HOUSE DOCKET, NO. 4763 FILED ON: 5/5/2016

HOUSE . . . . . No. 4317

The Commonwealth of Massachusetts

PRESENTED BY:

Timothy R. Madden and Daniel A. Wolf

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act authorizing the Town of Nantucket to impose a real estate transfer fee for affordable and workforce housing.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Timothy R. Madden	*Barnstable, Dukes and Nantucket*
Daniel A. Wolf	*Cape and Islands*

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HOUSE . . . . . No. 4317

By Representative Madden of Nantucket and Senator Wolf, a joint petition (accompanied by bill, House, No. 4317) of Timothy R. Madden and Daniel A. Wolf (by vote of the town) that the town of Nantucket be authorized to impose a real estate transfer fee. Municipalities and Regional Government. [Local Approval Received.]

The Commonwealth of Massachusetts

In the One Hundred and Eighty-Ninth General Court
(2015-2016)

An Act authorizing the Town of Nantucket to impose a real estate transfer fee for affordable and workforce housing.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. For purposes of this act, the words and phrases set forth in this section shall have the following meanings:

"Affordable Housing Restriction" is a recorded instrument held by a qualified holder which encumbers and/or restricts a real property interest so that the real property interest is perpetually or for a term of at least thirty (30) years limited to use as a residence occupied by a low or moderate income household which earns less than a specified income level, the upper limit of which may not exceed one hundred seventy-five percent (175%) of the Nantucket median income. A "qualified holder" is a governmental body or charitable corporation or trust which qualifies under the terms of Massachusetts General Laws Chapter 184 ("Chapter 184") to hold an affordable housing restriction. Without limiting the generality of the foregoing, "Affordable Housing Restriction" includes but is not limited to any instrument which conforms

12 to the requirements of (i) a Nantucket Housing Needs Covenant as described in Chapter 301 of
13 the Acts of 2002 and defined in the Town of Nantucket Code.

14 "Eligible Applicants", shall refer to non-profit and for-profit corporations and
15 organizations, individuals, and public entities.

16 "Purchaser", shall refer to the transferee, grantee or recipient of any real property interest.

17 "Purchase price", all consideration paid or transferred by or on behalf of a purchaser to a
18 seller or his nominee, or for his benefit, for the transfer of any real property interest, and shall
19 include, but not be limited to, all cash or its equivalent so paid or transferred; all cash or other
20 property paid or transferred by or on behalf of the purchaser to discharge or reduce any
21 obligation of the seller; the principal amount of all notes or their equivalent, or other deferred
22 payments, given or promised to be given by or on behalf of the purchaser to the seller or his
23 nominee; the outstanding balance of all obligations of the seller which are assumed by the
24 purchaser or to which the real property interest transferred remains subject after the transfer,
25 determined at the time of transfer, but excluding real estate taxes and other municipal liens or
26 assessments which are not overdue at the time of transfer; the fair market value, at the time of
27 transfer, of any other consideration or thing of value paid or transferred by or on behalf of the
28 purchaser, including, but not limited to, any property, goods or services paid, transferred or
29 rendered in exchange for such real property interest.

30 "Real property interest", shall refer to any present or future legal or equitable interest in
31 or to real property, and any beneficial interest therein, including the interest of any beneficiary in
32 a trust which holds any legal or equitable interest in real property, the interest of a partner or
33 member in a partnership or limited liability company, the interest of a stockholder in a

34 corporation, the interest of a holder of an option to purchase real property, the interest of a buyer
35 or seller under a contract for purchase and sale of real property, and the transferable development
36 rights created under chapter 183A of the General Laws; but shall not include any interest which
37 is limited to any of the following: the dominant estate in any easement or right of way; the right
38 to enforce any restriction; any estate at will or at sufferance; any estate for years having a term of
39 less than 30 years; any reversionary right, condition, or right of entry for condition broken; and
40 the interest of a mortgagee or other secured party in any mortgage or security agreement.

41 "Seller", shall refer to the transferor, grantor or immediate former owner of any real
42 property interest.

43 "Time of transfer" of any real property interest shall mean the time at which such transfer
44 is legally effective as between the parties thereto, and, in any event, with respect to a transfer
45 evidenced by an instrument recorded with the appropriate registry of deeds or filed with the
46 assistant recorder of the appropriate registry district, not later than the time of such recording or
47 filing.

48 “Town” shall refer to the Town of Nantucket acting by and through the Board of
49 Selectmen.

50 SECTION 2. There is hereby imposed a fee equal to one per cent (1%) of the purchase
51 price upon the transfer of any real property interest in any real property situated in Nantucket
52 County. Said fee shall be the liability of the seller of such real property interest, and any
53 agreement between the purchaser and the seller or any other person with reference to the
54 allocation of the responsibility for bearing said fee shall not affect such liability of the seller.
55 The fee shall be paid to the Town of Nantucket, or its designee, and shall be accompanied by a

56 copy of the deed or other instrument evidencing such transfer, if any, and an affidavit signed
57 under oath or under the pains and penalties of perjury by the purchaser or his legal representative
58 and the seller or his legal representative, attesting to the true and complete purchase price and the
59 basis, if any, upon which the transfer is claimed to be exempt in whole or in part from the fee
60 imposed hereby. The Town, or its designee, shall promptly thereafter execute and issue a
61 certificate indicating that the appropriate fee has been paid or that the transfer is exempt from the
62 fee, stating the basis for the exemption. The register of deeds for Nantucket County, and the
63 assistant recorder for the registry district of Nantucket County, shall not record or register, or
64 receive or accept for recording or registration, any deed, except a mortgage deed, to which has
65 not been affixed such a certificate executed by the Town or its designee. Failure to comply with
66 this requirement shall not affect the validity of any instrument. The Town shall deposit all fees
67 received hereunder with the Town treasurer. The treasurer shall deposit such fees in the
68 Affordable Housing Trust Fund. The fee imposed hereunder shall be due simultaneously with the
69 time of transfer of the transfer upon which it is imposed. Notwithstanding the foregoing,
70 whenever there is a conveyance of real property interests and a conveyance of personalty related
71 thereto at or about the same time, the allocations of payments between real estate and personalty
72 agreed to by the purchaser and seller shall not determine the amount of the fee due pursuant to
73 this section; instead, the Town may require payment of the fee referred to in real property
74 interests so conveyed as determined by the Town.

75 SECTION 3. At any time within seven days following the issuance of the certificate of
76 payment of the fee imposed by section two, the seller or his legal representative may return said
77 certificate to the Town or its designee for cancellation, together with an affidavit signed under
78 oath or under the pains and penalties of perjury that the transfer, with respect to which such

79 certificate was issued, has not been consummated, and thereupon the fee paid with respect to
80 such transfer shall be forthwith returned to the seller or his legal representative.

81 SECTION 4. The following transfers of real property interests shall be exempt from the
82 fee established by section 10. Except as otherwise provided, the seller shall have the burden of
83 proof that any transfer is exempt under this section and any otherwise exempt transfer shall not
84 be exempt in the event that such transfer (by itself or as part of a series of transfers) was made
85 for the primary purpose of evading the fee imposed by Section 10.

86 (a) Transfers to the government of the United States, the commonwealth, and any of their
87 instrumentalities, agencies or subdivisions, including but not limited to transfers to the Town of
88 Nantucket, the County of Nantucket.

89 (b) Transfers which, without additional consideration, confirm, correct, modify or
90 supplement a transfer previously made.

91 (c) Transfers made as gifts without consideration. In any proceedings to determine the
92 amount of any fee due hereunder, it shall be presumed that any transfer for consideration of less
93 than fair market value of the real property interest transferred was made as a gift without
94 consideration to the extent of the difference between the fair market value of the real property
95 interest transferred and the amount of consideration claimed by the seller to have been paid or
96 transferred, if the purchaser shall have been at the time of transfer the spouse, the lineal
97 descendant, or the lineal ancestor of the seller, by blood or adoption, and otherwise it shall be
98 presumed that consideration was paid in an amount equal to the fair market value of the real
99 property interest transferred, at the time of transfer.

100 (d) Transfer to the trustees of a trust in exchange for a beneficial interest received by the
101 purchaser in such trust; distributions by the trustees of a trust to the beneficiaries of such trust.

102 (e) Transfers by operation of law without actual consideration, including but not limited
103 to transfers occurring by virtue of the death or bankruptcy of the owner of a real property
104 interest.

105 (f) Transfers made in partition of land and improvements thereto, under chapter two
106 hundred and forty-one of the General Laws.

107 (g) Transfers to any charitable organization as defined in clause Third of section five of
108 chapter fifty-nine of the General Laws, or any religious organization, provided that the real
109 property interest so transferred will be held by the charitable or religious organization solely for
110 its public charitable or religious purposes.

111 (h) Transfers to a mortgagee in foreclosure of the mortgage held by such mortgagee, and
112 transfers of the property subject to a mortgage to the mortgagee in consideration of the
113 forbearance of the mortgagee from foreclosing said mortgage.

114 (i) Transfers made to a corporation or partnership or limited liability company at the time
115 of its formation, pursuant to which transfer no gain or loss is recognized under the provisions of
116 section three hundred and fifty-one or seven hundred and twenty-one of the Internal Revenue
117 Code of 1986, as amended; provided, however, that such transfer shall be exempt only in the
118 event that (1) with respect to a corporation, the transferor retains an interest in the newly formed
119 corporation which is equivalent to the interest the transferor held prior to the transfer, or (2) with
120 respect to a partnership or limited liability company, the transferor retains after such formation

121 rights in capital interests and profit interests within such partnership or limited liability company
122 which are equivalent to the interest the transferor held prior to the transfer.

123 (j) Transfers made to a stockholder of a corporation in liquidation or partial liquidation of
124 the corporation, and transfers made to a partner of a partnership or to a member of a limited
125 liability company in dissolution or partial dissolution of the partnership or limited liability
126 company; but the transfer shall be exempt only if (i) with respect to a corporation, the transferee
127 receives property (including real property interests and other property received) which is the
128 same fraction of the total property of the transferor corporation as the fraction of the
129 corporation's stock owned by the transferee prior to the transfer or (ii) with respect to a
130 partnership or limited liability company, the transferee receives property (including real property
131 interests and other property received) which is the same fraction of the property of the
132 partnership or limited liability company as the fraction of the capital and profit interests in the
133 transferor formerly owned by the transferee.

134 (k) Transfers consisting of the division of marital assets under the provisions of section
135 thirty-four of chapter two hundred and eight of the General Laws or other provisions of law.

136 (l) Transfers of property consisting in part of real property interests situated in Nantucket
137 County and in part of other property interests, to the extent that the property transferred consists
138 of property other than real property situated in Nantucket county; provided that the purchaser
139 shall furnish the Town with such information as it shall require or request in support of the claim
140 of exemption and manner of allocation of the consideration for such transfers.

141 (m) The first $2 million of the sale price of any transfer or series of transfers of real
142 property interests in a single transaction. Said exemption may be adjusted as determined by the
143 affirmative vote of two-thirds of voters at an annual or special town meeting.

144 (n) Transfers of minority interests in corporations, trusts, partnerships or limited liability
145 companies which are publicly traded, which trades are not part of a series of transfers which
146 together constitute a transfer of control of a corporation, trust, partnership or limited liability
147 company.

148 SECTION 5. (a) The Town treasurer shall keep a full and accurate account stating when,
149 from or to whom, and on what account money has been paid or received relative to the activities
150 of the Trust Fund and the Housing Fund. Said account shall be subject to examination by the
151 director of accounts or his agent pursuant to section forty four of chapter thirty five of the
152 General Laws.

153 (b) Schedules of beneficiaries of trusts, list of stockholders of corporations and lists of
154 partnerships filed with the Trust Fund for the purpose of determining or fixing the amount of the
155 fee imposed under section ten or for the purpose of determining the existence of any exemption
156 under section twelve shall not be public records for the purposes of section ten of chapter sixty-
157 six of the General Laws.

158 SECTION 6. A seller who fails to pay all or any portion of the fee established by section
159 two on or before the time when the same is due shall be liable for the following additional
160 payments in addition to said fee:

161 (a) Interest: The seller shall pay interest on the unpaid amount of the fee to be calculated
162 from the time of transfer at a rate equal to fourteen per cent per annum.

163 (b) Penalties: Any person who, without fraud or willful intent to defeat or evade a fee
164 imposed by this chapter, fails to pay all or a portion of the fee within thirty days after the time of
165 transfer, shall pay a penalty equal to five per cent of the outstanding fee as determined by the
166 Town for each month or portion thereof thereafter that the fee is not paid in full; provided,
167 however, that in no event shall the amount of any penalty imposed hereunder exceed twenty five
168 per cent of the unpaid fee due at the time of transfer. Whenever the Town determines that all or
169 a portion of a fee due under this chapter was unpaid due to fraud with intent to defeat or evade
170 the fee imposed by this chapter, a penalty equal to the amount of said fee as determined by the
171 Town shall be paid by the seller in addition to said fee.

172 SECTION 7. (a) The Town shall notify the purchaser and the seller by registered or
173 certified mail of any failure to discharge in full the amount of the fee due under this Act and any
174 penalty or interest assessed. The Town shall grant a hearing on the matter of the imposition of
175 said fee, or of any penalty or interest assessed, if a petition requesting such hearing is received by
176 the Town within thirty days after the mailing of said notice. The Town shall notify the purchaser
177 and the seller in writing by registered or certified mail of its determination concerning the
178 deficiency, penalty or interest within fifteen days after said hearing. Any party aggrieved by a
179 determination of the Town concerning a deficiency, penalty or interest may, after payment of
180 said deficiency, appeal to the district or superior court within three months after the mailing of
181 notification of the determination of the Town. Upon the failure to timely petition for a hearing,
182 or appeal to said courts, within the time limits hereby established, the purchaser and seller shall
183 be bound by the terms of the notification, assessment or determination, as the case may be, and
184 shall be barred from contesting the fee, and any interest and penalty, as determined by the Town.
185 All decisions of said courts shall be appealable. Every notice to be given under this section by

186 the Town shall be effective if mailed by certified or registered mail to the purchaser or the seller
187 at the address stated in a recorded or registered instrument by virtue of which the purchaser holds
188 any interest in land, the transfer of which gives rise to the fee which is the subject of such notice;
189 and if no such address is stated or if such transfer is not evidenced by an instrument recorded or
190 registered in the public records in Nantucket County, such notice shall be effective when so
191 mailed to the purchaser or seller in care of any person appearing of record to have a fee interest
192 in such land, at the address of such person as set forth in an instrument recorded or registered in
193 Nantucket County.

194 (b) All fees, penalties and interest required to be paid pursuant to this chapter shall
195 constitute a personal debt of the seller and may be recovered in an action of contract or in any
196 other appropriate action, suit or proceeding brought by the Town; said action, suit or proceeding
197 shall be subject to the provisions of chapter two hundred and sixty of the General Laws.

198 (c) If any seller liable to pay the fee established by this act neglects or refuses to pay the
199 same, the amount, including any interest and penalty thereon, shall be a lien in favor of the Town
200 upon all property and rights to property, whether real or personal, belonging to either such
201 purchaser or such seller. Said lien shall arise at the time of transfer and shall continue until the
202 liability for such amount is satisfied. Said lien shall in any event terminate not later than six
203 years following the time of transfer. Said lien shall not be valid as against any mortgagee,
204 pledgee, purchaser or judgment creditor unless notice thereof has been filed by the Town (i) with
205 respect to real property or fixtures, in the registry of deeds for Nantucket County, or (ii) with
206 respect to personal property, in the office in which a security or financing statement or notice
207 with respect to the property would be filed in order to perfect a nonpossessory security interest

208 belonging to the person named in the relevant notice, subject to the same limitations as set forth
209 in section fifty of chapter sixty two C of the General Laws.

210 (d) Sellers applying for an exemption under subsections (a) through (o) of section four
211 shall be required at the time of application for exemption to execute an agreement legally
212 binding on sellers and separately legally binding upon any Legal Representative of the sellers (1)
213 assuming complete liability for any fee, plus interest and penalties if any, waived on account of
214 an allowed exemption subsequently determined to have been invalid, and (2) submitting to the
215 jurisdiction of the trial court of the commonwealth sitting in Nantucket County. Fees, plus
216 interest and penalties if any, shall be calculated as of the date of the initial property transfer.
217 Execution of the above-described agreement shall not be required of any mortgagee, pledge,
218 purchaser or judgment creditor unless notice of the agreement has been recorded or filed by the
219 Town.

220 In any case where there has been a refusal or neglect to pay any fee, interest or penalties
221 imposed by this act, whether or not levy has been made, the Town, in addition to other modes of
222 relief, may direct a civil action to be filed in a district or superior court of the commonwealth to
223 enforce the lien of the Town under this section with respect to such liability or to subject any
224 property of whatever nature, of the delinquent, or in which he has any right, title or interest, to
225 the payment of such liability.

226 The Town may issue a waiver or release of any lien imposed by this section. Such
227 waiver or release shall be conclusive evidence that the lien upon the property covered by the
228 waiver or release is extinguished.

229 SECTION 8. The fee described by Section 2 shall be of ten-year duration from the date
230 this legislation take effect. This fee may continue for five-year periods by a majority vote at
231 Town Meeting reauthorizing the fee. The fee described by Section 2 may be 1) decreased, or 2)
232 eliminated by a two-thirds vote of Town Meeting. The threshold exemption described in Section
233 4 (m) may similarly be raised by an affirmative two-thirds vote of Town Meeting. In the event
234 that Town Meeting does not renew the fee at the ten-year anniversary, or any subsequent five
235 year anniversary, or Town Meeting votes to eliminate the fee, the balance of any fees previously
236 collected shall be transferred to the Town of Nantucket and held by the Treasurer in a separate
237 account, and shall first be used to satisfy any outstanding liabilities or obligations incurred by the
238 Town of Nantucket or the Affordable Housing Trust as a result of imposition of the fee, and the
239 remainder may be expended without further appropriation by the Board of Selectmen for
240 affordable housing purposes. In the event that the liabilities and obligations of the Town of
241 Nantucket or the Affordable Housing Trust exceed the amounts transferred to the Town, the fee
242 shall remain in full force and effect until such liabilities and obligations have been satisfied.

243 SECTION 9. The provisions of this act are severable, and if any provision hereof,
244 including without limitation any exemption from the fee imposed hereby, shall be held invalid in
245 any circumstances such invalidity shall not affect any other provisions or circumstances. This
246 act shall be construed in all respects so as to meet all constitutional requirements. In carrying out
247 the purposes and provisions of this act, all steps shall be taken which are necessary to meet
248 constitutional requirements whether or not such steps are required by statute.

249 SECTION 10. If the Town has determined that a fee is due by asserting the application of
250 the evasion of fee doctrine described in Section 2, then the seller shall have the burden of
251 demonstrating by clear and convincing evidence as determined by the Town that the transfer, or

252 series of transfers, possessed both: (i) a valid, good faith business purpose other than avoidance
253 of the fee set forth in Section 2 and (ii) economic substance apart from the asserted fee avoidance
254 benefit. In all such cases, the transferee shall also have the burden of demonstrating by clear and
255 convincing evidence as determined by the Town that the asserted non-fee-avoidance business
256 purpose is commensurate with the amount of the fee pursuant to Section 2 to be thereby avoided.

257 SECTION 11. This act shall take effect ninety (90) days following the date of passage.