

HOUSE No. 2895

The Commonwealth of Massachusetts

PRESENTED BY:

Dylan A. Fernandes and Elizabeth A. Malia

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 empowering cities and towns to impose a fee on home sales over one million dollars to support affordable housing.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
<i>Dylan A. Fernandes</i>	<i>Barnstable, Dukes and Nantucket</i>	<i>2/17/2021</i>
<i>Elizabeth A. Malia</i>	<i>11th Suffolk</i>	<i>2/19/2021</i>
<i>Michelle L. Ciccolo</i>	<i>15th Middlesex</i>	<i>5/13/2021</i>
<i>Mindy Domb</i>	<i>3rd Hampshire</i>	<i>7/23/2021</i>
<i>Marjorie C. Decker</i>	<i>25th Middlesex</i>	<i>3/24/2022</i>

HOUSE No. 2895

By Representatives Fernandes of Falmouth and Malia of Boston, a petition (accompanied by bill, House, No. 2895) of Dylan A. Fernandes and Elizabeth A. Malia for legislation to authorize cities and towns to impose a fee up to 2 per cent of the purchase price upon the transfer of certain real property. Revenue.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 2457 OF 2019-2020.]

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-Second General Court
(2021-2022)**

An Act empowering cities and towns to impose a fee on home sales over one million dollars to support affordable housing.

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

1 Chapter 44 of the General Laws is hereby amended by inserting after section 55C the
2 following section:-

3 Section 55D. (a) For purposes of this section, the following words shall, unless the
4 context clearly requires otherwise, have the following meanings:-

5 “Affordable housing restriction”, a recorded instrument held by a qualified holder which
6 encumbers or restricts a real property interest so that the real property interest is perpetually or
7 for a term of not less than 30 years limited to use as a residence occupied by a low or moderate

8 income household which earns less than a specified income level, the upper limit of which may
9 not exceed 225 per cent of the city or town’s median income.

10 “Purchaser”, the transferee, grantee or recipient of any real property interest.

11 “Purchase price”, all consideration paid or transferred by or on behalf of a purchaser to a
12 seller or the seller’s nominee, or for the seller’s benefit, for the transfer of any real property
13 interest, including, but not be limited to: (i) all cash or its equivalent so paid or transferred; (ii)
14 all cash or other property paid or transferred by or on behalf of the purchaser to discharge or
15 reduce any obligation of the seller; (iii) the principal amount of all notes or their equivalent, or
16 other deferred payments, given or promised to be given by or on behalf of the purchaser to the
17 seller or the seller’s nominee; (iv) the outstanding balance of all obligations of the seller which
18 are assumed by the purchaser or to which the real property interest transferred remains subject
19 after the transfer, determined at the time of transfer, excluding real estate taxes and other
20 municipal liens or assessments which are not overdue at the time of transfer; and (v) the fair
21 market value, at the time of transfer, of any other consideration or thing of value paid or
22 transferred by or on behalf of the purchaser, including, but not limited to, any property, goods or
23 services paid, transferred or rendered in exchange for such real property interest.

24 “Qualified holder”, any governmental body or by a charitable corporation or trust whose
25 purposes include creating or retaining or assisting in the creation or retention of affordable rental
26 or other housing for occupancy by persons or families of low or moderate income.

27 “Real property interest”, any present or future legal or equitable interest in or to real
28 property and any beneficial interest therein, including the interest of any beneficiary in a trust
29 which holds any legal or equitable interest in real property, the interest of a partner or member in

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

39 “Seller”, the transferor, grantor or immediate former owner of any real property interest.

40 “Time of transfer”, the time at which the transfer of any real property interest is legally
41 effective as between the parties thereto, and, in any event, with respect to a transfer evidenced by
42 an instrument recorded with the appropriate registry of deeds or filed with the assistant recorder
43 of the appropriate registry district, not later than the time of such recording or filing.

44 (b) In any city or town that accepts this section in the manner provided in section
45 4 of chapter 4, the city or town may impose an excise upon the transfer of any real property
46 interest in any real property situated in the city or town of equal to not more than 1.8 per cent of
47 the portion of the purchase price. There shall be an exemption equal to \$1,000,000; provided,
48 that the exemption may be increased by an affirmative vote of a majority of voters of the city or
49 town’s legislative body. The excise shall be due from the purchaser of real property interest, and
50 any agreement between the purchaser and the seller or any other person with reference to the
51 allocation of the responsibility for paying the excise shall not affect the duty of the purchaser.

52 The excise shall be paid to the city or town, or its designee, and shall be accompanied by a copy
53 of the deed or other instrument evidencing such transfer, if any, and an affidavit signed under
54 oath or under the pains and penalties of perjury by the purchaser or the purchaser's legal
55 representative and the seller or the seller's legal representative, attesting to the true and complete
56 purchase price and the basis, if any, upon which the transfer is claimed to be exempt in whole or
57 in part from the excise. The city or town, or its designee, shall promptly thereafter execute and
58 issue a certificate indicating that the excise has been paid or that the transfer is exempt from the
59 excise, stating the basis for the exemption. The register of deeds for the county in which the city
60 or town is located, and the assistant recorder for the registry district of the county in which the
61 city or town is located, shall not record or register, or receive or accept for recording or
62 registration, any deed, except a mortgage deed, to which a certificate is not affixed. Failure to
63 comply with this requirement shall not affect the validity of any instrument.

64 The city or town shall deposit all monies received pursuant to this subsection with the
65 city or town's treasurer. The treasurer shall deposit the monies in the city or town's Municipal
66 Affordable Housing Trust Fund established pursuant to section 55C or any other affordable
67 housing trust fund established by general or special law providing for the creation and
68 preservation of affordable housing in municipalities for the benefit of low and moderate income
69 households or for the funding of community housing, as defined in and in accordance with
70 chapter 44B. If no municipal or regional fund exists for a city or town, the treasurer shall pay the
71 monies to the treasurer and receiver general of the commonwealth, who shall deposit the monies
72 in the Affordable Housing Trust Fund established by chapter 121D. Notwithstanding the terms
73 and conditions of the expenditure of funds from the city or town's Municipal Affordable
74 Housing Trust Fund, Affordable Housing Trust Fund established by chapter 121D or any other

75 affordable housing trust fund established by general or special law providing for the creation and
76 preservation of affordable housing, monies deposited in said funds pursuant to this section shall
77 be expended to create and preserve affordable housing through the use of affordable housing
78 restrictions.

79 The excise shall be due simultaneously at the time of transfer of the transfer upon which
80 it is imposed. Notwithstanding the foregoing, whenever there is a conveyance of real property
81 interests and a conveyance of personalty related thereto at or about the same time, the allocations
82 of payments between real estate and personalty agreed to by the purchaser and seller shall not
83 determine the amount of the excise due pursuant to this section; instead, the city or town may
84 require payment of the excise referred to in real property interests so conveyed as determined by
85 the city or town.

86 (c) In addition to the excise in subsection (b), in any city or town that accepts this
87 section in the manner provided in section 4 of chapter 4, there shall be an excise upon the
88 transfer of any real property interest in any real property situated in the city or town equal to 0.2
89 per cent the purchase price. . There shall be an exemption equal to \$1,000,000; provided, that
90 the exemption may be increased by an affirmative vote of a majority of voters of the city or
91 town's legislative body. The excise shall be the duty of the purchaser of the real property
92 interest, and any agreement between the purchaser and the seller or any other person with
93 reference to the allocation of the responsibility for bearing the excise shall not affect the duty of
94 the purchaser. The excise shall be paid to the department of housing and community
95 development; provided, that the department shall expend 50 per cent of the monies received for
96 the residential assistance to families in transition program and shall deposit 50 per cent of the
97 monies received in the Affordable Housing Trust Fund established by chapter 121D for the

98 construction of affordable housing pursuant to said chapter 121D. Notwithstanding the terms
99 and conditions of the expenditure of funds from the Affordable Housing Trust Fund established
100 by chapter 121D, monies deposited in said fund pursuant to this section shall be expended to
101 create and preserve affordable housing through the use of affordable housing restrictions. The
102 payments to the department of housing and community development shall be accompanied by a
103 copy of the deed or other instrument evidencing the transfer, if any, and an affidavit signed under
104 oath or under the pains and penalties of perjury by the purchaser or the purchaser's legal
105 representative and the seller or the seller's legal representative, attesting to the true and complete
106 purchase price and the basis, if any, upon which the transfer is claimed to be exempt in whole or
107 in part from the excise. The department of housing and community development, or its designee,
108 shall promptly thereafter execute and issue a certificate indicating that the appropriate excise has
109 been paid or that the transfer is exempt from the excise, stating the basis for the exemption. The
110 register of deeds for the county in which the city or town is located, and the assistant recorder for
111 the registry district of the county in which the city or town is located, shall not record or register,
112 or receive or accept for recording or registration, any deed, except a mortgage deed, to a
113 certificate is not affixed. Failure to comply with this requirement shall not affect the validity of
114 any instrument. The excise imposed by this subsection shall be due simultaneously at the time of
115 transfer of upon which it is imposed.

116

117 (d) At any time within 7 days following the issuance of the certificates of
118 payment of the excise imposed by subsections (b) and (c), the purchaser or the purchaser's legal
119 representative may return the certificates to the city or town or its designee and the department of
120 housing and community development or its designee for cancellation, together with an affidavit

121 signed under oath or under the pains and penalties of perjury that the transfer, with respect to
122 which the certificates were issued, has not been consummated, and thereupon the excise paid
123 with respect to the transfer shall be forthwith returned to the purchaser or the purchaser's legal
124 representative.

125

126 (e) The following transfers of real property interests shall be exempt from the
127 excise imposed by subsections (b) and (c):

128 (i) Transfers to the government of the United States, the commonwealth and any
129 of their instrumentalities, agencies or subdivisions, including but not limited to transfers to the
130 city or town.

131 (ii) Transfers which, without additional consideration, confirm, correct, modify or
132 supplement a transfer previously made.

133 (iii) Transfers made as gifts without consideration. In any proceedings to
134 determine the amount of any excise due hereunder, it shall be presumed that any transfer for
135 consideration of less than fair market value of the real property interest transferred was made as a
136 gift without consideration to the extent of the difference between the fair market value of the real
137 property interest transferred and the amount of consideration claimed by the purchaser to have
138 been paid or transferred, if the seller shall have been at the time of transfer the spouse, the lineal
139 descendant, or the lineal ancestor of the purchaser, by blood or adoption, and otherwise it shall
140 be presumed that consideration was paid in an amount equal to the fair market value of the real
141 property interest transferred, at the time of transfer.

142 (iv) Transfers by operation of law without actual consideration, including but not
143 limited to transfers occurring by virtue of the death or bankruptcy of the owner of a real property
144 interest.

145 (v) Transfers made in partition of land and improvements thereto pursuant to
146 chapter 241.

147 (vi) Transfers to any charitable organization as defined in clause Third of section
148 5 of chapter 59, or any religious organization; provided that the real property interest so
149 transferred shall be held by the charitable or religious organization solely for its public charitable
150 or religious purposes.

151 (vii) Transfers to a mortgagee in foreclosure of the mortgage held by the
152 mortgagee, and transfers of the property subject to a mortgage to the mortgagee in consideration
153 of the forbearance of the mortgagee from foreclosing the mortgage.

154 (viii) Transfers made to a corporation, partnership or limited liability company at
155 the time of its formation, pursuant to which transfer no gain or loss is recognized pursuant to 26
156 U.S.C. §§ 351, 721; provided, however, that the transfer shall be exempt only in the event that:
157 (1) with respect to a corporation, the transferor retains an interest in the newly formed
158 corporation which is equivalent to the interest the transferor held prior to the transfer; or (2) with
159 respect to a partnership or limited liability company, the transferor retains after formation rights
160 in capital interests and profit interests within partnership or limited liability company which are
161 equivalent to the interest the transferor held prior to the transfer.

162 (ix) Transfers made to a stockholder of a corporation in liquidation or partial
163 liquidation of the corporation, and transfers made to a partner of a partnership or to a member of

164 a limited liability company in dissolution or partial dissolution of the partnership or limited
165 liability company; but the transfer shall be exempt only if: (1) with respect to a corporation, the
166 transferee receives property, including real property interests and other property received, which
167 is the same fraction of the total property of the transferor corporation as the fraction of the
168 corporation's stock owned by the transferee prior to the transfer; or (2) with respect to a
169 partnership or limited liability company, the transferee receives property, including real property
170 interests and other property received, which is the same fraction of the property of the
171 partnership or limited liability company as the fraction of the capital and profit interests in the
172 transferor formerly owned by the transferee.

173 (x) Transfers consisting of the division of marital assets pursuant to section 34 of
174 chapter 208 or any other general or special law.

175 (xi) Transfers of minority interests in publicly traded corporations, trusts,
176 partnerships or limited liability companies, provided that the transfers are not part of a series of
177 transfers which together constitute a transfer of control of a corporation, trust, partnership or
178 limited liability company.

179 Except as otherwise provided, the purchaser shall have the burden of proof that any
180 transfer is exempt under this subsection and any otherwise exempt transfer shall not be exempt in
181 the event that the transfer, by itself or as part of a series of transfers, was made for the primary
182 purpose of evading the excise imposed by subsections (b) and (c).

183

184 (f) The city or town's treasurer shall keep a full and accurate account stating
185 when, from or to whom, and on what account money has been paid or received relative to the

186 activities of the Municipal Affordable Housing Trust Fund or any other affordable housing trust
187 fund established by any general or special law providing for the creation and preservation of
188 affordable housing.

189 Schedules of beneficiaries of trusts, list of stockholders of corporations and lists
190 of partnerships filed with the Municipal Affordable Housing Trust Fund or any other affordable
191 housing trust fund established by a law of the commonwealth providing for the creation and
192 preservation of affordable housing for the purpose of determining or fixing the amounts of the
193 excise imposed by subsections (b) or (c); or determining the existence of any exemption
194 pursuant to subsection (e) shall not be public records for the purposes of section 10 of chapter 66.

195

196 (g) A purchaser who fails to pay all or any portion of the excise established by
197 subsections (b) and (c) on or before the time of transfer due shall be liable for the following
198 payments in addition to the excise:

199 (i) A purchaser shall pay interest on the unpaid amount of the excise, calculated
200 from the time of transfer, at a rate equal to 14 per cent per annum.

201 (ii) If the city or town or the department of housing and community development
202 determines that a purchaser failed to pay all or a portion of a excise due under this section
203 without fraud or willful intent to defeat or evade an excise imposed by this section within 30
204 days after the time of transfer, the purchaser shall pay a penalty equal to 5 per cent of the
205 outstanding excise, as determined by the city or town for failure to pay an excise pursuant to
206 subsection (b) or the department of housing and community development for failure to pay an
207 excise pursuant to subsection (c), for each month or portion thereof thereafter that the excise is

208 not paid in full, to the city or town or the department of housing and community development,
209 respectively; provided, however, that in no event shall the amount of the penalty exceed 25 per
210 cent of the excise due at the time of transfer.

211 (iii) If the city or town or the department of housing and community
212 development determines that a purchaser failed to pay all or a portion of an excise due under this
213 section due to fraud with intent to defeat or evade an excise imposed by this section, the
214 purchaser shall pay a penalty equal to the amount of the excise to the city or town for failure to
215 pay an excise pursuant to subsection (b) or the department of housing and community
216 development for failure to pay an excise pursuant to subsection (c).

217 (h) The city or town shall notify the purchaser and the seller by registered or
218 certified mail of any failure to discharge in full the amount of the excise established by
219 subsection (b) and any penalty or interest assessed. The department of housing and community
220 development shall notify the purchaser and the seller by registered or certified mail of any failure
221 to discharge in full the amount of the excise established by subsection (c) and any penalty or
222 interest assessed. The city or town or department of housing and community development shall
223 grant a hearing on the matter of the imposition of an excise, or of any penalty or interest
224 assessed, if a petition requesting such hearing is received by the city or town or department of
225 housing and community development within 30 days after the mailing of the notice. The city or
226 town or department of housing and community development shall notify the purchaser and the
227 seller in writing by registered or certified mail of its determination concerning the deficiency,
228 penalty or interest within 15 days after said hearing.

229 Any party aggrieved by a determination concerning a deficiency, penalty or
230 interest may, after payment of said deficiency, appeal to the district or superior court within 3
231 months after the mailing of notification of the determination of the city or town. Upon the failure
232 to timely petition for a hearing or appeal within the time limits established, the purchaser and
233 seller shall be bound by the terms of the notification, assessment or determination, and shall be
234 barred from contesting the excise and any interest and penalty. All decisions of the courts shall
235 be appealable. Every notice to be given under this section shall be effective if mailed by certified
236 or registered mail to the purchaser or the seller at the address stated in a recorded or registered
237 instrument by virtue of which the purchaser holds any interest in land, the transfer of which gives
238 rise to the excise which is the subject of the notice; and if no address is stated or if the transfer is
239 not evidenced by an instrument recorded or registered in the public records in the city or town,
240 the notice shall be effective when mailed to the purchaser or seller in care of any person
241 appearing of record to have an excise interest in the land, at the address of the person as set forth
242 in an instrument recorded or registered in the city or town.

243 All excises, fees, penalties and interest required to be paid pursuant to this section
244 shall constitute a personal debt of the purchaser and may be recovered in an action of contract or
245 in any other appropriate action, suit or proceeding brought by the city or town; said action, suit
246 or proceeding shall be subject to chapter 260.

247 If any purchaser liable to pay the excise established by this section neglects or
248 refuses to pay the excise, the amount, including any interest and penalty thereon, shall be a lien
249 in favor of the city or town or department of housing and community development upon all
250 property and rights to property, whether real or personal, belonging to either such purchaser or
251 such seller. The lien shall arise at the time of transfer and shall continue until the liability for

252 such amount is satisfied. The lien shall in any event terminate not later than 6 years following the
253 time of transfer. The lien shall not be valid as against any mortgagee, pledgee, purchaser or
254 judgment creditor unless notice thereof has been filed by the city or town or department of
255 housing and community development (i) with respect to real property or fixtures, in the registry
256 of deeds for the county in which the city or town resides; or (ii) with respect to personal
257 property, in the office in which a security or financing statement or notice with respect to the
258 property would be filed in order to perfect a nonpossessory security interest belonging to the
259 person named in the relevant notice, subject to the same limitations as set forth in section 50 of
260 chapter 62C.

261 Purchasers applying for an exemption under subsection (e) shall be required at the
262 time of application for exemption to execute an agreement legally binding on purchasers and
263 separately legally binding upon any legal representative of the purchasers: (i) assuming complete
264 liability for any excise, plus interest and penalties if any, waived on account of an allowed
265 exemption subsequently determined to have been invalid, and (ii) submitting to the jurisdiction
266 of the trial court of the commonwealth sitting in the county where the city or town is located.
267 Excises, plus interest and penalties if any, shall be calculated as of the date of the initial property
268 transfer. Execution of the above-described agreement shall not be required of any mortgagee,
269 pledge, purchaser or judgment creditor unless notice of the agreement has been recorded or filed
270 by the city or town and department of housing and community development.

271 In any case where there has been a refusal or neglect to pay any excise, fee,
272 interest or penalties imposed by this section, whether or not levy has been made, the city or town
273 or department of housing and community development, in addition to other modes of relief, may
274 direct a civil action to be filed in a district or superior court of the commonwealth to enforce their

275 lien under this section with respect to such liability or to subject any property of whatever nature,
276 of the delinquent, or in which they have any right, title or interest, to the payment of such
277 liability.

278 The city or town or department of housing and community development may
279 issue a waiver or release of any lien imposed by this section in their respective favor. Such
280 waiver or release shall be conclusive evidence that the lien upon the property covered by the
281 waiver or release is extinguished.

282 (i) The excise described by subsection (b) shall be of 5-year duration from the
283 date a city or town accepts this section. The imposition of the excise and the excise amount shall
284 be determined by a majority vote by the city or town’s legislative body. The excise may continue
285 for 5-year periods if affirmed by a majority vote of the city or town’s legislative body. The
286 excise described by subsection (b) may be decreased or eliminated by a two-thirds vote of the
287 city or town’s legislative body. If the legislative body does not renew the excise at the 5-year
288 anniversary, or any subsequent 5-year anniversary, or the legislative body votes to eliminate the
289 excise, the balance of any monies previously collected shall be transferred to the city or town and
290 held by the treasurer in a separate account, and shall first be used to satisfy any outstanding
291 liabilities or obligations incurred by the city or town or the Municipal Affordable Housing Trust
292 or any other affordable housing trust fund established by a law of the commonwealth providing
293 for the creation and preservation of affordable housing as a result of imposition of the excise, and
294 the remainder may be expended without further appropriation by the legislative body for
295 affordable housing purposes. If the liabilities and obligations of the city or town or the Municipal
296 Affordable Housing Trust or any other affordable housing trust fund established by any general
297 or special law providing for the creation and preservation of affordable housing exceed the

298 amounts transferred to the city or town, the excise shall remain in effect until such liabilities and
299 obligations have been satisfied.

300

301 (j) A city or town may vote to eliminate the excise described in subsection (c)
302 only after the city or town votes to eliminate the excise described in subsection (b).

303

304 (k) If the city or town or the department of housing and community development
305 determines that an excise is due by asserting the application of the evasion of excise doctrine
306 described in subsection (g), then the purchaser shall have the burden of demonstrating by clear
307 and convincing evidence as determined by the city or town or the department of housing and
308 community development that the transfer, or series of transfers, possessed both: (i) a valid, good
309 faith business purpose other than avoidance of the excises set forth in subsections (b) and (c);
310 and (ii) economic substance apart from the asserted excise avoidance benefit. In all such cases,
311 the transferee shall also have the burden of demonstrating by clear and convincing evidence as
312 determined by the city or town or the department of housing and community development that
313 the asserted non-excise-avoidance business purpose is commensurate with the amount of the
314 excises pursuant to subsections (b) and (c) to be thereby avoided.