

**AT THE BOTTOM OF BILLIONAIRE MOUNTAIN: AFFORDABLE  
HOUSING IN ELITE RESORT TOWNS**

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***Abstract***

*Creating a sustainable solution to rising housing costs and vanishing affordable housing poses an apparently eternal challenge to city planners and state leaders across the United States. This challenge is particularly acute in seasonal resort areas like the island getaway of Martha's Vineyard, MA, and the ski town of Aspen, CO. Each year, businesses in these vacation destinations struggle to attract workers to run the areas' services—their ski slopes, lifeguard stations, tennis clubs, clam shacks, hotels, cinemas, grocery stores, post offices, and even medical centers. In short, the infrastructure and services that keep these towns functional—and attract the tourists who keep these economies running—face an “existential crisis” every year when preparing for the on season. What keeps workers at bay? The ever-surging cost and ever-depleting supply of affordable housing.*

*The challenges are prohibitively high housing costs, unreasonable seasonal demand, and fewer and fewer directions to expand. The goal is to create affordable housing that can sustain the workforce necessary to support the community and yet prevent over-development that detracts from the local community's charm. One solution: tax the very home sales that drive the local workforce out of the community and use that funding to acquire and rehabilitate buildings that otherwise might sit vacant for half of the year or be remodeled and sold under another astronomical price tag. By taxing home sales, these cities can simultaneously discourage rising home prices and find funding for affordable housing projects. By focusing on acquisition-rehabilitation, affordable housing initiatives can focus on creating sustainable workforce housing that preserves the historic neighborhoods that give places like the Vineyard and Aspen the charm that keeps us coming back year after year—as a tourist or as part of the workforce.*

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## I. Introduction

In the 2022-2023 winter season, 14.8 million people visited Colorado Ski Country to ski its legendary slopes.<sup>2</sup> Every summer, the population on Martha's Vineyard booms from 23,000 to 200,000.<sup>3</sup> These destinations are so good at attracting the rich and famous they are branded with nicknames like "Billionaire Mountain" and "Hollywood East."<sup>4</sup> But with their allure comes luxury real estate, seasonal demand, and limited new construction, making these areas nearly unlivable for the locals who keep these towns operational.<sup>5</sup> Without sufficient affordable workforce housing, places like the Vineyard and Aspen can neither sustain their communities nor keep pace with the tourism industry—a formula leading them straight to an "existential" crisis.<sup>6</sup>

Merely building new units is not the answer. This narrow approach focuses on a numbers game: the ratio of available homes on the market to the number of buyers and renters.<sup>7</sup> In reality, houses are not fungible pieces of property but interdependent units that comprise a

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<sup>2</sup> Jason Blevins, *Colorado ski resorts enjoyed a record season with mountain towns harvesting highest-ever tax revenue*, THE COLO. SUN (Jun. 19, 2023), <https://coloradosun.com/2023/06/19/colorado-ski-resorts-record-skiers-visits/>.

<sup>3</sup> *About Martha's Vineyard*, MARTHA'S VINEYARD CHAMBER OF COMMERCE, <https://www.mvy.com/about-marthas-vineyard/> (last visited Feb. 27, 2024).

<sup>4</sup> See Neal Leitereg, *How They Closed It: Making Moves on Colorado's Billionaire Mountain*, FORBES (Oct. 13, 2021, 1:15 PM), <https://www.forbes.com/sites/forbes-global-properties/2021/10/13/how-they-closed-it-making-moves-on-colorados-billionaire-mountain/?sh=7b7188925601> (last visited Mar. 29, 2024); see also Chris McGreal, *Obamas play safe with vacation in Martha's Vineyard*, THE GUARDIAN (July 6, 2009, 3:39PM), <https://www.theguardian.com/world/2009/jul/06/obama-family-holiday-marthas-vineyard> (last visited Mar. 29, 2024).

<sup>5</sup> See Jan G. Laitos & Heidi Ruckriegle, *The Problem of Amenity Migrants in North America and Europe*, 45 URB. LAW. 849, 850 (2013); Laurence A.G. Moss, *The Mountain Amenity Migration Phenomenon, Why It Is Happening and Our Response*, Banff Centre 1, 8; Fitzgerald Yaw, Jr., *Book Review: Living and Working in Paradise: Why housing Is Too Expensive and What Communities Can Do About It*, SOC. AND ECON. STUD., 153, 154 (2005).

<sup>6</sup> Marissa J. Lang, *On Martha's Vineyard, even the doctors can't afford housing anymore*, WASH. POST (Sept. 16, 2022), <https://www.washingtonpost.com/dc-md-va/2022/09/16/marthas-vineyard-housing-rentals-crisis/>.

<sup>7</sup> Elizabeth M. Tisher, *Historic Housing For All: Historic Preservation as the New Inclusionary Zoning*, VT. L. REV. 603, 618 (2017).

community.<sup>8</sup> A successful and sustainable housing program should consider the entire community, preserving what strengthens it and countering what divides it.<sup>9</sup> In the resort town's reality, its ability to draw in tourists is its strength, but its blindness toward its own workforce is its weakness.<sup>10</sup>

One strategy: focus on projects that refurbish existing properties, so that community preservation means both preserving the resort town's charm and sustaining the workforce. The Coalition to Create the MV Housing Bank is advocating to do just that: its proposal would impose a 2 percent transfer tax on those purchasing homes on the island worth more than one million dollars.<sup>11</sup> The proceeds would be used to generate new affordable housing on the island, 75 percent of which would be created by rehabilitating existing properties.<sup>12</sup> Acquisition-rehabilitation may not be efficient for large projects, and is limited by how many properties a housing bank can wrangle, but it integrates affordable housing into the community without transforming a small town's unique attributes or overwhelming its infrastructure.<sup>13</sup> If the housing bank can buy back enough vacation homes and re-position them as year-round community housing, it could also work as a defense tactic against seasonal housing trends—like cold homes that sit empty much of the year and short-term rentals that drive up rental prices—that exacerbate community instability in resort towns.<sup>14</sup>

Funding acquisition-rehabilitation efforts with a local RETT can be difficult, as the state must have a home rule provision that grants autonomy over local matters to local authorities—and the state must recognize a local transfer tax as falling under that authority.<sup>15</sup> Unique areas like Aspen and the Vineyard demonstrate why a transfer tax should be

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<sup>8</sup> *Id.* at 617.

<sup>9</sup> Yaw, *supra* note 5, at 154.

<sup>10</sup> *See id.*

<sup>11</sup> An Act Establishing the Martha's Vineyard Housing Bank, Bill H. 3804, 193rd Gen. Court (Mass. 2023).

<sup>12</sup> *Id.*

<sup>13</sup> *See* Tisher, *supra* note 7, at 633; *see* Kara L. Dardeno, *Chapter 40B Should Buy the Farm*, 42 SUFFOLK U. L. REV. 129, 136 (2008); *Fact Sheet on Chapter 40B The State's Affordable Housing Zoning Law*, CITIZENS' HOUSING AND PLANNING ASS'N (2011).

<sup>14</sup> *See* Reagan Larkin & Amy Brimah, *The State of Short-Term Rentals in Colorado*, 51 COLO. LAW. 34, 37 (2022) (noting that short-term rentals have been "singled out as a primary culprit" of the housing crisis in Colorado).

<sup>15</sup> *See* Virginia Sargent, *Let Cities Decide: End Colorado's Prohibition on Rent Regulation*, 92 U. COLO. L. REV. 337, 351 (2021).

tailored to meet a community's specific needs.<sup>16</sup> The final challenge facing this initiative is implementing long-term restrictions that ensure the affordability and year-round use of these housing units.<sup>17</sup> These restrictions are critical to ensure that this housing is used by those who need it, and in ways that strengthen the town as a community, not just as a seasonal resort.<sup>18</sup>

In short, this article will explore how the success of an affordable housing strategy in a resort town depends on its ability to balance the preservation of the town's character with the expansion of its workforce housing.<sup>19</sup>

## ***II. The Resort Town's Affordable Housing Problem***

### **A. The Resort Town**

When you disembark from the ferry in Vineyard Haven—whether as a year-rounder, a season regular, or a newcomer—you know you have landed somewhere special. Maybe it's the people, maybe it's something in the salty air, maybe it's knowing you are off the mainland, removed from reality. The island draws you in—whether you're one of the rich and famous or one of the service workers; whether you rent a beach house or sleep in your car. It seems inexplicable to live where you can't afford; to stay where affordable housing is so “chronically under-invested” in.<sup>20</sup> And yet, it's home. You make it work.

However, it is rapidly becoming unworkable to be a member of the workforce in any resort town—a phenomenon affecting destinations across the U.S., from Martha's Vineyard off the coast of Massachusetts

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<sup>16</sup> See Lang, *supra* note 6 (““We can't build our way out of this,” said Silber, from the housing bank coalition. Instead, the Vineyard, she said, must recapture housing that has been lost to the investment and short-term rental market rather than leaning exclusively on new development on the environmentally fragile island.”).

<sup>17</sup> Erika Barber, *Affordable Housing in Massachusetts: How to Preserve The Promise of “40B” With Lessons From Rhode Island*, 46 NEW ENGLAND L. REV. 125, 141 (2011).

<sup>18</sup> See *id.* at 142.

<sup>19</sup> See Jenny Stuber, *Aspen and the American Dream*, CONTEXTS, Spring 2020, at 34.

<sup>20</sup> See Lang, *supra* note 6.

to Aspen in the Colorado Rockies.<sup>21</sup> The lack of affordable housing represents more than a mismatch in supply and demand: it indicates a market failure, community instability, and an “existential” crisis.<sup>22</sup> At the heart of the issue are a plethora of luxury real estate, a vicious cycle of seasonal demand, and limits on new development, which have all coalesced to create the standard of housing inequality in the modern resort town.<sup>23</sup>

*1. High-End Real Estate: Amenity Migration and a Housing Market Failure*

With its humble roots as a remote mining town, Aspen did not explode into a ski destination until the 1960s and 70s, but when it did, it became a booming spot for tourism, and the demand for housing quickly outstripped supply.<sup>24</sup> Purchases of second—and third—homes and the development of so-called mega-mansions have driven housing costs (figuratively) through the roof.<sup>25</sup> This phenomenon, called “amenity migration,” transforms a community, and the unintended side effect is that it makes the area less and less livable for the locals.<sup>26</sup> Developers cater new construction toward wealthy amenity migrants, and local businesses tailor their dining and shopping experiences toward the same, displacing both long-time locals and low-income service workers who cannot afford to pay the luxury up-charges or the increased property taxes.<sup>27</sup>

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<sup>21</sup> See *id.*; see also Laitos & Ruckriegle, *supra* note 5, at 852; Yaw, *supra* note 5, at 154 (“The pricing of housing out of the reach of tourism industry workers has the same negative repercussions in Ocho Rios, Jamaica as they do in Martha’s Vineyard, Massachusetts”); GREATER ROARING FORK REGIONAL HOUSING STUDY, ECONOMIC & PLANNING SYSTEMS, INC. 112 (April 2019) (quoting one survey respondent as saying, “Do not want to leave, but it is no longer possible to stay”).

<sup>22</sup> See Lang, *supra* note 6; Yaw, *supra* note 5, at 154; see also Moss, *supra* note 5, at 8.

<sup>23</sup> See Laitos & Ruckriegle, *supra* note 5, at 850.

<sup>24</sup> See Heather Hansman, *What ski towns tell us about the inequality crisis*, DESERET NEWS, Feb. 7, 2022, <https://www.deseret.com/2022/2/7/22918555/what-ski-towns-tell-us-about-the-countrys-inequality-crisis-affordable-housing-healthcare>.

<sup>25</sup> See *id.*; see also Laitos & Ruckriegle, *supra* note 5, at 887.

<sup>26</sup> Laitos & Ruckriegle, *supra* note 5, at 852.

<sup>27</sup> See *id.* at 854.

A century earlier and some 2,000 miles away, the prosperity of Martha's Vineyard began with its whaling community.<sup>28</sup> Successful fishermen displayed their new-found wealth by building stately captains' homes, which still define much of the island's aesthetic today.<sup>29</sup> By the first half of the 19<sup>th</sup> century, the island had gained a reputation as a resort area,<sup>30</sup> and tourism quickly overtook fishing as the island's leading industry. However, with its high cost of living today, even businesses that serve wealthy clientele and those that provide essential services are strained by the lack of affordable housing.<sup>31</sup> This—prioritizing accommodations for tourists over homes for tourism workers—is considered a “market failure in the housing market.”<sup>32</sup> The “sustainability of the tourism industry depends on access to workers who can provide the services the industry requires,” and access to those workers depends on the availability of low-cost housing.<sup>33</sup> Today, the housing crisis is so bleak in places like Martha's Vineyard and Aspen that even the sustainability of critical infrastructure like hospitals, the postal service, and the fire department requires affordable housing solutions.<sup>34</sup>

While a resort town's economy is largely fueled by tourism-centric service jobs, service workers are all those who are “employed to serve another”—meaning not just those in food service and hospitality, but also those in protective services, healthcare, education, waste management, and more.<sup>35</sup> However, in an economy so heavily reliant on

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<sup>28</sup> *Making of Martha's Vineyard*, NEW YORK TIMES, [https://archive.nytimes.com/www.nytimes.com/fodors/top/features/travel/destinations/unitedstates/massachusetts/marthasvineyard/fdrs\\_feat\\_617\\_8.html](https://archive.nytimes.com/www.nytimes.com/fodors/top/features/travel/destinations/unitedstates/massachusetts/marthasvineyard/fdrs_feat_617_8.html), (last visited Jan. 22, 2022).

<sup>29</sup> *Id.*

<sup>30</sup> *See id.*; Allison Williams, *The Hotel That Saved a Town*, CONDÉ NAST TRAVELER, Jul. 23, 2014, <https://www.cntraveler.com/stories/2014-07-23/harbor-view-hotel-that-saved-town> (last visited Mar. 29, 2024).

<sup>31</sup> Zoe Greenberg, *From fire chief to mail clerks, no one seems able to find housing on Martha's Vineyard*, BOSTON GLOBE, Jun. 5, 2021, <https://www.bostonglobe.com/2021/06/05/metro/even-fire-chief-marthas-vineyard-cant-find-housing/>.

<sup>32</sup> *See* Yaw, *supra* note 5, at 154.

<sup>33</sup> *Id.*

<sup>34</sup> Lang, *supra* note 6.

<sup>35</sup> *SERVICE Definition & Legal Meaning*, BLACK'S L. DICTIONARY (2d ed. 1910); *Service workers definition*, L. INSIDER, <https://www.lawinsider.com/dictionary/service-workers> (last visited June 28, 2023).

tourism, the range of jobs and related incomes is skewed. Although visitor-related jobs pay higher than average on the Vineyard, the sector accounts for 37 percent of jobs, but only 28 percent of wages.<sup>36</sup> In Aspen, visitor-based jobs are “primarily” responsible for the city’s economic growth between 2010 and 2019, but 39 percent of those jobs made below 80 percent of the average median income (AMI).<sup>37</sup> Meanwhile, traditionally high-paying jobs—like careers in healthcare, technology, education—may pay less in a resort town than elsewhere because of the “higher reliance on part-time and seasonal work.”<sup>38</sup> Income statistics may also be overestimated<sup>39</sup> in places like Aspen and Martha’s Vineyard if the incomes of remote workers and affluent vacationers are included in the calculation.<sup>40</sup>

For places like Aspen and the Vineyard, “affordable housing,” is what others would consider just plain housing. Despite a median household income of \$96,123,<sup>41</sup> Aspen’s median home sale price was \$3.0 million in January 2024.<sup>42</sup> Similarly, the Vineyard’s median home sale price hit \$2.03 million in January 2024,<sup>43</sup> but had a median household income of \$93,225.<sup>44</sup> Given the mismatch between median home

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<sup>36</sup> *Economic Profile of Martha’s Vineyard*, MARTHA’S VINEYARD COMMISSION, <https://www.mvcommission.org/economic-profile-marthas-vineyard> (last visited Mar. 29, 2024).

<sup>37</sup> *Affordable Housing Strategic Plan: City of Aspen 2022-2026*, CITY OF ASPEN, 1, 13 (May 2022).

<sup>38</sup> *Economic Profile of Martha’s Vineyard*, *supra* note 36.

<sup>39</sup> As are home sale prices. This is why the median, not the average, is taken. See *What is the difference between ‘Average’ and ‘Median’ figures?* CTR. FOR REAL ESTATE AT WICHITA ST. U., <https://realestate.wichita.edu/question/median-vs-average/> (last visited Mar. 29, 2024).

<sup>40</sup> *About Pitkin County*, PITKIN COUNTY, <https://pitkincounty.com/594/About-Pitkin-County> (last visited Mar. 29, 2024).

<sup>41</sup> *Pitkin County, Colorado*, U.S. CENSUS BUREAU QUICKFACTS, <https://www.census.gov/quickfacts/fact/table/pitkincountycolorado/PST045221> (last visited Mar. 29, 2024) [hereinafter *Pitkin County, Colorado*, U.S. CENSUS BUREAU]. Median household income is based on the years 2018-2022.

<sup>42</sup> *Aspen Housing Market*, REDFIN, <https://www.redfin.com/city/983/CO/Aspen/housing-market> (last visited Feb. 24, 2024).

<sup>43</sup> *Martha’s Vineyard Housing Market*, REDFIN, <https://www.redfin.com/neighborhood/767084/MA/West-Tisbury/Martha-s-Vineyard/housing-market>, (last visited Feb. 24, 2024).

<sup>44</sup> *Dukes County, Massachusetts*, U.S. CENSUS BUREAU QUICKFACTS, <https://www.census.gov/quickfacts/fact/table/dukescountymassachusetts/PS>



price and household income, Aspen provides affordable housing to residents who make up to 240 percent of the AMI.<sup>45</sup> That is \$265,200 for a family of four.<sup>46</sup> Similarly, the Coalition for a Martha's Vineyard Housing Bank classifies those that make up to 240 percent of the AMI as "middle income," with an annual income of \$251,280 for a family of four.<sup>47</sup>

## 2. *Seasonal Demand: Short-Term Rentals and Cold Homes Wreak Havoc*

Year-round resort town residents face competition from three fronts: the seasonal workers whose arrival annually exacerbates housing issues,<sup>48</sup> the seasonal renters whose demand for housing sends rental rates soaring during the on-season,<sup>49</sup> and the vacation-home buyers who "can outbid year-round residents wanting to purchase homes."<sup>50</sup>

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T045221 (last visited Feb. 24, 2024). Median household income is based on the years 2018-2022.

<sup>45</sup> *Maximum Income & Assets*, APCHA, <https://www.apcha.org/341/Maximum-Income-Assets> (last visited Mar. 29, 2024).

<sup>46</sup> *See id.*

<sup>47</sup> *See Frequently Asked Questions*, COAL. TO CREATE THE MV HOUS. BANK, <https://www.ccmvhab.org/faq> (last visited Jan. 22, 2023).

<sup>48</sup> 3,000 to 5,000 seasonal workers move to the Vineyard for the summer (joining the year-round labor force of roughly 8,000), but only 21 percent of island businesses provide employee housing. *See About Martha's Vineyard*, *supra* note 3. Aspen Ski Co.—one of Aspen's biggest employers—alone adds 1,000 temporary workers every winter to the labor force of Pitkin County (with a total employment of 13,813), but only has 750 beds to provide for them. *Pitkin County, Colorado*, U.S. CENSUS BUREAU, *supra* note 41. Notably: housing here is measured in *beds*, not rooms, apartments, units, or otherwise. Leslie Thatcher, *Aspen Ski Co. Offers Free Season Passes for Seasonal Housing Through its Tenants to Turns Program*, KPCW (Sept. 28, 2022), <https://www.kpcw.org/state-regional/2022-09-28/Aspen-ski-co-offers-free-season-passes-for-seasonal-housing-through-its-tenants-to-turns-program> (last visited Mar. 29, 2024).

<sup>49</sup> *Colorado Short Term Rental Impact Study*, HR&A ADVISORS (May 2022), [https://news.airbnb.com/wp-content/uploads/sites/4/2022/06/STR-Colorado-Impact-Study\\_Final\\_05.25.2022.pdf](https://news.airbnb.com/wp-content/uploads/sites/4/2022/06/STR-Colorado-Impact-Study_Final_05.25.2022.pdf) (last visited Mar. 29, 2024).

<sup>50</sup> *The Housing Situation on Martha's Vineyard*, MARTHA'S VINEYARD COMM'N, <https://www.mvcommission.org/housing-situation-marthas-vineyard> (last visited Oct. 16, 2022).

These visitors—vacationers and workers—need somewhere to stay. Almost 4,000 of the Vineyard’s homes are used as short-term rentals (STRs).<sup>51</sup> Dedicated STRs limit available housing stock, especially with the advent of rental sites like Airbnb.<sup>52</sup> STRs drive up prices by decreasing the supply of long-term units available to rent.<sup>53</sup> Furthermore, their financial success incentivizes leaseholders to dedicate even more housing stock to tourist housing.<sup>54</sup> “Put simply, a renter in an Airbnb-saturated neighborhood seeking to occupy one of the handful of available apartments is no longer bidding against the local residential rent price, but is instead bidding against the extra profit that STRs can bring.”<sup>55</sup> Case in point: according to a study commissioned by Airbnb, the median rental price in Aspen was a jaw-dropping \$22,500 per month in 2021.<sup>56</sup>

Meanwhile, vacation-home buyers purchase second homes that may sit vacant for much of the year.<sup>57</sup> These “cold homes” take space that could otherwise be filled by year-round residents, while affordable housing remains “degraded or become[s] unaffordable.”<sup>58</sup> They are sometimes rented in the off-season to year-round workers, but this is only half a solution, one that still contributes to a sense of “impermanence” and “instability.”<sup>59</sup> The Vineyard’s year-round renters are accustomed to the annual “island shuffle,” when, either not allowed to stay or unable to pay hiked-up summer rental rates, many vacate their winter lodging for other accommodations. Summer “housing can mean anything from a shack with no kitchen or flushable toilet to a camper

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<sup>51</sup> *The Problem*, COAL. TO CREATE THE MV HOUS. BANK, <https://www.ccmvhb.org/the-problem> (last visited Feb. 25, 2024).

<sup>52</sup> Larkin & Brimah, *supra* note 14, at 37.

<sup>53</sup> See Mark Merante & Keren Mertens Horn, *Is Home Sharing Driving up Rents? Evidence from Airbnb in Boston*, DEPT. ECON, U. MA. BOSTON, 1, 13-21 (working paper 2016-03) (finding a correlation between increase in “Airbnb density” and decrease in number of units available to rent, thus the “increase in market tightness puts upward pressure on price.”).

<sup>54</sup> See Dayne Lee, *How Airbnb Short-term Rentals Exacerbate Los Angeles’s Affordable Housing Crisis: Analysis and Policy Recommendations*, HARVARD L. & POL’Y R., 229, 238 (2016).

<sup>55</sup> *Id.*

<sup>56</sup> *Colorado Short Term Rental Impact Study*, *supra* note 49, at 27.

<sup>57</sup> See Laitos & Ruckriegle, *supra* note 5, at 889.

<sup>58</sup> See *id.* at 890; see also Moss, *supra* note 5, at 8; GREATER ROARING FORK REGIONAL HOUSING STUDY, *supra* note 21 (listing complaints of no hot water, no heat, and being unable to afford anything besides rent).

<sup>59</sup> See Moss, *supra* note 5, at 8.

van or a room in someone else's home," sometimes getting through the season by "staying in a house for only a few days" before shuffling elsewhere.<sup>60</sup> Others pitch a tent or sleep in their cars.<sup>61</sup> Still others move off-island altogether, commuting by ferry, which "puts further stress on the local tourist economy" and "breaks up families, many of whom have called the Vineyard home for generations."<sup>62</sup>

The lack of a "sense of local belonging" is indicative of the housing market failure: the deficit of workforce housing makes it difficult to create a sustainable, authentic community, and with that missed opportunity goes the potential for producing "higher service levels for the tourists and . . . greater returns to the developers and tourism business operators."<sup>63</sup> This feeling of "impermanence" could be challenged with the new ubiquity of remote work, spurred on by the Covid-19 pandemic, which has increased the population of year-round residents in both Aspen and the Vineyard,<sup>64</sup> as well as the amount of time that part-time residents spend in their vacation homes. These upward trends have led to a reduction in the number of homes that can be rented to workers in the off-season,<sup>65</sup> but an increased demand for local services, and thus for more year-round employees.<sup>66</sup>

### 3. *Limited Development: Conservation and Zoning Laws Restrict Construction*

Despite the hot housing market, new construction is scarce on the Vineyard.<sup>67</sup> The island's population increased 25 percent between

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<sup>60</sup> See Lang, *supra* note 6.

<sup>61</sup> See *id.*

<sup>62</sup> Bendix Anderson, *Locals Demand Affordable Housing*, AFFORDABLE HOUS. FIN. (Aug. 1, 2007), <https://www.housingfinance.com/developments/locals-demand-affordable-housing> (last visited Mar. 29, 2024).

<sup>63</sup> See Yaw, *supra* note 5, at 155.

<sup>64</sup> Compare Moss, *supra* note 5, at 8, with Hansman, *supra* note 24. See also *Frequently Asked Questions*, *supra* note 47 (noting that year-round residents now occupy 51 percent of the Vineyard's homes, as opposed to 38 percent in pre-pandemic times).

<sup>65</sup> See Moss, *supra* note 5, at 8; Hansman, *supra* note 24; see also Lang, *supra* note 6.

<sup>66</sup> See § II(A)(1).

<sup>67</sup> *The Housing Situation on Martha's Vineyard*, *supra* note 50.

2010 and 2020, but housing stock grew less than 2 percent.<sup>68</sup> The cost to acquire property is a barrier to growth, but so is the shortage of land: of the island's 57,067 acres of land, only 7,820 acres remain available—which could be dedicated to development or conservation.<sup>69</sup> On an island renowned for its untouched ecological landscapes and staunch environmentalists, that means we have nearly reached the end of the road—or beach, as it were—for available lots to develop into new housing.<sup>70</sup>

Aspen, Colorado, and its neighboring ski communities tell a similar tale. Although Aspen has successfully financed an affordable housing initiative with a real estate transfer tax (RETT) for decades, availability in existing affordable housing units is slim to none.<sup>71</sup> And just like the Vineyard, land supply is limited—not because of surrounding waters, but because millions of acres in the surrounding mountains are protected public land.<sup>72</sup> The prospect of developing new affordable housing faces challenges from those seeking to conserve its natural en-

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<sup>68</sup> *Martha's Vineyard Commission: 2020 US Census Overview*, MARTHA'S VINEYARD COMM'N, 1, 18 (Jan. 5, 2022), [https://www.mvcommission.org/sites/default/files/docs/2020\\_US\\_Census\\_Powerpoint\\_1\\_5\\_22.pdf](https://www.mvcommission.org/sites/default/files/docs/2020_US_Census_Powerpoint_1_5_22.pdf).

<sup>69</sup> *Land Protection*, VINEYARD CONSERVATION SOC'Y, <https://vineyardconservation.org/land-protection/> (last visited Oct. 16, 2022).

<sup>70</sup> This also means that requiring developers to offset new, fair market housing with a proportional number of new affordable housing units will not be as successful on the Vineyard as it may be elsewhere. *See id.*; *see also* Joseph A. Dane, *Maui's Residential Workforce Housing Policy: Finding the Boundaries of Inclusionary Zoning*, 30 U. OF HAW. L. REV. 447, 450 (2008).

<sup>71</sup> Jason Blevins, *Aspen's workers are hitting retirement age. And that's made the resort town's employee housing program a ticking time bomb.*, THE COLO. SUN, Oct. 23, 2018, <https://coloradosun.com/2018/10/23/aspen-housing-shortage-affordable-problem/> (last visited Mar. 29, 2024) [hereinafter Blevins, *Aspen's workers are hitting retirement age*].

<sup>72</sup> The federal government owns 36.2 percent of Colorado's lands; a whopping 24.1 million acres. *Colorado is the #9 state with the most land owned by the federal government*, STACKER, Aug. 12, 2022, <https://stacker.com/colorado/colorado-9-state-most-land-owned-federal-government> (last visited Mar. 29, 2024).

vironment—including its wildlife, open spaces, and “rural character”<sup>73</sup>—and those seeking to preserve its small-town charm and quality of life.<sup>74</sup>

Even with the little land that is available, new construction faces a plethora of challenges. For one thing, the cost of construction in a resort town is daunting, averaging more than \$500 per square foot on the Vineyard, far above the approximate \$350 per square foot cost for new construction in Massachusetts generally.<sup>75</sup> “The obvious solution” to the cost issue is buy “a resale that is in good condition and . . . make it ‘like new.’”<sup>76</sup> For another, zoning restrictions and permit requirements limit and delay new construction.<sup>77</sup> However, they also help create functioning neighborhoods, “ensur[ing] that concerns such as water quality, traffic, and neighborhood scale are carefully considered and, if necessary, mitigated.”<sup>78</sup> These concerns are just as relevant for affordable housing as they are for at-market housing—if not more, given that budgeting for related expenditures, like transportation costs, can be limited for many seeking affordable housing.<sup>79</sup> Simply building new construction does not equate to building up a community, and simply

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<sup>73</sup> Scott Condon, *Ambitious plan for preventing development on Roaring Fork region land*, THE ASPEN TIMES, May 8, 2022, <https://www.aspentimes.com/news/ambitious-plan-for-preventing-development-on-roaring-fork-region-land/> (last visited Mar. 29, 2024).

<sup>74</sup> See Stuber, *supra* note 19; see also Laitos & Ruckriegle, *supra* note 5, at 866.

<sup>75</sup> Anderson, *supra* note 62; *Real Estate Confidential: What’s new(ish) on Martha’s Vineyard*, MVTIMES, Mar. 11, 2022, <https://www.mvtimes.com/2022/03/11/real-estate-confidential-whats-newish-marthas-vineyard/> (last visited Mar. 29, 2024); Sandy John & Madeline Sheen, *The Cost to Build a House in Massachusetts (2023)*, HOMELIGHT (Jan. 28, 2023), <https://www.homelight.com/blog/buyer-cost-to-build-a-house-in-massachusetts/#:~:text=On%20average%2C%20building%20a%20custom,square%20foot%2C%20according%20to%20Garcia> (last visited Mar. 29, 2024).

<sup>76</sup> *Real Estate Confidential*, *supra* note 75.

<sup>77</sup> See *infra* § IV(B).

<sup>78</sup> *Development Permitting Processes on Martha’s Vineyard*, MARTHA’S VINEYARD COMMISSION, 1, 6-7 (Feb. 2008), [https://www.mvcommission.org/sites/default/files/docs/Development\\_Permitting\\_on\\_Martha\\_s\\_Vineyard\\_0.pdf](https://www.mvcommission.org/sites/default/files/docs/Development_Permitting_on_Martha_s_Vineyard_0.pdf) (last visited Mar. 29, 2024).

<sup>79</sup> Tisher, *supra* note 7, at 612. See GREATER ROARING FORK REGIONAL HOUSING STUDY, *supra* note 21, at 99 (reporting that workers in Aspen rated proximity to employment, proximity to transportation, and community character as important factors for choosing housing).

increasing housing units “does not account for the other myriad variables that drive housing decisions and impact household expenditures.”<sup>80</sup>

### B. Housing the Workforce

Why focus on affordable housing in resort towns? Isn't their exclusivity and luxury real estate part of the allure?<sup>81</sup> While the answer to both questions is yes, the situation is more nuanced than that. These towns need service workers, and those workers need housing.<sup>82</sup>

Workforce housing is “provided for a wide diversity of income levels that support the local economy and preserves a vibrant middle class.”<sup>83</sup> It exists for the “people who are our infrastructure, who hold this community up.”<sup>84</sup> But the resort town's affluent vacationers and second (and third) homeowners need the workforce housing for something more than just “a constant labor pool from which resort businesses can draw.”<sup>85</sup> Resort towns are more than luxury getaways. Yes, part of their allure is the exclusivity, but the availability of workforce housing supports the “continued existence of a diverse community.”<sup>86</sup> With “the presence of children, economic vitality among multiple economic classes, and neighborhood character,” workforce housing keeps a resort town feeling like a town, rather than a resort.<sup>87</sup>

For places like Aspen and Martha's Vineyard, where average home and rental prices are so disconnected from average annual income,<sup>88</sup> the housing crisis stems not just from an expensive housing

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<sup>80</sup> Tisher, *supra* note 7, at 612.

<sup>81</sup> See Stuber, *supra* note 19, at 35; Heather Perlberg, *Wall Street West is Booming in Aspen With New Crop of Elite Residents*, BLOOMBERG, Aug. 30, 2022, <https://www.bloomberg.com/news/features/2022-08-30/aspen-real-estate-wall-street-west-booms-with-new-crop-of-elite-residents?leadSource=uverify%20wall> (last visited Mar. 29, 2024).

<sup>82</sup> See Lang, *supra* note 6.

<sup>83</sup> Rebecca Anderson Fisher, *Town of Breckenridge Workforce Housing Plan*, AM. L. INSTITUTE – AM. BAR ASS'N CONT. LEGAL EDUC., 287, 290 (2008).

<sup>84</sup> Lang, *supra* note 6.

<sup>85</sup> See Laitos & Ruckriegle, *supra* note 5, at 891.

<sup>86</sup> See *id.*

<sup>87</sup> See *id.*; Stuber, *supra* note 19, at 35.

<sup>88</sup> See Lang, *supra* note 6. “[O]n an island where commuting means setting sail over temperamental waters, the Vineyard's housing crisis is also an existential one . . . ‘If you don't have municipal workers, if you don't have

market, but from an insufficient supply of dedicated workforce housing for the very people who serve and service the community.<sup>89</sup> On the Vineyard, year-round housing fell by 8.2 percent—or 603 units—from 2010 to 2019, while seasonal and second home housing stock rose 15.4 percent.<sup>90</sup> Of the year-rounders who have managed to secure stable housing, many suffer cost burdens to maintain it.<sup>91</sup> Forty-two percent of the Vineyard’s year-round homeowners and 39 percent of year-round renters are cost burdened over their housing; which is defined as spending more than 30 percent of income to housing.<sup>92</sup> In Aspen, 34 percent of households are cost burdened.<sup>93</sup>

The result is that while the Vineyard’s population is growing, its socioeconomic diversity is “eroding.”<sup>94</sup> Lower income households have decreased since 2000, and, on average, it’s those households who “are essential to the Island’s seasonal, tourist, and service economy” who are disappearing.<sup>95</sup> Thus, the problem, and therefore the solution, lies not just in creating more affordable housing, but in creating a sustainable, stable housing program for the workforce that allows counties like Pitkin and Dukes to thrive because of their communities—not just because of their businesses.<sup>96</sup>

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teachers, if you don’t have emergency workers, if you don’t have someone to help families who are struggling and run the food bank, how does a community keep functioning?” posited Silber to the *Post*. Nancy Watzman, *In Aspen, even doctors need affordable housing*, THE COLO. INDEP. (Jun. 1, 2015), <https://www.coloradoindependent.com/2015/06/01/in-aspen-even-doctors-need-affordable-housing/> (last visited Mar. 30, 2024).

<sup>89</sup> Anderson Fisher, *supra* note 83, at 290 (stating that workforce housing is for “employees who work in the community . . . providing the labor force needed for local businesses to succeed.”).

<sup>90</sup> MARTHA’S VINEYARD HOUSING NEEDS ASSESSMENT, MARTHA’S VINEYARD COMMISSION 3 (Dec. 2020).

<sup>91</sup> *Id.* at 4.

<sup>92</sup> *Id.*

<sup>93</sup> GREATER ROARING FORK REGIONAL HOUSING STUDY, *supra* note 21, at 70, tbl.39.

<sup>94</sup> MARTHA’S VINEYARD HOUSING NEEDS ASSESSMENT, *supra* note 90, at 2-14.

<sup>95</sup> *Id.* at 2.

<sup>96</sup> See Moss, *supra* note 5, at 11; Stuber, *supra* note 19, at 37.

### *III. The Coalition to Create the MV Housing Bank*

Take a closer look at the Vineyard: as of May of 2023, 323 people sat on the Dukes County Regional Housing Authority's (DCRHA) rental waitlist and 512 sat on the home ownership waitlist—and that just accounts for those who sought help from the DCRHA.<sup>97</sup> While a 2013 assessment estimated that 50 affordable or community housing units needed to be produced *each year* to meet these needs, only eight subsidized units and 166 additional community housing units have been created in the 10 years since the report published.<sup>98</sup> “Without a significant and permanent source of financing,” creating 50 or even 30 new affordable housing units annually is challenging<sup>99</sup>—if not impossible.

In 2021, affordable housing advocates on Martha's Vineyard started the Coalition to Create the MV Housing Bank (CCMVHB) with the goal of crafting and passing legislation that would generate more affordable housing.<sup>100</sup> The first iteration of their proposal, announced in 2022, would create a Vineyard housing bank funded by a RETT.<sup>101</sup> Under the Coalition's plan, the housing bank would acquire real property,

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<sup>97</sup> STATE OF HOUSING ON MARTHA'S VINEYARD, MARTHA'S VINEYARD COMMISSION 17 (May 2023).

<sup>98</sup> MARTHA'S VINEYARD HOUSING NEEDS ASSESSMENT, *supra* note 90, at 5, 4.

<sup>99</sup> *Id.*

<sup>100</sup> Noah Asimow, *Coalition Forms to Try Again for Housing Bank*, VINEYARD GAZETTE, Aug. 27, 2021, 8:21 PM, <https://vineyardgazette.com/news/2021/01/27/colaition-forms-make-new-run-housing-bank-vineyard> (last visited Mar. 30, 2024).

<sup>101</sup> An Act Establishing the Martha's Vineyard Housing Bank, Bill H. 3804, 193rd Gen. Court (Mass. 2023). Urban cities like Boston and Somerville, as well as neighboring vacation destinations like Nantucket and Provincetown, are similarly pushing legislation for transfer fees, also called transfer taxes, that can finance affordable housing development projects and establish equilibrium in cities whose residents are being pushed out by “a boom in the construction of luxury real estate.” See Chuck Collins & Omar Ocampo, *Money on the Table: Beacon Hill Inaction Stalls Affordable Housing Resources for Cities and Towns*, INSTIT. FOR POL'Y STUD. (2020); see also *Municipalities in support of a Real Estate Transfer Fee*, LOCAL OPTION FOR HOUS. AFFORDABILITY COAL. (LOHA), <https://www.realestatetransferfee.org/municipalities> (last visited Mar. 30, 2024); An Act empowering cities and towns to impose a fee on certain real estate transactions to support affordable housing, Bill S.868, 192d Gen. Court (Mass. 2021); An Act empowering cities and towns to support affordable housing with a fee on certain real estate transactions, Bill H.13777, 192d Gen. Court (Mass. 2021).



rehabilitate existing properties, and develop new structures, and then sell, lease, exchange, transfer, or convey them to those in need of affordable housing.<sup>102</sup> The plan would also provide down payment assistance to help residents purchase homes on the island.<sup>103</sup> The proposal requires that 75 percent of funds annually go toward re-purposing “properties previously developed with existing buildings.”<sup>104</sup>

To fund the initiative, CCMVHB proposed a transfer fee, imposed on the homebuyer, of 2 percent of the price of any real estate sold on the island, above the first million dollars.<sup>105</sup> In its first year, the Coalition predicts that the tax could raise \$12 million and aims to use it to:

- Convert two existing houses into eight income-restricted rental apartments.
- Fill the funding gap for ten income-restricted accessory apartments to existing dwellings.
- Loan eight families \$200,000 of down payment assistance to access market-rate homes.
- Buy six permanent year-round restrictions on existing short-term rental properties.
- Grant or loan funds for ten denitrification wastewater upgrades in critical watershed areas.<sup>106</sup>

The proposal further states that “only activities and projects that create, preserve or support perpetual year-round housing, community housing or housing-related infrastructure that serves perpetual year-round housing or community housing, shall be eligible for funding.”<sup>107</sup>

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<sup>102</sup> An Act Establishing the Martha’s Vineyard Housing Bank, Bill H. 3804, 193rd Gen. Court (Mass. 2023).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*; *The Solution*, COAL. TO CREATE THE MV HOUS. BANK, <https://www.ccmvhb.org/the-solution> (last visited Mar. 30, 2024).

<sup>105</sup> An Act Establishing the Martha’s Vineyard Housing Bank, Bill H. 3804, 193rd Gen. Court (Mass. 2023).

<sup>106</sup> *Id.* The denitrification wastewater upgrades would not be limited to affordable housing projects, but to any property that needs an update to an old sewer system that has been poisoning water sources with large nitrogen outputs. See Noah Asimow, *Housing Needs Assessment Portrays an Island in Crisis*, VINEYARD GAZETTE, Feb. 4, 2021, 4:05 pm, <https://vineyardgazette.com/news/2021/02/04/housing-needs-assessment-portray-island-crisis> (last visited Mar. 30, 2024).

<sup>107</sup> An Act Establishing the Martha’s Vineyard Housing Bank, Bill H. 3804, 193rd Gen. Court (Mass. 2023).

To be eligible to rent or own “community housing,” residents must make under 240 percent of the area’s median income and use the housing year-round.<sup>108</sup>

The purpose, notably, is not just to produce new affordable housing units on the island, but to do so to “preserve the Island community.”<sup>109</sup> The proposal aims to produce 38 new affordable housing units in its first year of implementation<sup>110</sup>—a far cry from the 835 currently reported as waitlisted for DCRHA housing<sup>111</sup> or the 2,529 with an unmet housing need,<sup>112</sup> but a marked improvement from the 174 subsidized units created between 2013 and 2023<sup>113</sup>—while also combatting the vicious effects of seasonal housing.

#### *IV. A Solution in Acquisition-Rehabilitation*

The solution to the affordable housing deficit does not exist in increasing the housing supply, but rather by re-examining how a community “does class” and embracing its entire identity.<sup>114</sup> Acquiring existing properties and rehabilitating them (“acq-rehab”) can create affordable housing when “there is no longer room to expand outward”<sup>115</sup> without disrupting a community’s historic design.<sup>116</sup> While acq-rehab may face supply challenges similar to what new development faces, it has greater potential to create affordable housing that is truly integrated with the community and sustainable against aggressive housing market trends.<sup>117</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> COAL. TO CREATE THE MV HOUS. BANK, <https://www.ccmvhb.org> (last visited May 16, 2024)

<sup>110</sup> *The Solution*, *supra* note 104.

<sup>111</sup> STATE OF HOUSING ON MARTHA’S VINEYARD, *supra* note 97, at 17 (combining rental and homeownership waitlists).

<sup>112</sup> MARTHA’S VINEYARD HOUSING NEEDS ASSESSMENT, *supra* note 90, at 43.

<sup>113</sup> *Id.* at 4, 5 (combining additions of new subsidized and community housing).

<sup>114</sup> See Stuber, *supra* note 19, at 37 (contributing Aspen’s affordable housing success to how it uses different social classes’ overlapping interests to make a functioning community); see also Michelle S. Viegas, *Community Development and the South Beach Success Story*, 12 GEO. J. ON POVERTY L. AND POL’Y 389, 394 (2005).

<sup>115</sup> Tisher, *supra* note 7, at 610.

<sup>116</sup> Viegas, *supra* note 114.

<sup>117</sup> Tisher, *supra* note 7, at 612.

**A. “More” Housing Does Not Have to Mean “New” Housing**

Focusing on creating new housing is not a sustainable solution to the affordable housing deficit.<sup>118</sup> It has also historically failed to correct that deficit.<sup>119</sup> Even though communities in Massachusetts “have had more than 30 years to increase their affordable housing stock” through the state’s landmark Affordable Housing Law, M.G.L. Ch. 40B, still, “there are fewer affordable units being created per year in Massachusetts than are needed.”<sup>120</sup> The purpose of 40B was to address the state’s housing shortage by making it easier to get approval of affordable housing developments by allowing developers to evade local zoning laws “if at least 20-25% of the units have long-term affordability restrictions.”<sup>121</sup> However, with the Vineyard’s limited availability of undeveloped land, and its commitments to its small town aesthetic and its conservation efforts, 40B’s incentives—and the potential for 75 percent of projects to be eventually converted into market-rate housing—does little to soothe the island’s specific challenges.<sup>122</sup>

Furthermore, building new housing often means building out where amenities are scarcer and attempting to create a community-feel there.<sup>123</sup> This adds strain to a locality to ensure that new neighborhoods have access to services and are not isolated or segregated.<sup>124</sup> 40B, for

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<sup>118</sup> *Id.* at 618. While Aspen requires that affordable housing zoning be distributed “throughout the City to ensure a mix of housing types,” “super-gentrification” still notably exists. *Compare* ASPEN, COLO., MUN. CODE § 26.710.110(A), *with* Stuber, *supra* note 19, at 39.

<sup>119</sup> Tisher, *supra* note 7, at 617.

<sup>120</sup> Theodore C. Regnante & Paul J. Haverty, *Compelling Reasons Why the Legislature Should Resist the Call to Repeal Chapter 40B*, 88 MASS. L. REV. 77, 77, n. 2 (2003).

<sup>121</sup> Jenny Schuetz, *Four reasons why more public housing isn’t the solution to affordability concerns*, BROOKINGS (Jan. 14, 2021), <https://www.brookings.edu/blog/the-avenue/2021/01/14/four-reasons-why-more-public-housing-isnt-the-solution-to-affordability-concerns/> (last visited Mar. 30, 2024).

<sup>122</sup> *See* Dardeno, *supra* note 13, at 136; *Fact Sheet on Chapter 40B*, *supra* note 13.

<sup>123</sup> *See Development Permitting Processes on Martha’s Vineyard*, *supra* note 78, at 6-7; Tisher, *supra* note 7, at 612.

<sup>124</sup> Tisher, *supra* note 7, at 612.

example, is frequently criticized for allowing developers to build projects that “overwhelm[] municipalities' ability to provide services for the increased population.”<sup>125</sup>

Take Morgan Woods: at 60 units, it's the largest affordable housing development on the Vineyard.<sup>126</sup> This community was made possible because Edgartown “identified a 12-acre piece of land next to a nature conservancy” outside of town, which meant developers had to build around “environmentally sensitive areas.”<sup>127</sup> Given the costs and the short time available to build—curtailed for the tourist season—they used modular construction.<sup>128</sup> In other words, it's possible to address the affordable housing shortage by adding to the housing supply, but developers encounter a myriad of challenges—costs, zoning restrictions, timing issues, the lack of land—and must create new communities, set apart from the downtown areas where the jobs, schools, shops, health centers, and already-thriving neighborhoods are located.<sup>129</sup>

### **B. Expansion Through Preservation**

Combining affordable housing with historic preservation recognizes that it is possible to provide livable housing for lower-income and working-class residents while enhancing historic and unique attributes of a community.<sup>130</sup> With acq-rehab, town planners can ensure “walkable, transit-oriented neighborhoods close to shopping, schools, parks, and other amenities,” without needing to overhaul existing infrastructure, making these neighborhoods both desirable and livable for a diverse community.<sup>131</sup> Acq-rehab also counters a challenge specific to resort towns: the seasonal demand that creates a swath of expensive short-term rentals and cold homes.<sup>132</sup>

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<sup>125</sup> Regnante & Haverty, *supra* note 120, at 80.

<sup>126</sup> See Anderson, *supra* note 62.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Tisher, *supra* note 7, at 612.

<sup>130</sup> *Id.* at 625.

<sup>131</sup> *Id.* CCMVHB's proposal will prioritize housing projects that are located near existing services. See An Act Establishing the Martha's Vineyard Housing Bank, Bill H. 3804, 193rd Gen. Court (Mass. 2023).

<sup>132</sup> Moss, *supra* note 5, at 8; see also MARTHA'S VINEYARD COMMISSION, MARTHA'S VINEYARD STATISTICAL PROFILE (Feb. 2019), <https://www.mv>

While some argue that historic preservation is antithetical to the goals of affordable housing, claiming it “prevent[s] development,” and “obstruct[s] change,” its purpose is to regulate—not prevent—construction and alterations to protect “character-defining features.”<sup>133</sup> Arguing that historic preservation obstructs change is based on the mistaken assumption that merely increasing the supply of housing will solve the problem.<sup>134</sup> However, treating housing as “fungible” neither successfully creates enough affordable housing nor reflects the nuances or “realities of the housing market.”<sup>135</sup>

Take Aspen, for example. “[A] place like Aspen should not exist.”<sup>136</sup> The disparity between the town’s average annual income and average home price is what sociologist Jenny Stuber calls “the impossible math of Aspen, Colorado.”<sup>137</sup> What’s more, the ski town limits building development to maintain its “look, feel, and charm” and unique “Aspen brand.”<sup>138</sup> Designated historic buildings require “approval of a development order and either a certificate of no negative effect or a certificate of appropriateness before a building permit or any other work authorization will be issued by the City.”<sup>139</sup> All construction is restricted: residential homes in moderate-density areas are limited to a height of 25 feet, although the minimum lot size is 15,000 square feet.<sup>140</sup> In high-density areas, residential buildings are limited to 15 feet in height,<sup>141</sup> which is roughly the height of a tall one-story home.<sup>142</sup>

Yet, Stuber argues, it is this commitment to Aspen’s small-town character—its identity as a “real-place” as opposed to a manufactured

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commission.org/sites/default/files/docs/web03\_MVSP\_FINAL\_PRINT\_2019-03-21-3.pdf (last visited Mar. 30, 2024) (noting that 65 percent of homes in Dukes County were reported as vacant for part of 2016, in comparison to 9.8 percent of homes across Massachusetts as a whole).

<sup>133</sup> Tisher, *supra* note 7, at 613.

<sup>134</sup> *Id.* at 613-617.

<sup>135</sup> *Id.* at 617.

<sup>136</sup> Stuber, *supra* note 19, at 35.

<sup>137</sup> *See id.*

<sup>138</sup> *Id.* at 37.

<sup>139</sup> ASPEN, COLO., MUN. CODE § 26.415.060(a).

<sup>140</sup> ASPEN, COLO., MUN. CODE § 26.710.050(d)(1)-(7).

<sup>141</sup> ASPEN, COLO., MUN. CODE § 26.710.120(d)(7).

<sup>142</sup> *See How Tall is a 1, 2, and 3 Story House?*, WEEKENDBUILDS.COM, <https://weekendbuilds.com/how-tall-is-a-house/> (last visited Apr. 10, 2024). In other words, it is unlikely that any affordable apartment complex that can efficiently house multiple families can be built in a high-density area of Aspen.

ski resort—that has led to the success of its affordable housing program.<sup>143</sup> Land use regulations that keep buildings small and “historically appropriate” create scarcity that increases property values, but impact fees and transfer fees capitalize on this and redistribute wealth from the free market to affordable housing initiatives that enable the working class to make Aspen their home.<sup>144</sup> The same land use restrictions that generated scarcity define affordable housing projects, reinforcing and preserving Aspen’s unique small-town charm that fuels tourism and attracts its wealthy vacationers.<sup>145</sup>

### C. Acq-Rehab’s Cost-Benefit Analysis

Aspen’s system works—but only to a point. Property values are increasing out of reach for even upper-middle-class homebuyers and affordable housing supply consistently fails to meet demand.<sup>146</sup> Acq-rehab can be more expensive than new development, given the costs of acquiring and renovating properties.<sup>147</sup> One report from Aspen predicts that acquiring existing, free market property and converting it into affordable housing could require “a 3- to 5-fold increase to the current affordable housing tax revenues.”<sup>148</sup> Furthermore, while another study found that rehabilitation is more affordable than demolition for renovating houses to a “livable” standard, that is not necessarily the case if developers must update houses to meet modern green standards.<sup>149</sup> Additionally, rehabilitation requires “subtler and often unique skills,” lacks the predictability of new construction, varies in quantity of work, and may require knowledge of “old (‘archaic’) construction techniques and building codes;”<sup>150</sup> aspects that include the potential for hidden

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<sup>143</sup> See Stuber, *supra* note 19, at 39-40.

<sup>144</sup> *Id.* at 37.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 38-39; see also Carolyn Sackariason, *Increasing affordable housing capacity in Aspen on fast track for 2022*, ASPEN TIMES, Dec. 30, 2021, <https://www.aspentimes.com/news/increasing-affordable-housing-capacity-in-aspen-on-fast-track-for-2022/> (last visited Apr. 10, 2024).

<sup>147</sup> Brian Gormley, *Appraising Detroit: A Follow-Up to HUD’s “Barriers to the Rehabilitation of Affordable Housing Study,”* 12 J. OF AFFORDABLE HOUS. & CMTY. DEV. L. 314, 314 (2003).

<sup>148</sup> *Affordable Housing Strategic Plan*, *supra* note 39, at 31.

<sup>149</sup> Tisher, *supra* note 7, at 622.

<sup>150</sup> David Listokin & Barbara Listokin, *Barriers to the Rehabilitation of Affordable Housing, Volume 1: Finding and Analysis*, CTR. FOR URB. POL’Y RSCH., RUTGERS—THE STATE U. OF N.J., 1, 6 (2001).

costs and challenges, making these projects less attractive to some developers.<sup>151</sup>

On the other hand, rehabilitation reduces waste<sup>152</sup> and escapes certain restrictions and requirements that new construction must follow and meet.<sup>153</sup> Additionally, renovating existing properties means that, in the Vineyard’s case, the building has already been deemed to have no adverse impact on wildlife, nor will it obstruct scenic waters and landscapes, pollute surface and groundwater, or impair important coastal lands.<sup>154</sup> Furthermore, to maximize profits, affordable housing developers may use cheap, low-quality supplies in new construction, whereas historic buildings are made of materials that have already withstood the test of time.<sup>155</sup> Some argue that “the greenest building is one that is already built,” and “still more, many historic buildings are located along key transportation and density corridors, curbing sprawl and fuel consumption.”<sup>156</sup> Renovation also gives developers the advantages of reusing materials and working with already existing structures—potentially easing the burdens of buying and transporting materials.<sup>157</sup>

Critics argue that acq-rehab is less efficient than new development because it focuses on smaller projects,<sup>158</sup> but that is not necessarily antithetical to the goals of small towns with little room to grow outward

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<sup>151</sup> Gormley, *supra* note 147, at 315.

<sup>152</sup> MVC Energy and Environmental Building Policy for DRI Review, MARTHA’S VINEYARD COMM’N, 1, 5 (adopted on Dec. 4, 2008) <https://www.mvcommission.org/sites/default/files/docs/drienergypolicy.pdf>.

<sup>153</sup> See An Act Establishing the Martha’s Vineyard Housing Bank, Bill H. 3804, 193rd Gen. Court (Mass. 2023) (requiring new construction to “achieve a home energy rating service rating of zero”).

<sup>154</sup> EDGARTOWN, MA., ZONING BYLAW, art. 5, § 4(d), *available at* <https://www.edgartown-ma.us/Home/ShowDocument?id=12660> (last visited Apr. 10, 2024) (amended Sept. 2022).

<sup>155</sup> Tisher, *supra* note 7, at 622.

<sup>156</sup> Ian Michael Rogers, *Historic Preservation and Progress in Atlanta: Opportunity Knocks*, 2 J. COMPAR. URB. L. & POL’Y 214, 231 (2017).

<sup>157</sup> Anderson, *supra* note 62.

<sup>158</sup> Listokin & Listokin, *supra* note 150, at 6. One recent proposal in Miami—with bigger development goals to acquire and rehabilitate multi-family housing, accessory dwelling units, and commercial buildings and plazas—notes that the most successful projects will range from 5 to 50 units. *Miami Affordable Housing Master Plan: Investing in the Future and Soul of Miami* (Draft) 1, 8, FLA. INT’L UNIV. JORGE M. PEREZ METROPOLITAN CENTER, <https://metropolitan.fiu.edu/research/periodic-publications/recent-reports/city-of-mia-affordable-housing-master-plan.pdf> (last visited Apr. 10, 2024).

and no interest in growing upward. The Coalition's goal, after all, is to create just 38 new affordable units on the Vineyard in the housing bank's first year.<sup>159</sup> Acq-rehab is also "limited by the market's supply" of available properties that can be acquired and rehabilitated,<sup>160</sup> but new development is likewise limited by the available supply of land.<sup>161</sup>

While this strategy still faces challenges similar to that of new construction, like insufficient funding and gentrification, acq-rehab approaches the housing deficit by "capitalizing on an area's unique strengths," not by applying a fungibility theory that merely bandages, but does not cure, the issues.<sup>162</sup> It's this shift in thinking that gives the model "the potential to effectuate enormous positive change across the nation."<sup>163</sup>

#### ***V. The Mechanics: How to Finance and Preserve Acq-Rehab Housing Projects***

While a housing strategy focused on acq-rehab may answer the question of where to build when undeveloped land is unavailable, resort towns still face the hurdles of financing these projects and securing them long-term.

##### **A. Financing Affordable Housing: A Real Estate Transfer Tax**

Thirty-eight states and the District of Columbia impose a real estate transfer tax (RETT), also known as a transfer fee or documentary stamp tax, on the sale of property.<sup>164</sup> The tax is "generally imposed on the total consideration received for the property and/or the property's FMV [fair market value] at the time of transfer,"<sup>165</sup> sometimes kicking

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<sup>159</sup> *The Solution*, *supra* note 104.

<sup>160</sup> Gormley, *supra* note 147, at 326.

<sup>161</sup> Tisher, *supra* note 7, at 610.

<sup>162</sup> *Id.*; Viegas, *supra* note 114, at 404.

<sup>163</sup> Viegas, *supra* note 114, at 404.

<sup>164</sup> *Summary of Real Estate Transfer Taxes by State*, LAND CONSERVATION ASSOC. NETWORK, <https://www.landcan.org/pdfs/StateTransferTaxChart.pdf> (last visited Apr. 10, 2024).

<sup>165</sup> Eric J. Greenberg, *Don't Transfer that Interest! How the 'Mere Change Exemption' Provides Little Relief to Taxpayers*, 81 ALB. L. R. 1117, 1134 (2018).



in only above a certain threshold.<sup>166</sup> Transfer taxes are “the most common source of dedicated revenues” for funding affordable housing programs.<sup>167</sup> However, implementing a transfer tax faces constitutional and statutory challenges, in addition to the obstacles that any proposal to raise taxes faces.<sup>168</sup>

### *I. How Local Can You Go?*

CCMVHB’s proposal calls for a locally administered, county-wide RETT.<sup>169</sup> Local RETTs are only possible if authorized under a state’s constitutional or statutory home rule provision, which grants “renewed autonomy to local government.”<sup>170</sup> While 43 states allow home rule,<sup>171</sup> municipalities that elect to exercise it still face a variety of challenges, from conflicts with state legislatures to constitutional limits on their home rule authority.

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<sup>166</sup> For example, Pitkin County exempts the first \$100,000 of value from its one percent transfer tax. ASPEN, COLO., MUN. CODE § 23.48.070(b)-(c)(2) (2022); Bethany Spitz, *The Aspen Pitkin County Housing Authority*, 48 COLO. LAW. 44, 47 (2019). CCMVHB’s proposal exempts the first million dollars of a home’s purchase price “or a higher exemption as determined annually by the commission.” An Act Establishing the Martha’s Vineyard Housing Bank, Bill H. 3804, 193rd Gen. Court (Mass. 2023).

<sup>167</sup> Frank Alexander, *Financing Affordable Housing in Georgia: The Possibility of a Dedicated Revenue Source*, 13 GA. ST. U. L. REV. 363, 365-66 (1997).

<sup>168</sup> See *id.*; Anna-Lisa Mullis, *Dismantling the Trojan Horse: Mesa County Board of County Commissioners v. State*, 82 U. COLO. R. 259, 302 (2011); see generally NAR RSCH., POTENTIAL IMPACTS OF INCREASES IN REAL ESTATE TRANSFER TAXES (Aug. 2003).

<sup>169</sup> An Act Establishing the Martha’s Vineyard Housing Bank, Bill H. 3804, 193rd Gen. Court (Mass. 2023).

<sup>170</sup> *Williams v. Town of Hilton Head Island, S.C.*, 429 S.E.2d 802, 805 (S.C. 1993) (noting that imposing a transfer fee is a necessary and proper way for the local government to fund public acquisitions of land to preserve them as public recreation and scenic areas “for the general welfare of the citizens of Hilton Head Island”).

<sup>171</sup> *Home Rule*, COMMUNITY ENVIRONMENT LEGAL DEFENSE FUND, <https://celdf.org/home-rule/> (last visited Apr. 10, 2024).

## (a) Statutory Challenges in Colorado

Home rule means that municipalities can regulate matters “solely of local concern” and the state cannot interfere.<sup>172</sup> When a matter is “of mixed state and local concern,” both local and state authorities have the power to regulate it, and the state legislation will likely prevail.<sup>173</sup> However, the mere existence of state legislation “is not necessarily a bar to the enactment of local ordinances” if the local rule “is not inconsistent with the State legislation, unless the Legislature has expressly forbidden the adoption of local ordinances.”<sup>174</sup> Local ordinances can exercise “powers and functions beyond” that which the state laws may exercise as long as they do not frustrate the state legislative purpose.<sup>175</sup> They notably do so because of the need to perform “local study and to obtain recommendations on the local level.”<sup>176</sup>

For example, although 12 ski towns in Colorado administer local RETTs, the state legislature preempted additional municipalities from implementing them by prohibiting new local RETTs in the Taxpayer’s Bill of Rights (TABOR) Amendment of 1992.<sup>177</sup> TABOR and its prohibition against municipal RETTs have now withstood over 30

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<sup>172</sup> Sargent, *supra* note 15, at 351.

<sup>173</sup> *Id.* Compare *Town of Telluride v. Lot Thirty-Four Venture*, 3 P.3d 30, 37 (Colo. 2000) (finding rent regulation is a statewide issue because regulations in one municipality impact rent in neighboring towns, whereas uniform regulations support “informed and realistic expectations.”), with *Fielder v. City of Los Angeles*, 14 Cal. App. 4th 137, 145-46 (Feb. 26, 1993) (stating that because a city-based transfer tax is “a one-time burden,” with “purely local” effects, it is not a matter of “statewide concern.”).

<sup>174</sup> *Bloom v. City of Worcester*, 293 N.E.2d 268, 280-81 (Jul. 3, 2012).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Jason Blevins, *Colorado mountain communities harvesting record real estate taxes, but not banking on boom*, ASPEN TIMES, Aug. 23, 2002, <https://www.aspentimes.com/news/colorado-communities-are-harvesting-record-real-estate-transfer-taxes-but-they-are-not-banking-on-the-boom/> (last visited Apr. 10, 2024). Those ski towns which already had imposed RETTs were exempt, but they cannot increase the percentage charged. See Chris Stiffler, *Closing a Fair Deal: What a Real Estate Transaction Tax Would Look Like in Colorado*, COLO. FISCAL INSTIT., (March 2022), [https://www.coloradofiscal.org/wp-content/uploads/2022/03/2022-03-14\\_Real-Estate-Transaction-Tax-Paper.pdf](https://www.coloradofiscal.org/wp-content/uploads/2022/03/2022-03-14_Real-Estate-Transaction-Tax-Paper.pdf).

years of litigation, debate, and even arguments calling it unconstitutional.<sup>178</sup> While it could be reformed, “the Colorado local governments appear prepared to live with the effects.”<sup>179</sup>

### (b) Constitutional Challenges in Massachusetts

The Massachusetts Constitution allows but limits home rule by excluding seven areas from local authority—taxation being one.<sup>180</sup> A municipality can only “levy, assess, and collect taxes” that the State Legislature approves.<sup>181</sup> This is why places like the Vineyard and Nantucket have been petitioning for the authority to impose a local RETT for over a decade to no avail.<sup>182</sup> While, when facing “anti-tax” sentiment, “greater fiscal autonomy might seem an elusive, even pointless prize to pursue,” it is a necessary pursuit when taxes must be “highly individualized”<sup>183</sup>—in what they tax, what programs are funded, and how they are funded.<sup>184</sup> Simply put, “without fiscal home rule there is no home rule.”<sup>185</sup>

## 2. *How Local Should You Go?*

State and local governments have only recently begun to play a bigger role in creating and managing affordable housing.<sup>186</sup> Given its uniquely local aspects, some argue that affordable housing is most

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<sup>178</sup> Mullis, *supra* note 168, at 302; Joshua Pens, *Restore the Republic: The Incompatibility Between the Taxpayer’s Bill of Rights and the Guarantee Clause*, 87 U. COLO. L. REV. 621, 626 (2015).

<sup>179</sup> Mullis, *supra* note 168, at 302.

<sup>180</sup> MA CONST. art. LXXXIX (amended 1966) (amending Mass. Const. amend. art. II, § 2).

<sup>181</sup> *Id.* While CCMVHB’s proposal refers to a “transfer fee,” it is in practice a tax, not a fee. *See also* Emerson College v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984) (differentiating a fee from a tax by noting that fees are: 1. exchanged for government services that benefit the payor, not other members of society; 2. voluntary; and 3. collected to compensate the government for its services, not to raise revenue) (citations omitted).

<sup>182</sup> Collins & Ocampo, *supra* note 101.

<sup>183</sup> Joni Armstrong Coffey, *The Case for Fiscal Home Rule*, 71 FL. B. J. 54, 55 (1997).

<sup>184</sup> Pens, *supra* note 178; Alexander, *supra* note 167, at 371.

<sup>185</sup> *See* Coffey, *supra* note 183, at 54–57.

<sup>186</sup> Alexander, *supra* note 167, at 365.

effectively approached on a county or municipal level.<sup>187</sup> The challenges of seasonal resort towns demonstrate this fact: rural towns in Western Massachusetts, with an abundant supply of open land and a lack of demand for large, private coastal estates, do not experience the same “existential” crisis in affordable housing that places like the Vineyard face.<sup>188</sup> Furthermore, resort towns likely benefit from a transfer tax (“on these large vacation homes,” no less) in ways other towns may not, given their “large number of absentee homeowners who are contributing little, if any, to other tax bases.”<sup>189</sup>

Others argue that “the sheer magnitude of the housing needs of our community at large necessitates a statewide approach.”<sup>190</sup> However, “the proximity of local governments and the visibility of the services they provide” make them better situated to garner support for a transfer tax because of “the greater ease with which the voter can compare the costs with the benefits.”<sup>191</sup> Taking a statewide approach makes it more challenging to convince voters to approve of new taxes, “even if he or she would support the same community interest for which the tax was being sought,” because it is difficult to envision the “subtle impact of governmental benefits” that a tax, with its immediate, “palpable impact” could create.<sup>192</sup> Furthermore, convincing voters to support a tax becomes even more challenging when it funds “a service that benefits only a minority of the state.”<sup>193</sup> Those opposed to RETTs argue that the tax imposes a larger burden on lower income households and is paid only by the small population of those buying or selling homes.<sup>194</sup> Opponents also argue that RETTs operate as an unfair or “arbitrary” tax, as the amount “is neither systematically related to a household’s ability to pay

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<sup>187</sup> See Sargent, *supra* note 15, at 356-57.

<sup>188</sup> See Lang, *supra* note 6; see Teresa Wiltz, *In Shift, States Step in on Affordable Housing*, THE PEW CHARITABLE TRUSTS (Oct. 15, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/15/in-shift-states-step-in-on-affordable-housing> (last visited Apr. 10, 2024).

<sup>189</sup> Mullis, *supra* note 168, at 302.

<sup>190</sup> Alexander, *supra* note 167, at 367.

<sup>191</sup> Pens, *supra* note 178, at 656 (“[T]hrough spring 2015, municipal voters approved 463 of the 803 extensions, rate increases, and base expansions proposed. . . . In contrast, only 3 of the 11 proposed statewide tax increases were passed by voters.”).

<sup>192</sup> *Id.* at 625.

<sup>193</sup> *Id.* at 657 (using the example of Medicaid, but applying the concept similarly to affordable housing).

<sup>194</sup> See NAR RSCH., *supra* note 168, at 3.

nor to the benefits that movers derive from public services.”<sup>195</sup> Calculating a transfer tax based on total consideration of the sale or on the property’s fair market value and imposing it “without taking into account any gain or loss realized on the property” may have “a sever[e] adverse effect on the taxpayer.”<sup>196</sup>

Therefore, when faced with both the hurdles of achieving fiscal home rule<sup>197</sup> and the desirability of individualized programs,<sup>198</sup> the best plan of approach may be a statewide, optional, local RETT, an alternate plan that has also been brought before the Massachusetts state legislature.<sup>199</sup> The proposal would allow cities and towns to choose whether to impose a transfer fee; at what rate, between 0.5 and 2 percent, to impose it; and whether to impose it on the buyer or seller.<sup>200</sup> The statewide coverage of this bill would make it easier for a municipality to impose a RETT, but would still allow local municipalities to have control over its implementation.<sup>201</sup>

### 3. *Other Resistance and Challenges to RETTs*

A RETT can cause artificial changes in the prices of house sales. If the RETT is imposed on the seller, as it is in Nantucket’s proposal,<sup>202</sup> the seller could inflate their home price to displace the cost of the tax onto the buyer.<sup>203</sup> Conversely, the added cost from a local RETT could instead incentivize the seller to lower their home price to reduce

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<sup>195</sup> See *id.* at 2.

<sup>196</sup> See Greenberg, *supra* note 165, at 1134.

<sup>197</sup> See Alexander, *supra* note 167, at 371; see also Coffey, *supra* note 183, at 54.

<sup>198</sup> See Coffey, *supra* note 183, at 57; Pens, *supra* note 178, at 657.

<sup>199</sup> An Act empowering cities and towns to support affordable housing with a fee on certain real estate transactions, Bill H. 1377, 192nd Gen. Ct. (Mass. 2021).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> An act authorizing the town of Nantucket to impose a real estate transfer fee for affordable and workforce housing, Bill H.4201, 192nd Gen. Ct. (Mass. 2021); *Nantucket Housing Production Plan 2021*, BARRETT PLANNING GROUP, LLC, 1, 68 (prepared for the Town of Nantucket and Nantucket Affordable Housing Trust).

<sup>203</sup> Donald R. Haurin, et al., *List Prices, Sale Prices and Marketing Time: An Application to US Housing Markets*, 38 REAL ESTATE ECON., 659, 682 (2010).

the tax burden, either to lower their own tax liability or to make the purchase price more attractive to potential buyers.<sup>204</sup> This is even more likely when the RETT is imposed after a certain threshold, as it is in CCMVHB's proposal.<sup>205</sup> The threshold could incentivize sellers to artificially reduce the cost of their home to just below the maximum exemption.<sup>206</sup> That incentive could temper the ever-rising price tags on the island's listings.<sup>207</sup> On the other hand, it is a manipulated reduction in price that misrepresents the market value and reduces funds available for the housing bank.<sup>208</sup>

The added tax would also increase closing costs, discouraging “mobility among current homeowners” and preventing “frequent movers from entering homeownership.”<sup>209</sup> However, the additional cost could also discourage home flipping—buying homes as speculative investments to hold and sell in a few years for a profit—further limiting the pool of homes that could be acquired and refurbished for affordable housing purposes.<sup>210</sup>

Furthermore, just because a RETT is financially successful does not mean it will be put to good use.<sup>211</sup> Affordable housing progress is constantly stalled by opposing interests that advocate for limiting pop-

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<sup>204</sup> See PFM GROUP CONSULTING, LLC., ECONOMIC IMPACT OF A REAL ESTATE TRANSFER TAX FOR THE CITY OF BOSTON 9 (Oct. 25, 2019), <https://www.docdroid.net/cqftLrT/pfm-study-boston-real-estate-transfer-tax-pdf> (stating that “the imposition of the tax causes market prices to fall by roughly the equivalent of the tax”).

<sup>205</sup> An Act Establishing the Martha's Vineyard Housing Bank, Bill H. 3804, 193rd Gen. Court (Mass. 2023).

<sup>206</sup> The maximum exemption being \$1 million on the Vineyard. See *id.*

<sup>207</sup> See PFM GROUP CONSULTING, *supra* note 204, at 9.

<sup>208</sup> See Wojciech Kopczuk & David J. Munroe, *Mansion Tax: The Effect of Transfer Taxes on the Residential Real Estate Market* 1, 25 (Nat'l Bureau of Econ. Rsch., Working Paper No. 20084, 2014), [https://www.nber.org/system/files/working\\_papers/w20084/w20084.pdf](https://www.nber.org/system/files/working_papers/w20084/w20084.pdf) (last visited Apr. 10, 2024).

<sup>209</sup> *Id.* at 7; see also PFM GROUP CONSULTING, *supra* note 204, at 9 (finding that the volume of home sales contracts when transaction prices increase); see also NAR RSCH., *supra* note 168, at 7.

<sup>210</sup> See Bradford P. Anderson, *Welcome to my Flipperhood: A Call to Repair the Residential Real Estate Tax Swindle*, GEO. J. OF L. AND PUB. POL'Y, 415, 427 (2009).

<sup>211</sup> See Nicholas J. Brunick, *Renewing the Land of Opportunity*, J. OF AFFORDABLE HOUS. & COMM'Y DEV. L. 161, 177 (2010) (“Unfortunately, the State of Florida has exhibited a disturbing habit of raiding these funds for other purposes.”).

ulation growth, preventing city sprawl, and restricting real estate development that disrupts a community's cohesive aesthetics and composition.<sup>212</sup> The unpredictability and “volatility” of annual home sale volume can make a RETT an “unreliable” source of funds.<sup>213</sup>

However, in a community like Aspen or the Vineyard, where the market is hot and the average home sells for millions, a bad year may not neutralize a good year. In 2021 alone, Pitkin County's RETT raised \$38 million.<sup>214</sup> It can at least provide a revenue stream that helps “avoid annual political battles over appropriations,” and can be supplemented with diversified funding sources.<sup>215</sup> Workforce housing in Aspen is highly subsidized by a variety of other funding initiatives, including impact fees; fee-in-lieu; and land-in-lieu, a “pay-to-play” approach that requires private developers to pay a fee or convey vacant property to the city if their projects do not include affordable housing.<sup>216</sup> Furthermore, the CCMVHB's proposal is modeled after the island's land bank, which has successfully taxed homebuyers a similar 2 percent fee on sales of over \$800,000 since 1986, and has not caused a noticeable decrease in sales (or home prices)—all while protecting land from housing developers.<sup>217</sup> But this begs the question, would adding on another tax work as smoothly?

### **B. Securing Affordable Housing: Perpetual Affordability Covenants**

All affordable housing projects funneled through the proposed Martha's Vineyard Housing Bank Commission would be subject to anti-flipping restrictions that mandate the length of time a home must be

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<sup>212</sup> See Laitos & Ruckriegle, *supra* note 5, at 892.

<sup>213</sup> See NAR RSCH., *supra* note 168, at 8; see also Brunick, *supra* note 211, at 177.

<sup>214</sup> Scott Condon, *Pitkin County Commissioners Adrift on Affordable Housing Policy*, ASPEN TIMES, Jul. 7, 2022, <https://www.aspentimes.com/news/pitco-commissioners-adrift-on-affordable-housing-policy/> (last visited Apr. 10, 2024).

<sup>215</sup> See also Brunick, *supra* note 211, at 178.

<sup>216</sup> See Spitz, *supra* note 166; see also Stuber, *supra* note 19, at 35.

<sup>217</sup> See *The Solution*, *supra* note 104; *About the Land Bank*, MARTHA'S VINEYARD LAND BANK, <https://www.mvlandbank.com/about/about-the-land-bank> (last visited Apr. 10, 2024). In 2022, the land bank brought in \$22,291,005. See *2022 Annual Report*, MARTHA'S VINEYARD LAND BANK COMMISSION, [https://www.mvlandbank.com/fileadmin/files/Uncategorized/2022\\_Annual\\_Report\\_Land\\_Bank.pdf](https://www.mvlandbank.com/fileadmin/files/Uncategorized/2022_Annual_Report_Land_Bank.pdf) (last visited Apr. 10, 2024).

lived in before it can be re-sold.<sup>218</sup> The Commission would also have the authority to impose year-round housing, perpetual community housing, and transfer price (or rental rate) restrictions on all of its housing projects and properties “created, rehabilitated or acquired pursuant to this act.”<sup>219</sup> Furthermore, all down payment loans and grants from the Commission would come with year-round housing restrictions.<sup>220</sup>

Affordability in perpetuity supports the goal of community preservation—although it faces legal challenges—as it “promote[s] the idea of community control.”<sup>221</sup> When developers “have all the power and control,” they determine “the number of affordable housing units,” but when the community has the power to restrict home sales, they take back “control of the market rates within . . . community limits.”<sup>222</sup> Affordability restrictions ensure that a home designated to serve affordable housing needs remains affordable, despite self-serving interests of homeowners or private developers.<sup>223</sup> Furthermore, year-round and community housing restrictions make sense in the face of a resort town’s unique struggles to cope with the effects of seasonal demand on price and supply.<sup>224</sup> However, actually securing affordable housing in perpetuity—and ensuring its practicality for future generations—can be a Herculean task for some communities.

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<sup>218</sup> An Act Establishing the Martha’s Vineyard Housing Bank, Bill H. 3804, 193rd Gen. Court (Mass. 2023). Violating the anti-flipping restriction triggers liability equal to 100 percent of the amount of funding received from the housing bank and 100 percent of the net gain from the sale.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* Community housing refers to “rental and ownership housing units for use as year-round housing by those residents of Martha’s Vineyard earning up to 240 per cent of area median income.” The Commission will further define “year-round housing,” but it “shall not include housing units in which the primary occupants reside for less than 11 months during any 1-year period.” *See id.*

<sup>221</sup> Chelsea King, *Merging Inclusionary Zoning and Community Land Trusts to Increase Affordable Housing in Baltimore Without Displacing Neighborhoods*, 49 U. BALTIMORE L. F. 43, 61 (2018).

<sup>222</sup> *Id.* at 60-61.

<sup>223</sup> Erika Barber, *supra* note 17, at 143 (detailing how one affordable housing ordinance in Newton, MA, created 225 affordable units—and then lost more than fifty of them to developers after the affordability restriction expired).

<sup>224</sup> *See supra* § II(A)(2).



1. *The Legal Challenges to Perpetual Affordability Covenants*

Perpetual affordable housing covenants are typically applied to privately-owned affordable housing projects in exchange for public funding and are used to create “a lasting stock of affordable housing insulated from gentrification and skyrocketing market rate property values.”<sup>225</sup> Six states have statutorily empowered housing banks and other parties to apply affordability covenants, “despite their inconsistencies with common law requirements.”<sup>226</sup>

Massachusetts, for example, allows for perpetual restrictions that limit the use of the land to low- or moderate-income families; restrict to whom the property can be resold; and restrict the use of the property (such as imposing a year-round living requirement).<sup>227</sup> The State Legislature has also expressly granted Dukes and Nantucket Counties the right to place permanent deed restrictions on dedicated affordable housing, defined as restricted for those making up to 150 percent of the area’s median income.<sup>228</sup> The Massachusetts Supreme Judicial Court has also weighed in, stating that “[w]here the beneficiary of the restriction is the public and the restriction reinforces a legislatively stated public purpose . . . the appropriate question is whether the bargain contravened public policy when it was made and whether its enforcement is consistent with public policy and is reasonable.”<sup>229</sup>

Affordable housing initiatives outside of Massachusetts (and the five other states with affordability covenant enabling statutes) face a steeper battle to secure long term affordability restrictions.<sup>230</sup> Without state enabling legislation, there is “cause for concern about the judicial enforceability of most affordability covenants,” even though they “are presumed to secure” affordable housing projects worth “billions of

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<sup>225</sup> Elizabeth Elia, *Perpetual Affordability Covenants: Can these Land Use Tools Solve the Affordable Housing Crisis?*, 124 PENN. ST. L. REV. 57, 62 (2019) [hereinafter Elia, *Perpetual Affordability Covenants*].

<sup>226</sup> *Id.* at 63. The six states are: Massachusetts, Maine, Vermont, Rhode Island, New Jersey, California, and Oregon. *See id.* at n. 21.

<sup>227</sup> MASS. GEN. L. ANN. 184 § 31.

<sup>228</sup> *See* MARTHA’S VINEYARD HOUSING NEEDS ASSESSMENT, *supra* note 90, at 3.

<sup>229</sup> *Bennett v. Comm’r of Food and Agric.*, 576 N.E. 2d 1365, 1367 (1991).

<sup>230</sup> Elizabeth Elia, *Servitude Done “Proper”ly: Propriety, Not Contract Law*, 37 J. LAND USE AND ENV’L L. 31, 73 (2021) (emphasis added).

dollars.”<sup>231</sup> The main legal challenges are the rule against perpetuities and the rule against unreasonable restraints on alienation of real property.<sup>232</sup>

#### (a) Rule Against Perpetuities

The common law rule against perpetuities requires a property interest to vest, free of restrictions that control ownership, within 21 years of a named individual’s lifetime.<sup>233</sup> There is little analysis of how perpetual affordability covenants interact with the rule against perpetuities.<sup>234</sup> Most states have abolished the rule or extended the time by which the interest must vest.<sup>235</sup> Massachusetts and Colorado, for example, both allow interests that vest within 90 years of creation.<sup>236</sup> In Colorado, furthermore, the rule against perpetuities does not apply to commercial transactions, which may be interpreted as any transaction between sophisticated parties.<sup>237</sup> Therefore, this rule is unlikely to present a significant bar to perpetual affordability covenants.<sup>238</sup>

#### (b) Unreasonable Restraints on Alienation

Despite modern changes to the rule against perpetuities, perpetual affordability covenants still might be considered unreasonable restraints on alienation of real property, given the duration of the restriction (forever).<sup>239</sup> A direct restraint on alienation is a condition imposed on the transfer of property that prohibits or penalizes the new owner’s ability to freely dispose of their property.<sup>240</sup> Under the common law, any direct restraint—like an affordability covenant, whether or not

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<sup>231</sup> Elia, *Perpetual Affordability Covenants*, *supra* note 225, at 63-64; *see also* Ben Doyle, *Forever is an Awfully Long Time*, 48 COLO. LAW. 44, 47 (2019).

<sup>232</sup> John R. Nolon, *Shattering the Myth of Municipal Impotence: The Authority of Local Government to Create Affordable Housing*, 17 FORDHAM URB. L. J. 383, 390 (1989).

<sup>233</sup> Lori Freeman, *Creative Solution to Housing Crisis*, 46 MT LAW. 14, 17 (2021).

<sup>234</sup> *See* Nolon, *supra* note 232, at 402.

<sup>235</sup> *Id.*

<sup>236</sup> *See* COLO. REV. STAT. ANN. §15-11-1102.5(2)(b); MASS. GEN. LAWS ch. 190B §2-901(a)(2).

<sup>237</sup> *See* Doyle, *supra* note 231, at 50.

<sup>238</sup> Nolon, *supra* note 232, at 390.

<sup>239</sup> Elia, *Perpetual Affordability Covenants*, *supra* note 225, at 73.

<sup>240</sup> *See id.* at 72; Nolon, *supra* note 232, at n. 91.

perpetual—is generally void.<sup>241</sup> The purposes of the doctrine are to support development, encourage property transfers, and limit property owners from imposing conditions that impede future ownership.<sup>242</sup>

Some jurisdictions have softened this rule by first determining whether the restraint is reasonable.<sup>243</sup> What is reasonable depends on weighing the justification for the restraint against the “quantum of restraint.”<sup>244</sup> California courts have on several occasions found affordability covenants to be reasonable and enforceable, given the “strong public interest in creating affordable housing.”<sup>245</sup> In addition, in at least one case, the court avoided the question altogether by finding that the affordability covenant was not one held in perpetuity at all, but rather one drawn up to hold only “‘while the ‘development . . . remains in existence in or upon any part of, and thereby confers benefit upon, the subject property described herein.’”<sup>246</sup>

However, as a general rule, “the longer the covenant, the greater the quantum of restraint, the more likely the covenant will be found unreasonable and thus unenforceable.”<sup>247</sup> Notably, affordability covenants are considered “severe restrictions,” designed to dictate who can own or buy a property, to whom an owner can sell the property, at what price they can sell the property, and even how long they must hold the property—restrictions that are the antithesis of the rule’s purposes.<sup>248</sup> Therefore, while housing commissions in places like the Vineyard, Nantucket, and parts of California may easily be able to impose perpetual restrictions on affordable housing projects, those in states without specific legislation permitting perpetual affordability covenants face a more difficult—or at least uncertain—time relying on judicial interpretation.<sup>249</sup>

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<sup>241</sup> Elia, *Perpetual Affordability Covenants*, *supra* note 225, at 72.

<sup>242</sup> Nolon, *supra* note 232, at 402.

<sup>243</sup> Elia, *Perpetual Affordability Covenants*, *supra* note 225, at 73.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 74.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 73.

<sup>248</sup> *See id.* at 78; Nolon, *supra* note 232, at 401–402.

<sup>249</sup> *See* § 31, *supra* note 246; *see also* Elia, *Perpetual Affordability Covenants*, *supra* note 225, at 74.

## 2. *The Practical Challenges to Perpetual Affordability Covenants*

While CCMVHB's proposal notes that all funding must go toward creating perpetual, year-round, community housing, it leaves the decision of what restrictions will be imposed to the housing bank commission.<sup>250</sup> While all projects will be subject to an anti-flipping restriction and all down payment assistance will also be subject to a year-round housing restriction, it is unclear when and where the transfer price restrictions will be applied. It is also unclear when and where the year-round or community housing restrictions will be applied on housing projects that the commission acquires, rehabilitates, and transfers to eligible recipients.<sup>251</sup> The lack of specifics on the application of these restrictions—while giving the Commission flexibility to apply them thoughtfully—does leave unclear how strong and how lasting these restrictions will be.

However, the affordable restriction term may not need to be perpetual to make a powerful impact. A long-term affordability mandate can “pose the same negative development incentives of a permanent affordability mandate.”<sup>252</sup> Furthermore, a long-term restriction could become an obstacle if the property “need[s] to be replaced or refinanced with market-rate housing, or adapted for another use.”<sup>253</sup> Thus, the government must determine how much it values long-term affordability, weigh them against other community needs, and reflect this in the subsidy it offers to developers to increase their rate of return.<sup>254</sup>

On the flip side, what do you do when recipients of affordable housing retire? Aspen faces the debate now,<sup>255</sup> as 20 to 40 percent of the

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<sup>250</sup> An Act Establishing the Martha's Vineyard Housing Bank, Bill H. 3804, 193rd Gen. Court (Mass. 2023).

<sup>251</sup> *See id.*

<sup>252</sup> Vincent J. Reina, *Affordable Housing, But for How Long? The Opportunity and Challenge of Mandating Permanently Affordable Housing*, 46 FORDHAM URB. L. J. 1267, 1292 (2019).

<sup>253</sup> *See Doyle, supra* note 231, at 47.

<sup>254</sup> *See id.*

<sup>255</sup> The debate has included suggestions such as building senior living facilities and financial incentives to move out or downsize. The suggestions received heated backlash with accusations that the suggestions were pretext to kick retirees out of their homes. *See* Jason Auslander, *Retirees and affordable housing stirs toxic debate in Aspen*, THE ASPEN TIMES, Nov. 16, 2017, <https://www.aspen-times.com/news/retirees-and-affordable-housing-stirs-toxic-debate-in-aspen/>.

city's 1,631 deed-restricted owned homes could be occupied by retirees by 2025.<sup>256</sup> Additionally, "many" retirees live in units with bedrooms they no longer use, as other family members have since left.<sup>257</sup> Likewise, 23.3 percent of the Vineyard's population is 65 years and older, and are reportedly "overhoused" in homes with space that other families need.<sup>258</sup> However, the "silver tsunami"<sup>259</sup> cannot just be evicted—nor does anyone want to do so—as such a policy would not only be unkind, it would also reinforce a transient workforce, rather than build a lasting and diverse community.<sup>260</sup>

Even if retirees wanted to move, their exit options are scarce, as their homes appreciate at a mere 3 percent per year, as opposed to the roughly 12 percent annual appreciation on Aspen's free market.<sup>261</sup> While a free-market home would have cost much more in the first place, "it would have appreciated at a much greater rate," whereas "when a local sells her affordable home, she barely has enough for a down payment on a free-market home."<sup>262</sup>

CCMVHB's proposal offers at least a partial solution to this obstacle: exempting sales of real property from the RETT if the property has been consistently used as affordable housing and has at least five years remaining on its affordable housing restriction—so although a retiree would still loses out on the market value appreciation of their home, they would benefit from the years of living in a heavily discounted home, without being subject to the transfer fee.<sup>263</sup>

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Another proposal suggests increasing "the number of years of full-time work required before a resident can retire in affordable housing," possibly varying "depending on the age of that buyer." See Bevins, *Aspen's workers are hitting retirement age*, *supra* note 71.

<sup>256</sup> Blevins, *supra* note 71.

<sup>257</sup> See Auslander, *supra* note 255.

<sup>258</sup> See MARTHA'S VINEYARD HOUSING NEEDS ASSESSMENT, *supra* note 90, at 12.

<sup>259</sup> See Scott Condon, *Commissioner candidates tangle over affordable housing plan*, ASPEN DAILY NEWS, Oct. 7, 2022, [https://www.aspendailynews.com/news/commissioner-candidates-tangle-over-affordable-housing-plan/article\\_ee650fb0-45e9-11ed-8b0b-ffcf8609e683.html](https://www.aspendailynews.com/news/commissioner-candidates-tangle-over-affordable-housing-plan/article_ee650fb0-45e9-11ed-8b0b-ffcf8609e683.html) (last visited Apr. 10, 2024).

<sup>260</sup> *Id.*

<sup>261</sup> Blevins, *supra* note 70.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

## VI. Conclusion

Realistically, the affordable housing crisis in vacation destinations like Dukes or Pitkin County will exist long after a local real estate transfer tax is imposed and a development strategy of acq-rehab is implemented. Despite its already successful RETT, Aspen seems no closer to solving their housing crisis, nor has the town prevented home prices from continuing to rise.<sup>264</sup> Every winter, the community falls back on creative solutions to provide lodging for its service workers.<sup>265</sup> Likewise, other cities that have revitalized their neighborhoods through acq-rehab still struggle against rising housing costs and gentrification.<sup>266</sup>

However, we have yet to see a community that has committed RETT-financing to fund a strategy that centers around and prioritizes acq-rehab. By combining acq-rehab with RETT funding, it can be possible for a community to find a balance between generating affordable housing and preserving its original character. At its core, this strategy identifies the characteristics of a community that first attracted both the wealthy and the working classes, recognizes the service workers as the backbone of its community, provides for them accordingly, and preserves the values and charm that will keep the community thriving long into the future.

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<sup>264</sup> See Scott Condon, *Aspen Skiing Co. concerned that housing, worker shortages will affect guest experiences*, THE ASPEN TIMES, Nov. 11, 2021, <https://www.aspentimes.com/news/aspen-skiing-co-concerned-that-housing-worker-shortages-will-affect-guest-experiences/> (last visited Apr. 10, 2024).

<sup>265</sup> Hansman, *supra* note 24.

<sup>266</sup> See Viegas, *supra* note 114, at 403; see also Deirdra Funcheon, *How Miami became the center of America's rental housing crisis*, WASH. POST, Sept. 16, 2022, <https://www.washingtonpost.com/business/2022/09/16/miami-center-america-rental-crisis/> (last visited Apr. 10, 2024).