A seemingly obvious way to expand the impact of 4(d) and maintain the affordability of more properties is to further reduce the property tax liability on affordable units to incentivize more property owners to participate. In fact, Minnesota Senator Senjem introduced S.F. No. 316, a proposal to eliminate the tiered system of market valuation and apply the 0.25% class rate to all 4(d) property, in the most recent legislative session.<sup>26</sup> Similar bills were proposed in the Minnesota House of Representatives.<sup>27</sup> While this additional tax reduction would certainly increase participation, it would also reduce municipal tax capacity, requiring government entities to shift the tax burden onto other community members, including low-income and BIPOC residents, to restore it. In addition, there is currently no requirement dictating how property tax savings must be spent; mission-driven organizations are likely to reinvest the

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<sup>25</sup> Matt Jones et al, [Met Council 4d Housing & Energy](#) (May 2020).

<sup>26</sup> Senator David Senjem, [S.F. No. 316 – Modifying Classification Rate for Class 4d Low-Income Rental Properties](#) (2020)

<sup>27</sup> Minnesota House of Representatives, [“Introduction of Bills”](#) (n.d.).

additional savings into their 4(d) properties, but the same cannot necessarily be said for for-profit owners and developers. As such, housing affordability may be guaranteed by 4(d), but quality and longevity are not.

Amendments to the Low-Income Rental Classification must respect both the capacity of municipalities, including both staff and tax capacity, and the incentives necessary for adequate participation, striking a delicate balance between the public good and private market forces. This will likely require localization and/or regionalization of the 4(d) class rate and associated incentives to serve the diversity of municipal needs throughout the state, though this introduces an additional layer of complexity to an already elaborate tax code. Alternatively, maintaining a consistent statewide rate could be made more impactful by subsidizing municipalities with low tax capacity to offset a portion of the revenue they lose to 4(d). State level analysis is ultimately necessary to determine if either of these options is a feasible approach, which is beyond the scope of this analysis. However, there are additional challenges related to programs that help preserve NOAH affordability, both 4(d) and otherwise, that warrant examination. Again, rent- and income-restricted properties can technically no longer be considered NOAH, but imposing these restrictions as a condition of participation in select programs is, in essence, NOAH preservation by another name. Increasing interest and participation in programs that require affordable rents and serve low-income Minnesotans is critical to expanding their impact.

Developing new programs is unnecessary. Rather, property owners and landlords need reduced requirements to participate or better education and support to fulfill current requirements. The latter is a better option from a tenants' rights and protections perspective,

but not all cities and counties in Minnesota have the capacity to provide the education and support necessary to actively promote NOAH preservation. Blaine, Minnesota, is a clear example of this. Blaine, a suburb of Minneapolis located in Anoka and Ramsey Counties, had over 67,000 residents and 24,000 housing units in 2019.<sup>28</sup> Community Development Specialist Elizabeth Showalter describes Blaine’s housing development as standard in the 1970s and 1980s followed by a near absence of new development until 2017, resulting in a housing stock that largely consists of older property. Newly constructed housing is fairly inexpensive, affordable to residents earning 70-80% of Area Median Income. For these reasons, Blaine is not at high risk of gentrification, but does have significant issues with NOAH disinvestment. However, the city has just one housing manager, Showalter, who dedicates only one-third of her staff time to overseeing rent- and income-restricted programs and other housing matters. Blaine could benefit from additional staff members to help landlords and property owners navigate available programs and administer funds for property improvements, but the number of housing units in the city do not warrant the cost of hiring them. Targeted NOAH management and preservation are thus not possible.

Showalter suggests development of regional consortia in which several cities or counties collectively compensate an expert to do cross-jurisdiction landlord and property owner training, NOAH management, and rent- and income-restricted compliance work on a per property basis. Many counties already do something similar to manage public housing developments and the Housing Choice Voucher program. The Northwest Minnesota Multi-County Housing & Redevelopment Authority (NWMNHRA)<sup>29</sup> and Southeastern Minnesota Multi-County Housing &

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<sup>28</sup> Ruth Tucker, [2020 Economic Development Annual Report](#) (2020).

<sup>29</sup> Northwest Minnesota Multi-County Housing & Redevelopment Authority, “[Home](#)” (n.d.).

Redevelopment Authority (SEMMCHRA)<sup>30</sup> manage both public housing developments and the Housing Choice Voucher program in their respective multi-county service areas, and the Metropolitan Council Housing & Redevelopment Authority (Metro HRA)<sup>31</sup> and South Central Minnesota Multi-County Housing & Redevelopment Authority (SCMMCHRA)<sup>32</sup> manage the Housing Choice Voucher program. Cities and counties join multi-county HRAs because they do not have the affordable housing stock or staff capacity necessary to justify independent city or county HRA management.

Given their established relationships with both property owners and tenants and their demonstrated expertise in affordable housing program management, multi-county housing redevelopment authorities in Minnesota are ideal managers of regional affordable housing consortia. They also span municipal boundaries, which would serve scattered site NOAH properties and boundaryless NOAH preservation needs well. These organizations do not represent the majority of Minnesota counties because most counties have independent HRAs and PHAs. However, they do represent what is possible when communities pool their resources, and could pilot the introduction of a cross-jurisdiction NOAH and rent- and income-restricted program manager. Many of the cities and counties that would benefit from regional consortia like Blaine are already members of a multi-country HRA.

Multi-county HRAs do not necessarily need to be the host organizations for these managers. Regardless, Minnesota Housing and many localities do not have the capacity to do so, which suggests a regional approach through new or existing cross-jurisdiction organizations

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<sup>30</sup> Southeastern Minnesota Multi-County Housing & Redevelopment Authority, "[About](#)", (n.d.).

<sup>31</sup> Metropolitan Council, "[Metro HRA Rental Assistance](#)" (n.d.).

<sup>32</sup> South Central Minnesota Multi-County Housing & Redevelopment Authority, "[Home](#)", (n.d.).

is the most feasible option. Convening representatives of cities and states throughout the state to gauge interest in regional consortia and better understand the geographies that would most benefit from this collaboration is the next step of implementation. If it is decided that multi-county HRAs are the best host organizations, Minnesota Housing should approach the Minnesota Chapter of the National Association of Housing and Redevelopment Officials (NAHRO) to determine if it is an eligible activity and, if not, how eligible activities can be expanded to include this.

## Non-Financial Means of Preserving NOAH

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Implement opportunity to purchase policies to remove NOAH properties from the speculative market and insulate tenants from rent increases

Opportunity to purchase legislation is becoming increasingly popular throughout the United States as policymakers learn about the importance of NOAH to the affordable housing supply and recognize the role of ownership changes in lost NOAH affordability. In fact, the City of Minneapolis is currently working to develop a local opportunity to purchase policy.<sup>33</sup> Tight housing markets invite speculation, and low- and moderate-income households often cannot successfully compete with for-profit developers. The COVID-19 pandemic poses additional challenges to housing security. Opportunity to purchase policies are considered mechanisms to preserve affordable housing, protect and empower tenants, and prevent displacement, especially in speculative markets.

These policies take three primary forms: TOPA, COPA, and Hybrid. Tenant Opportunity to Purchase Acts (TOPAs) grant tenants the first right to purchase their multifamily rental housing or assign the right to a third party. Community Opportunity to Purchase Acts (COPAs) grant qualified nonprofits the first right to purchase multifamily rental housing. Nonprofits are typically vetted by the managing government entity to confirm their experience owning and managing affordable housing, and their commitment to maintaining housing quality and affordability. TOPA and COPA may be enacted independently or in tandem, wherein COPA rights are triggered if tenants waive their TOPA rights or assign them to a qualified nonprofit.

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<sup>33</sup> Scott Bruton and Gretchen Nicholls, [Opportunity to Purchase Policy Options for the City of Minneapolis](#) (January 2021).

Rights may include right of first offer, right of first refusal, or first right of purchase. Right of first offer requires property owners to provide an offer of sale with the asking price, associated terms, and additional information about opportunity to purchase rights and resources to support their exercise. Right of first refusal allows tenants to match the sale price and terms accepted by property owners in a third-party contract. First right of purchase includes both right of first offer and right of first refusal. Regardless of the specific rights granted in the legislation, their exercise follows a similar process: the entitled party receives advance notice of the property owner's intent to sell, followed by distinct timeframes to submit a statement of interest; negotiate with the property owner; submit an offer and/or match a third party offer; and secure adequate financing.

Both opposers and advocates of opportunity to purchase policies tend to focus on the same facts, but their fundamentally different priorities produce conflicting interpretations. The policies are primarily opposed by property owners and landlords, many of whom argue that they infringe on private property rights, give rental property occupants an unfair market advantage, and increase transaction costs for property sales.<sup>34</sup> Regarding market advantage, regular homebuyers and organizations that are not designated as qualified do not receive the same consideration as current tenants and qualified organizations even if their offers are higher. Regarding transaction costs, the timeline for property sales is extended and more legal counsel may be necessary to ensure opportunity to purchase rights are respected. Advocates consider these aspects of opportunity to purchase policies positives. They argue the policies “level the playing field for tenants and affordable housing developers” and create necessary opportunities

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<sup>34</sup> Scott Bruton and Gretchen Nicholls, [Opportunity to Purchase Policy Options Presentation](#) (November 2020).

for ownership and wealth building, especially for marginalized groups.<sup>35</sup> Market advantages and extended sale timelines are critical ways of doing so.

#### Case Study: Washington, District of Columbia

Congress enacted the District of Columbia Home Rule Act in 1973, affording residents of the District the right to self-governance, which ultimately gave rise to grassroots movements around a variety of issues. One of the most prominent of these issues was housing. Tenants in Washington, D.C. organized in 1973 to “demand stronger rent control laws, legislation discouraging speculation, and enforcement of building codes in response to a wave of mass evictions, condominium conversions, rapid gentrification, and housing conditions complaints.”<sup>36</sup> D.C. lawmakers used their new power quickly, passing a number of laws and regulations between 1974 and 1980 to address their concerns with particular focus on establishing tenants’ rights and preventing displacement. Rent control, stabilization of the condominium conversion process, compensation for tenants displaced by condominium conversion, just cause eviction controls, and opportunity to purchase were the primary strategies utilized to do so.

The opportunity to purchase strategy was implemented as the Tenant Opportunity to Purchase Act (TOPA) via the Rental Housing Conversion and Sales Act of 1980. Homeowners pay property taxes that many feel entitle them to influence community development initiatives and outcomes in their respective neighborhoods, but renters are not traditionally considered to have the same entitlement. However, despite not paying property taxes directly, their rent

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<sup>35</sup> East Bay Community Law Center, “[EBCLC’s Tenant Opportunity to Purchase Act \(TOPA\)](#)” (n.d.).

<sup>36</sup> Scott Bruton and Gretchen Nicholls, [Opportunity to Purchase Policy Options for the City of Minneapolis](#) (January 2021).

payments are the primary way that property owners can afford to do. Renters' unequal representation in public affairs, in combination with the myriad of social and financial reasons that people cannot or do not want to become homeowners, led tenants to demand justice. In the interest of empowering all residents in D.C., the Council introduced the Tenant Opportunity to Purchase Act as a mechanism for renters to influence community development in the event of a property sale the same way that homeowners do. There are eight purposes specified in TOPA that can be broadly summarized as preventing tenant displacement, preserving housing affordability, and protecting tenants' rights.<sup>37</sup>

The requirements and conditions of TOPA are many, but the core idea is simple. Before D.C. property owners can sell occupied residential rental housing to a third party, the tenants can exercise their first right of purchase – which includes both a right of first offer and a right of first refusal – as allowed by TOPA.<sup>38</sup> Tenants may exercise these rights independently or in partnership with another entity, or assign or sell them to another entity at their discretion.<sup>39</sup> TOPA protections apply to all people in the District regardless of income, occupying most rental units that are not single-family homes.

D.C. does not restrict TOPA sales to any particular outcome. Instead, the natural evolution of TOPA in D.C. has allowed three primary acquisition scenarios – continued rental housing, housing cooperative formation, and condominium conversions – to produce a range of outcomes that include rent protections; discounted cooperative membership or condominium purchase prices; property renovations; and cash payments.<sup>40</sup> In some cases, tenants achieve

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<sup>37</sup> [D.C. Code § 42-34](#)

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Aaron O'Toole and Benita Jones, "[Tenant Purchase Laws as a Tool for Affordable Housing Preservation: The D.C. Experience](#)", *Journal of Affordable Housing & Community Development Law*, 18(4): 367-388.

benefits independently through the tenant association they must form to take TOPA action. In other cases, they bargain with the entity to whom they assign or sell their TOPA rights to provide benefits as a condition of the transfer.

Danilo Pelletiere of the D.C. Department of Housing and Community Development (DHCD) likens TOPA rights to voting rights. He argues it is the role of government to provide information that helps D.C. residents understand their TOPA rights, much like it provides information about voter eligibility, voter registration, polling locations, and candidate platforms. Similarly, it is the role of government to enact consumer protection laws that increase transparency regarding TOPA rights and protect those who choose to exercise them, much like laws against voter suppression and fraud. “It must be actionable or it’s not actually a right,” Pelletiere states.

To support TOPA action, DHCD provides financial, technical, and legal assistance;<sup>41</sup> and awards Community Development Block Grant funds to community-development organizations who do the same. DHCD also manages the Housing Production Trust Fund,<sup>42</sup> which has been a critical source of support for low-income tenants interested in exercising their TOPA rights. The Trust Fund has financed acquisition and rehabilitation of hundreds of properties each year since its inception in 1988. The District does not track TOPA sale data, such as purchaser demographics, longevity of resulting property ownership, whether rights were assigned or sold to a third party, or whether affordability was maintained. Regardless of the specific details of the sale, TOPA compliance is managed through title companies, which verify that property ownership transfers are legitimate. These companies ensure TOPA requirements have been

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<sup>41</sup> D.C. Department of Housing and Community Development, “[Tenant Opportunity to Purchase Assistance](#)”, (2021).

<sup>42</sup> D.C. Department of Housing and Community Development, “[Housing Production Trust Fund](#)”, (2021).

fulfilled as part of the verification process, or else face massive fines. As a result, the policy practically becomes self-enforcing, as evidenced by the fact that DHCD employs no additional staff for TOPA compliance work.

What can Minnesota Housing learn?

A key takeaway from D.C. is that TOPA sales unrestricted to specific outcomes do not necessarily result in affordable housing or tenant ownership; in fact, they can interfere with affordability and ownership goals. If the sole goal of opportunity to purchase legislation is to preserve affordable rental housing, the approach taken by Washington, D.C. is not necessarily the correct one. However, as the first government entity to adopt this policy in the United States, it does provide a valuable foundation of knowledge and experience. Several other states and municipalities have already built on this foundation and adapted their opportunity to purchase proposals from D.C.'s TOPA to achieve their respective goals in the unique context of their communities.<sup>43</sup> For example, the City of San Francisco enacted a Community Opportunity to Purchase Act (COPA) in 2019 that restricts the outcome of sales to rent-restricted affordable housing.<sup>44</sup> The City of Berkeley is developing a Tenant Opportunity to Purchase Act that prohibits tenants and qualified nonprofit organizations from selling their opportunity to purchase rights.<sup>45</sup> New York State Senator Myrie introduced a Tenant Opportunity to Purchase Act that restricts the outcome of sales to limited equity cooperatives with restrictions on future sale prices.<sup>46</sup> These and other government entities must first define their policy goals, then

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<sup>43</sup> Julie Gilgoff, "[Giving Tenants the First Opportunity to Purchase Their Homes](#)", *Shelterforce* (July 2020).

<sup>44</sup> [San Francisco, California, Municipal Code § 41B](#)

<sup>45</sup> [Berkeley, California, Municipal Code § 13.89 \(Proposed\)](#)

<sup>46</sup> [N.Y. S.B. 3157 § 799 \(2021\)](#).

determine the particular opportunity to purchase stipulations that will help move towards them (e.g. who is assigned the right, what housing types are included, what outcomes are permitted, etc.).

The second takeaway from D.C. is that opportunity to purchase legislation must be supplemented by adequate financial, technical and legal assistance for it to be actionable. Given the complicated, time-consuming, and potentially expensive nature of TOPA, a comprehensive network of support is necessary to help tenants learn about and exercise their opportunity to purchase rights. This support can come from any number of sources, and will likely require a combination of many. For example, a housing advocacy organization could provide education and technical assistance to tenants pursuing purchases; a housing law center could facilitate tenant organizing and provide legal advice to inform negotiations; and a housing trust fund could provide gap financing to close on the property. Regardless of the source, most people require help navigating the opportunity to purchase process, especially marginalized groups who may not have the same access to capital or experience with property ownership as others. Potential benefits of the legislation will not be realized without it.

## Implement just cause eviction controls to help tenants establish security of tenure

Just cause eviction controls, also known as good cause eviction controls, are a tenant protection that prevents property owners and landlords from filing evictions and opting not to renew leases arbitrarily. It does not mean tenants cannot receive notice to move or be evicted at all. Rather, it limits allowable justifications for evictions and lease terminations to breaches of rental contract, removal of the property from the rental market, and other predefined causes. Evictions not only displace tenants in the immediate term, but also reduce the accessibility of future affordable housing options for which applicants will not be considered due to their eviction record. Lease terminations do not appear on eviction records, but the moves they force can be just as disruptive and devastating as those forced by evictions. Requiring just cause for evictions and lease terminations helps tenants establish housing tenure that can aid in preventing displacement.<sup>47</sup> No cause evictions and lease terminations are often precursors to NOAH investment with coordinating rent increases, so preventing them can help slow or halt the gentrification of affordable neighborhoods.

PolicyLink analysts claim, “Just cause eviction controls are an important tool for promoting tenant stability – particularly in low vacancy and expensive housing markets – where landlords may be tempted to evict tenants or terminate their leases in order to obtain higher rents.”<sup>48</sup> This is not as pressing of an issue in Minnesota, where property owners and landlords must have a legitimate reason to evict tenants,<sup>49</sup> and the lack of rent control means there is no incentive to pursue vacancy decontrol through evictions. However, Minnesota law does

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<sup>47</sup> NYU Furman Center, [Gentrification Response: A Survey of Strategies to Maintain Neighborhood Economic Diversity](#) (October 2016).

<sup>48</sup> PolicyLink, [Equitable Development Toolkit: Just Cause Eviction Controls](#) (March 2002).

<sup>49</sup> [Minn. Stat. § 504B.285](#)

currently allow termination of a lease at its expiration date without justification for nonrenewal, given that tenants are provided proper notice as required by the lease terms and the law.<sup>50</sup> Just cause eviction controls do not include lease expiry as an allowable justification for lease nonrenewal or eviction, which promotes tenant and neighborhood stability by reducing resident turnover, especially in communities where month-to-month leases are more common.<sup>51</sup>

Just cause eviction controls are not without their challenges. In particular, there is a national trend of weakening and removing existing controls in the name of protecting private property rights and allowing the free market to stabilize rents without government intervention.<sup>52</sup> Just cause eviction controls can, in fact, make filing evictions more cumbersome and increase the costs of doing so to landlords, which may disincentivize property investment and maintenance. However, the argument that the market can provide housing for all who seek it at rents they can afford without government intervention is demonstrably false. There is not enough flexibility in tight housing markets for supply to meet the full spectrum of demand, and the competition for scarce units results in skewedness toward high rents that cause displacement of low-income families.

#### Case Study: State of New Jersey

A New Jersey tenants' movement formed in 1969 in moderate-income New York suburbs to protest substantial rent increases and poor maintenance in their large apartment complexes, and their inability to stop renting due to the prohibitively high cost of single-family homes. Out

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<sup>50</sup> Ibid.

<sup>51</sup> University of Minnesota Center for Urban and Regional Affairs, [The Illusion of Choice: Evictions and Profit in North Minneapolis](#) (2019).

<sup>52</sup> PolicyLink, [Equitable Development Toolkit: Just Cause Eviction Controls](#) (March 2002).

of this movement came the New Jersey Tenants Organization, which helped tenants organize and advocate for rent control and other tenant protections at both the state and local levels. Though a state rent control act was never passed, over 100 municipalities in New Jersey have since passed local rent control ordinances.<sup>53</sup> Instead, the State of New Jersey enacted the Anti-Eviction Act in 1974, making it the first of only a handful of states to introduce state level just cause eviction controls in the United States. The Anti-Eviction Act requires that landlords and property owners can demonstrate grounds for lease nonrenewal and evictions to protect blameless tenants from displacement, especially during the statewide housing shortage New Jersey experienced at the time of the Act's passing.

Grounds for eviction in New Jersey include failure to pay rent, disorderly conduct, damage or destruction to the property, substantial violation or breach of landlord's rules and regulations, violation or breach of lease, failure to pay rent increases, property health and safety violations, and removal of the property from the rental market.<sup>54</sup> For each allowable justification, nonpayment of rent excluded, the landlord must describe the justification in a written notice to the tenant and provide a "Notice to Quit" formally ending the tenancy. Some circumstances require provision of a "Notice to Cease" warning the tenant to stop their conduct before a "Notice to Quit" can be issued. When a landlord files suit for eviction, they must provide evidence in court that grounds for the eviction are present.<sup>55</sup>

One allowable justification for eviction, failure to pay rent increases, comes with a caveat that is critical to the success of the Anti-Eviction Act as a tenant protection. Rent cannot be

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<sup>53</sup> Kenneth Baar, "[Rent Control in the 1970's: The Case of the New Jersey Tenants' Movement](#)", *Hastings Law Journal*, 28(3): 631-683.

<sup>54</sup> New Jersey Department of Community Affairs, "[Grounds for an Eviction Bulletin](#)" (February 2008).

<sup>55</sup> *Ibid.*

increased until a lease expires, tenants must be provided a written notice of increases, and increases cannot be so large that they are “unconscionable” (i.e. unreasonably harsh).<sup>56</sup> There is no specified dollar or percentage amount that makes an increase unconscionable; rather, what meets this nebulous criteria depends on the circumstances of the housing market and the property in question. “[Some] rent increases are unconscionable because the increase is much larger than the prior rent, or because the landlord has asked for many small increases in a short period of time that all add up to a large increase. [Smaller increases may also] be unconscionable if the conditions in the building are very bad and the landlord has failed to make needed repairs.”<sup>57</sup> Restrictions on unconscionable rent increases are subordinate to federally prescribed rent controls on subsidized units and rent control ordinances in the municipalities in New Jersey that have chosen to adopt them.<sup>58</sup>

Most rental housing occupants in New Jersey are protected by the Anti-Eviction Act, including those in single-family homes, apartments, rooming or boarding houses, mobile homes, and sometimes even hotels and motels.<sup>59</sup> The primary exception is tenants of owner-occupied properties with three or fewer units, who may be evicted without grounds at the time of lease expiry. Enactment of the Anti-Eviction Act in New Jersey has proven successful in reducing the number of evictions. According to the Eviction Lab at Princeton University, the state had higher eviction filing rates but lower eviction rates than the national average every year between 2000 and 2016.<sup>60</sup>

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<sup>56</sup> Legal Services of New Jersey, “[Your Rights Around Rent Increases](#)” (n.d.).

<sup>57</sup> Ibid.

<sup>58</sup> [N.J. Stat. Ann. § 2A:18-61](#)

<sup>59</sup> Legal Services of New Jersey, “[The Tenant’s Right to Court Process](#)” (n.d.).

<sup>60</sup> Eviction Lab, “[New Jersey, USA](#)” (n.d.).

What can Minnesota Housing learn?

Just cause eviction controls are not necessarily meant to be implemented independently of other policies. Apparent legal loopholes include significant rent increases, introduction of exclusionary screening protocols, and newfound refusal to accept housing assistance vouchers, all of which can function as evictions without triggering just cause eviction controls. An oft-cited example of informal evictions is Crossroads Apartments in Richfield, Minnesota, where new owners utilized these tactics to eliminate almost 700 NOAH units and displace 95% of original tenants without filing a single eviction. Without supplementary tenant protections, just cause eviction controls may not have prevented the majority of displacement at Crossroads, especially if failing to meet new screening criteria is not an allowable justification for lease nonrenewal or eviction. Rent control is the most effective supplement, but restrictions on rent increases like New Jersey's that do not rise to the level of formal rent control are likely more politically palatable. This is especially true in Minnesota, where state laws prohibiting rent control expressly preempt municipal implementation of rent control ordinances unless they are approved in a general election.<sup>61</sup> Restrictions still provide an additional layer of protection for vulnerable tenants like those at Crossroads by making the eviction controls less circumventable.

It is also important to determine in which units and under what circumstances tenants are protected by just cause eviction controls based on the specific goals of the policy. New Jersey applies them to most rental properties in the state, but they can be more narrowly targeted. For example, the City of San Francisco and New York State only apply them to rent-regulated units; the City of Seattle applies them to month-to-month tenancies and verbal

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<sup>61</sup> [Minn. Stat. § 471.9996](#)

agreements; and the City of Portland requires landlords to pay relocation assistance to tenants who must move due to an eviction without cause or a rent increase of at least 10%.<sup>62</sup> After the scale of just cause eviction controls is determined, strict and comprehensive enforcement mechanisms are necessary to ensure tenants' rights are actionable and policy goals can be achieved. Rental housing occupants in New Jersey cannot be evicted without a hearing and a judgment for possession from the New Jersey Superior Court.<sup>63</sup> However, most go to court without a lawyer.<sup>64</sup> To further minimize the odds of tenant displacement, Minnesota Housing could supplement this right to court process with an additional right to legal counsel so tenants are properly represented regardless of income level. As of January 2021, the right to legal counsel in eviction proceedings was guaranteed in seven cities – New York, NY; San Francisco, CA; Newark, NJ; Cleveland, OH; Philadelphia, PA; Boulder, CO; and Baltimore, MD – and has proven effective in keeping people in their homes.<sup>65</sup>

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<sup>62</sup> Local Housing Solutions, [Just cause eviction controls](#) (n.d.).

<sup>63</sup> New Jersey Courts, "[Information for Tenants](#)" (2018).

<sup>64</sup> Colleen O'Dea, "[Interactive Map: Eviction Filings Dip to Lowest Level in More than a Decade](#)", NJ Spotlight News (August 2018).

<sup>65</sup> Sarah Park and John Pollock, "[Tenants' Right to Counsel is Critical to Fight Mass Evictions and Advance Race Equity During the Pandemic and Beyond](#)", *American Civil Liberties Union* (2021).

## Conclusion

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Moral obligation pledges, regional NOAH management, opportunity to purchase policies, and just cause eviction controls are only a few of the NOAH preservation strategies that exist in states and municipalities throughout the country. Under current circumstances, they appear to be the most feasible in Minnesota, but there are so many more potential strategies to explore. These include rent control, community land trusts, cooperatives, manufactured home parks, affordable housing trust funds, right to legal counsel during evictions, and inclusionary zoning, among others.

Regardless of the specific NOAH preservation strategies used, however, disparate sources of technical, financial, and legal support for both landlords and tenants, in combination with a widespread lack of awareness of their respective rights and responsibilities, pose major barriers to their efficacy. This is particularly challenging for small, owner-occupied NOAH properties whose landlords do not have the time, resources, or experience to easily navigate existing housing programs and policies, let alone new ones. Tenants – especially those who traditionally have difficulty maintaining high credit, accessing job sites, earning livable wages, navigating their immigration status, using technology, or speaking English proficiently – face similar problems. Knowledge breeds power, but it is not currently being disseminated in a strategic, intentional way so landlords and tenants cannot easily utilize it.

A central landing page on the Minnesota Housing website with links to resources categorized by need could be the difference between security and displacement for some families. The City of Austin, Texas, compiled financial and legal resources for local property owners who feel pressure from aggressive real estate investors and changing neighborhoods,

feel financial stress from maintaining their homes, or own homes that require upgrades to make it safer to age-in-place.<sup>66</sup> This model is an excellent foundation on which Minnesota Housing can build to provide landlords and tenants with information to help maintain housing safety and affordability. To complement digital information and reach those who cannot access technology or have low digital literacy, local organizations should conduct grassroots outreach and trainings with particular focus on neighborhoods with high portions of NOAH property. This will ensure knowledge of and engagement with relevant housing programs and policies so landlords provide quality housing and tenants feel secure in their neighborhoods.

With a thoughtful combination of preservation strategies and statewide dedication to publicizing and promoting them, the stock of NOAH property has potential to withstand the pressures of market speculation. Moral obligation pledges, regional NOAH management, opportunity to purchase policies, and just cause eviction controls all require either statutory changes or intergovernmental collaboration or both, however. As such, they require commitment and cooperation from a wide range of stakeholders to come to fruition, and time is of the essence if they are to successfully support NOAH preservation efforts.

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<sup>66</sup> City of Austin, TX. "[Austin Is My Home](#)" (2021).