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DEED RESTRICTIONS AND AFFORDABLE HOME OWNERSHIP

Jack Feiyang Chen

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Harvard Law School
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DEED RESTRICTIONS AND AFFORDABLE HOME OWNERSHIP

Jack Feiyang Chen*

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ABSTRACT

Deed restrictions are a commonly used instrument in connection with affordable home ownership programs. As covenants attached to subsidized ownership units, deed restrictions set—among other provisions—maximum sales prices and occupancy constraints, binding current and subsequent owners over a specified period. Deed restrictions attempt to achieve two conflicting policy goals: allowing owners to build equity while keeping property affordable for future inhabitants. Deed restrictions thus represent an "ownership-lite" version of property ownership, missing a number of "sticks" from the proverbial bundle, and compound the risk and limit the reward of home ownership. This paper presents a survey of Massachusetts deed restrictions over the last three decades, and outlines the main components of deed restrictions and how they affect the incentives and payoffs of property ownership compared to unencumbered title.

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CONTENTS

I. INTRODUCTION 3
II. SUBSIDIZED HOME OWNERSHIP 5
A. Positive Externalities of Home Ownership 6
B. Income Redistribution 7
C. Race and Home Ownership 9
D. Current Home Ownership Policy 11
III. COMPONENTS OF DEED RESTRICTIONS 11
A. Dataset 11
B. Length 13
C. Buyer Qualifications 14
D. Resale Price 15
E. Capital Improvements 18
F. Sale Process 19
G. Occupancy Restrictions 20
H. Transferability 21
I. Financing 21
J. Enforcement 22
IV. DISCUSSION 23
A. Homeowner Incentives 23
B. Policy Tradeoffs 24
C. Recent Trends 25
V. CONCLUSION 29
APPENDIX 31

I. INTRODUCTION

Shared-equity property ownership is an increasingly popular policy tool to facilitate home ownership for households of modest economic means.[1] Such models allow households to purchase property at prices lower than market while limiting their return. Hence, these models are deemed "shared-equity" because the owners do not enjoy full appreciation of their property—part of their equity is "shared" with the public in the form of continued lower housing prices.[2]

Common forms of share-equity ownership models include limited-equity housing cooperatives, community land trusts, and deed restrictions.[3] Limited-equity housing cooperatives (LEHCs) are structured as corporations that own housing.[4] Occupants buy membership shares in the LEHC, which gives them the right to use a particular unit, and affordability is maintained by controlling the price of shares.[5] Community land trusts (CLTs) are nonprofits that own land and provide long-term ground leases allowing residents to build and own homes on top of such land; the lease maintains the property's affordability.[6] Finally, deed restrictions—the topic of this paper—are covenants attached to property title that impose various restrictions on the property, including controlling its sales price, binding all present and future owners over a certain period.

In their simplest form, deed restrictions are contracts that limit the transaction price on a piece of property. Just like the membership shares in LEHCs and the ground leases in CLTs, deed restrictions are an instrument to constrain price appreciation; without such a mechanism, designated affordable properties would immediately revert to market prices after their initial sale, and thus be rendered unaffordable for their target audience. As such, deed restrictions are a device by

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[1] *See, e.g.*, Ruoniu Wang et al., *Tracking Growth and Evaluating Performance of Shared Equity Homeownership Programs During Housing Market Fluctuations* 52 (Lincoln Inst. of Land Pol'y., Working Paper No. WP19RW1, 2019) (hereinafter *Tracking Growth*).

[2] *Shared Equity Models Offer Sustainable Homeownership*, U.S. DEP'T OF HOUS. AND URB. DEV. OFF. OF POL'Y DEV. AND RSCH. (2012), www.huduser.gov/portal/periodicals/em/fall12/highlight3.html.

[3] Julie F. Curtin et al., *CLTs: A Growing Trend in Affordable Home Ownership*, 17 J. OF AFFORDABLE HOUS. AND CMTY. DEV. L. 367, (2008).

[4] *Id.*

[5] *Id.*

[6] *Id.*

which the "sharing" of equity is administered. Studies have estimated the number of deed-restricted properties in the United States at between 100,000 and 300,000.[7]

Relative to other shared-equity models, deed restrictions come closest to traditional property ownership. Unlike CLTs, where one only owns the structure, or LEHCs, where one only owns a share in a corporation, owners of deed-restricted properties are full owners, *ad coelum et ad inferos*. Also unlike CLTs and LEHCs, deed-restricted properties do not require an overarching corporate structure, as ownership is directly vested in each individual. A final difference is that deed restrictions are generally regarded as "self-enforcing";[8] as contracts that would be found during a title search, their provisions can be enforced by and among the buyer and seller, and thus require less external intervention compared to other shared-equity models.

Deed restrictions are placed onto designated affordable properties by affordable housing developers in exchange for public funding.[9] Funders typically create deed restriction templates which developers are required to use in order to receive resources from their organization.[10] While deed restrictions can be self-enforcing, many deed restrictions also provide for an external enforcement agent, which can carry various titles, including the "Agency," the "Holder," or the "Program Manager," who may be a housing developer or another sponsoring agency; for the purposes of this paper, external enforcement will be referred to as the "program manager." Although the specific provisions of deed restrictions vary depending on jurisdiction and funding source, they generally seek—like other shared-equity models—to balance two competing goals: allowing owners to build equity while maintaining long-term affordability.[11]

Surveying a number of contemporary Massachusetts deed restrictions promulgated over the past three decades, this paper outlines the main components of deed restrictions from an economic perspective and how they differ from

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[7] *Shared Equity Models Offer Sustainable Homeownership, supra* note 2.
[8] David Abromowitz et al., *Deed Restrictions and Community Land Trust Ground Leases: Protecting Long Term Affordable Ownership*, HOUS. NEWS NETWORK, flhousing.org/wp-content/uploads/2012/12/Deed-Restrictions-and-Community-Land-Trust-Ground-Leases.pdf (last visited Apr. 21, 2023).
[9] *Shared Equity Models Offer Sustainable Homeownership, supra* note 2.
[10] *See, e.g.*, MASSHOUSING, COMMONWEALTH BUILDER PROGRAM GUIDELINES (2022) (hereinafter CommonWealth Builder Guidelines).
[11] Curtin, *supra* note 3, at 377.

traditional property ownership and thus affect owner incentives. These differences are further analyzed in relation to the competing policy goals of promoting equity-building among homeowners and maintaining affordability for future owners.

This paper posits that the "shared-equity" model of deed restrictions affects a number of proverbial "sticks" in the bundle of rights associated with traditional property ownership. Not only is resale price limited—the most obvious missing stick—the many provisions contained within a typical deed restriction impose additional restraints, affecting the incentives and returns of ownership. As such, deed-restricted property represents an "ownership-lite" version of property ownership. Indeed, the primary thrust of the majority of provisions found in the surveyed deed restrictions are aimed at maintaining affordability, not equity building. However, recent trends in Massachusetts deed restrictions illustrate a movement towards more "lenient" models, exemplified through shorter terms and higher resale prices, thus tipping the scale more in favor of allowing owners to build equity. Overall, the tension between the two policy goals of affordability and building equity represents a zero-sum trade-off. The design of deed restrictions thus requires clarity of purpose and context in relation to a site and its constituents.

This paper is the first to address deed restrictions in affordable housing. Prior academic literature has focused on other affordable ownership structures, such as CLTs[12] and LEHCs,[13] or deed restrictions in other contexts, such as racially restrictive covenants.[14] Part II begins by outlining the landscape of subsidized home ownership policies in the United States. Part III examines key components of deed restrictions, which are discussed in relation to policy goals, owner incentives, and latest trends in Part IV. A brief conclusion follows in Part V.

II. SUBSIDIZED HOME OWNERSHIP

Home ownership is without doubt a fundamental pillar of the contemporary American ethos. This reality is partially a result of explicit government policy.[15]

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[12] *See, e.g.*, Curtin, *supra* note 3.
[13] *See, e.g.*, Julie D. Lawton, *Limited Equity Cooperatives*, 23 J. OF AFFORDABLE HOUS. AND CMTY. DEV. L. 393, (2015).
[14] *See, e.g.*, Wendy Plotkin, *"Hemmed in": The Struggle against Racial Restrictive Covenants and Deed Restrictions in Post-WWII Chicago*, 94 J. OF THE ILL. STATE HIST. SOC'Y 39, (2001).
[15] *See, e.g.*, Gordon H. Sellon, Jr., *The Role of Government in Promoting Homeownership: The U.S. Experience*, 75 ECON. REV. – FED. RSRV. BANK OF KANSAS CITY 37, (1990); Michael S. Carliner, *Development of Federal Homeownership "Policy"*, 9 HOUS. POL'Y DEBATE 299, (2010).

From the 1930s onwards, the U.S. government encouraged mass home ownership and initiated a number of subsidies, most notably through the Federal Housing Administration, efforts which continue in earnest today in the form of tax subsidies, mortgage assistance, subsidized ownership developments, and many other programs.[16] Promoting home ownership for lower-income communities has and continues to be a goal for jurisdictions nationwide, and complements affordable rental programs. Like affordable rental programs, affordable home ownership programs use public and private subsidies to lower the cost of housing, except that ownership programs use these subsidies to support the purchasing of property, rather than their rental. The general impetus for subsidizing home ownership is that ownership results in financial and socio-cultural benefits that are not attainable for households of modest means given the cost of market housing; subsidized ownership thus permits such households to enter the market.[17]

Proponents of affordable home ownership programs believe it to be a worthwhile investment to jumpstart the ownership cycle given the positive externalities of home ownership and distributional effects, as well as the opportunity to rectify racial gaps in ownership. Skeptics maintain that subsidized ownership is a poor use of funds due to empirically weak efficacy and the unique challenges of home ownership faced by low-income communities. The following outlines the various theoretical underpinnings of subsidized home ownership and debates over their effectiveness, before adding deed restrictions to the conversation.

A. Positive Externalities of Home Ownership

The economic foundation of subsidizing home ownership depends on two justifications: either the subsidy rectifies market failure, or the subsidy is a beneficial form of income distribution. First, subsidized home ownership could be socially desirable if there is evidence of market failure—a positive externality generated by home ownership—that is not being priced into the market and results in a fewer-than-optimal number of homeowners.

There is some evidence of positive externalities arising from home ownership.[18] Property values are positively affected by ownership compared to

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[16] Curtin, *supra* note 3 at 369.
[17] *Shared Equity Models Offer Sustainable Homeownership, supra* note 2.
[18] *Why Subsidize Homeownership? A Review of the Rationales*, CONG. RSCH. SERV. (Sept. 6, 2019), sgp.fas.org/crs/misc/IF11305.pdf.

rental tenancy—homeowners are more inclined to maintain and improve property, which raises the value of both their home and the neighboring properties.[19] Home ownership is also linked to higher levels of social-political engagement, lower crime, longer tenancy, and improved childhood outcomes.[20] As such, home ownership can represent an economically efficient way of achieving salutary social outcomes compared to other means of government intervention.[21] That said, there are difficulties establishing causation between these positive effects and ownership due to potentially compounding variables, such as wealth, income, and community engagement.[22] Furthermore, home ownership can also come with negative externalities—some homeowners may advocate for initiatives that preserve their own property value but exclude others, such as rallying against the inclusion of low-cost rental properties in the neighborhood.[23]

But even accepting the existence of positive externalities, there remains debate whether they justify the cost. The mortgage interest deduction alone—the largest ownership subsidy—cost $195 billion in 2015, while the actual subsidy to homeowners based on non-taxation of imputed rents runs as high as $600 billion per year.[24] As such, ownership subsidizes represents a sizeable investment of resources.

B. Income Redistribution

Second, subsidies could be a desirable form of income redistribution in that money is drawn from wealthier taxpayers who likely own homes, and given to less wealthy households who do not, to permit the latter to purchase property. Because wealthy individuals typically derive less utility than a less wealthy individual from the same amount of money, income redistribution can raise overall societal utility.

There is evidence that owning a home can result in greater utility, both financial and social. The financial benefits of home ownership relative to renting are numerous. In two-thirds of counties in the U.S., it is cheaper to own than to

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[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Richard Florida, *The U.S. Spends Far More on Homeowner Subsidies Than It Does on Affordable Housing*, BLOOMBERG (Apr. 17, 2015), www.bloomberg.com/news/articles/2015-04-17/the-u-s-spends-far-more-on-homeowner-subsidies-than-it-does-on-affordable-housing.

rent.[25] Nationwide, the average homeowner spends 16 percent of their income on housing, compared to 26 percent for renters.[26] Ownership results in greater financial stability because mortgage payments are often locked in for up to thirty years.[27] As time passes, a greater proportion of the mortgage payment goes towards principal, which is effectively the owner's own money. Eventually, the day comes when the mortgage is fully paid off, and home ownership becomes inexpensive. Rent, on the other hand, only grows, and thus rents increase disproportionately to the cost of ownership over time.[28] Ownership may also result in appreciation, with real estate having generated an average return of 3.9 percent over the last three decades nationwide.[29] Appreciation is magnified given that mortgages allow individuals to leverage capital.[30] But even then, the investment value of a house does not only depend on appreciation—even without appreciation, the homeowner will have "invested" principal payments that would otherwise be lost through renting. Mortgage payments are thus a "forced" savings plan for many households.[31]

Ownership also provides physical stability. Low-income rental assistance programs depend on two unpredictable parties: landlords and government. Landlords have no obligation to renew leases, and eviction proceedings can bring significant turmoil to renters.[32] A homeowner who makes their payments, meanwhile, has no one to evict them. Similarly, government rental assistance is subject to changing administrations and budgets, with no guarantee of continuity.

Finally, becoming a homeowner can yield substantial social utility. Home ownership comes with various socio-cultural benefits and, given that it is central to the American Dream, the desire to own property is ingrained in the American psyche.[33]

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[25] Mike Loftin, *Homeownership is Affordable Housing*, URBAN INST. (May 7, 2021), www.urban.org/sites/default/files/publication/104214/homeownership-is-affordable-housing.pdf.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] U.S. Department of Housing and Urban Development, *Homeownership and its Benefits, Urban Policy Brief No. 2* (1995).
[31] *Id.*
[32] *See, e.g.*, Nicole Summers, *Civil Probation*, 75 STANFORD L. REV. (forthcoming 2023).
[33] *Homeownership and its Benefits, supra* note 30.

However, some may argue that distributive effect should be accomplished through the income tax and transfer system, and not through legal rules.[34] As deed restrictions are legal contracts, attempting to affect wealth distribution through these contracts can have distortionary effects on the incentives of property ownership, as explored in this paper. Instead, it may be more efficient and less distortionary to simply transfer more money to poor households to facilitate their purchase of a market-rate home, rather than create a unique legal form of ownership.

Home ownership also comes with outsized risks for the intended beneficiaries of subsidized housing because for less wealthy families, home ownership concentrates resources into one asset.[35] Given high transaction costs, appreciation is minimal unless one holds for a number of years.[36] Those with lower wealth and incomes are less likely to weather economic downturns, job loss, and unexpected repairs, and therefore less likely to sustain ownership long enough to reap the rewards.[37]

C. Race and Home Ownership

Beyond the economic bases provided above, some proponents believe that subsidized home ownership represents an opportunity to rectify the disparate ownership rates in the United States. The nationwide rate of home ownership has remained relatively steady over the past half century at around 65 percent.[38] But in 2022, 75 percent of White households owned their home compared to 45 percent of Black and 48 percent of Hispanic households, and 57 percent of households of other races,[39] a gap which has remained unchanged in half a century.[40] Many

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[34] Louis Kaplow and Steven Shavell, W*hy the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. OF LEGAL STUD. 667, (1994); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 647–60 (2004).
[35] Jenny Schuetz, *Rethinking Homeownership Incentives to Shrink the Racial Wealth Gap*, SHELTERFORCE (Mar. 15, 2022), shelterforce.org/2022/03/15/rethinking-homeownership-incentives-to-shrink-the-racial-wealth-gap.
[36] Miriam Axel-Lute, *Increased Homeownership Won't Close the Racial Wealth Gap*, SHELTERFORCE (Mar. 14, 2022), shelterforce.org/2022/03/14/increased-homeownership-wont-close-the-racial-wealth-gap.
[37] *Id.*
[38] *Homeownership Rate in the United States*, FRED, fred.stlouisfed.org/series/RHORUSQ156N (last visited Apr. 21, 2023).
[39] *Racial Differences in Economic Security: Housing*, U.S. DEP'T. OF THE TREASURY (Nov. 4, 2022), home.treasury.gov/news/featured-stories/racial-differences-in-economic-security-housing.
[40] *Id.*

reasons have been posited to explain this gap. From the public side, during much of the inter- and post-war era the Federal Housing Administration limited its support to segregated neighborhoods through practices today known as redlining.[41] From the private side, banks, appraisers, and realtors have intentionally or unintentionally contributed through disparate mortgage rates, fees, and valuations.[42] As a result, the median wealth of White homeowners is three times higher than Black homeowners,[43] and the average home owned by a White family is twice as valuable compared to one owned by a Black family.[44] As a result, home ownership programs may represent an opportunity cure this gap.

However, skeptics note that half a century of home ownership programs have failed to address the racial gap. First, as a result of past redlining and exclusionary zoning, Black and Hispanic neighborhoods are located in less desirable areas.[45] Because Black and Hispanic people tend to wish to buy in those neighborhoods, the reality is that their homes simply have lower property values.[46] Furthermore, because White Americans generally desire to live in White neighborhoods, and White Americans make up the majority of market demand, demand for homes in Black and Hispanic neighborhoods remain lower.[47] In addition, ownership programs do not address issues such as disparate mortgage rates[48] or property tax burdens.[49] The net result of these realities is that ownership returns are 3.7 percent lower for Black and Hispanic owners compared to White owners.[50] Indeed, the difference between White and Black home ownership rates and property values have remained unchanged after half a century of policies attempting to ameliorate this gap.[51]

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[41] KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT 254 (2019).
[42] *Id.* at 262.
[43] HARVARD JOINT CENTER ON HOUSING STUDIES, THE STATE OF THE NATION'S HOUSING 2022 5 (2022).
[44] Ellora Derenoncourt et al., *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020* (NBER Working Paper 30101, 2022).
[45] Axel-Lute, *supra* note 36.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Amir Kermani et al., *Racial Disparities in Housing Returns* (NBER Working Paper 29306, 2021).
[51] Derenoncourt, *supra* note 44.

D. Current Home Ownership Policy

Notwithstanding the above considerations, it is the current policy of the federal government and jurisdictions across the United States to promote home ownership through public subsidies.[52] As such, for the purposes of this paper, the objective to promote home ownership is taken as given, and deed restrictions will be analyzed from the perspective of promoting home ownership.

III. COMPONENTS OF DEED RESTRICTIONS

Deed restrictions, sometimes known as deed riders, are covenants primarily designed to keep property affordable by limiting its sales price. Deed restrictions are placed onto property by an affordable housing developer in exchange for public funds. These covenants "run with the land," meaning they bind all present and subsequent owners, and are enforced by a "program manager," a housing developer or sponsoring agency. Without a price-control mechanism, the subsidized property would immediately revert to market price upon its initial sale, which would represent an inefficient use of public funds by limiting its benefit to a single household, and effectively turn the program into a lottery. As such, deed restrictions seek to balance the public investment in affordable housing while allowing for some private benefit from ownership.

This section analyzes the main features of deed restrictions from the perspective of the two espoused, but conflicting, goals of deed restrictions: maintaining affordability while allowing owners to generate return.[53] Individual provisions will be assessed from these lenses, evaluating how such provisions alter owner returns and incentives compared to unencumbered ownership. Because each provision has the potential to affect returns and affordability, the design of deed restrictions is marked by much debate.[54]

A. Dataset

This paper is built upon a survey of nine Massachusetts affordable home ownership developments completed between 1999 to 2022, ranging in size from

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[52] *See, e.g.*, Sellon, *supra* note 14.
[53] Curtin, *supra* note 3, at 377.
[54] Interview with Kathy Brown, Executive Director, Boston Tenant Coalition, in Boston, MA (May 1, 2023) (hereinafter Interview with Kathy Brown).

eight to seventy-five affordable ownership units.[55] These developments were primarily built by the Jamaica Plain Neighborhood Development Corporation, a non-profit affordable housing developer based in Jamaica Plain, Massachusetts.

Each development features its own unique deed restriction, but are based upon templates produced by state housing agencies who provided funding in connection with these developments. As discussed in Part I, public funders typically promulgate a model deed restriction; as declared in one deed restriction's preamble, such model restrictions provide a "uniform plan for the administration and enforcement of covenants and restrictions imposed on real property in the City of Boston for the purpose of regulating the development of such real property as housing for the benefit of persons of low and moderate income."[56]

This paper categorizes the dataset into three "generations" of deed restrictions. Examination of key provisions under these groupings allows for a temporal evaluation of trends in Massachusetts. The first generation, titled the "Master Covenant for Affordable Housing," was promulgated by the Massachusetts Affordable Housing Trust Fund. Surveyed developments following this model include Creighton Condos (2009),[57] Sumner Hill House (2008),[58] Hyde Jackson Homes (2005),[59] Lamartine Homes (2003),[60] and Back of the Hill Phases One (1999),[61] Two (2000),[62] and Three (2003).[63] The second generation, the "Amended and Restated Master Covenant for Affordable Housing," was created by the MassHousing CommonWealth Builder Program, the quasi-public agency currently responsible for financing public housing in Massachusetts.[64] Surveyed developments under this template include Call Carolina (2021).[65] The third generation is called the "CommonWealth Builder Guidelines," also by the

[55] Details on the surveyed sites can be found in the Appendix.
[56] Suffolk County Registry of Deeds, Book 44909, page 40 (hereinafter Creighton Condos).
[57] *Id.*
[58] Suffolk County Registry of Deeds, Book 43768, page 15 (hereinafter Sumner Hill House).
[59] Suffolk County Registry of Deeds, Book 38601, page 125 (hereinafter Hyde Jackson Homes).
[60] Suffolk County Registry of Deeds, Book 32714, page 263 (hereinafter Lamartine Homes).
[61] Suffolk County Registry of Deeds, Book 24674, page 209 (hereinafter Back of the Hill Phase One).
[62] Suffolk County Registry of Deeds, Book 25638, page 167 (hereinafter Back of the Hill Phase Two).
[63] Suffolk County Registry of Deeds, Book 30854, page 224 (hereinafter Back of the Hill Phase Three).
[64] *About MassHousing*, MASSHOUSING, www.mymasshome.org/find (last visited May 4, 2023).
[65] Suffolk County Registry of Deeds, Book 66252, page 33 (hereinafter Call Carolina).

MassHousing CommonWealth Builder Program.[66] No surveyed developments were completed under this template, due to its recent release in early 2022; this paper relies upon the template outline.

B. Length

Deed restrictions are temporally limited starting from the time of initial sale. Upon expiry, the property reverts to market price. The length of deed restriction is an impactful provision—because the annual appreciation is capped, this difference compounds over time, resulting in an exponential deviation from market value. Such distortions naturally lower the potential for equity-building. At the same time, longer deed restrictions may maximize the number of beneficiaries.

Nationwide, deed restrictions typically range in duration anywhere from five years to 99 years.[67] Perpetual deed restrictions are generally invalid due to the rule against perpetuities, although a small number of states permit their use for affordable housing.[68] Trends in Boston-area deed restrictions have varied over time. Up until the early 2000s, there was a movement towards lengthier deed restrictions, resulting in many being set at thirty or fifty years.[69] This paper's survey bears evidence of this prior trend—most surveyed deed restrictions are thirty years in length with a twenty-year extension at the option of the program manager,[70] with Hyde Jackson Homes being the longest at fifty years.[71] More recently, the tide has turned towards shorter lengths:[72] the CommonWealth Builder template is thirty years long, but only the first fifteen years are subject to maximum resale prices.[73] However, the template also provides for a duration reset whenever ownership comes under the program manager, which the manager can do so by exercising its right of first refusal when the owner intends to sell, which allows for potentially infinite length.[74] Overall, the recent trend towards shorter restriction terms

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[66] CommonWealth Builder Guidelines, *supra* note 10.
[67] Abromowitz, *supra* note 8.
[68] *Id.*
[69] Melissa D. Katz, *Deeds That Keep Houses Affordable May Keep Neighborhoods Poor*, COMMONWEALTH MAGAZINE (Apr. 26, 2007), commonwealthmagazine.org/economy/deed-restrictions-on-affordable-housing-have-unintended-effects.
[70] *See, e.g.*, Creighton Condos, *supra* note 56, at 54.
[71] Hyde Jackson Homes, *supra* note 59, at 138.
[72] Interview with Kathy Brown, *supra* note 54.
[73] CommonWealth Builder Guidelines, *supra* note 10, at 7.
[74] *Id.*

incentivizes longer-term ownership, because if the owner can wait out their term, they can sell the property at market value and earn substantial return.

C. Buyer Qualifications

Another feature of deed restrictions is that homeowners cannot sell to whomever they choose. All surveyed deed restrictions limit the pool of buyers to those meeting certain qualifications, most commonly that the buyer 1) has an annual household income at or below a specified Area Median Income (AMI) range, as calculated by the U.S. Department of Housing and Urban Development (HUD), and 2) be a first-time homebuyer.[75]

All surveyed deed restrictions prescribe an AMI range, which indicates the target audience for its subsidized ownership program. Some developments, such as Call Carolina, even prescribe unique AMI ranges for individual units: two out of the eight units are designated for "Eligible Middle Income Purchasers" who must have household income at 100 percent or less of AMI, while six units are designated for "Eligible Moderate Income Purchasers" with incomes at 80 percent of AMI.[76]

All surveyed deed restrictions also prescribe a first time homebuyer requirement. Call Carolina's provision is illustrative of the relatively flexible definition of "first time homebuyer" present in all surveyed deed restrictions:

> "First Time Homebuyer" means a purchaser who has not previously owned a residential property, provided that, under request, [the program manager] may permit exceptions, for example, in the case of a divorced single parent who, previously, might have owned a residential property with an ex-spouse, or in the case of a person who might have inherited a residential property, but sold such property without residing in it."[77]

Sumner Hill more leniently defines first time homebuyers as those who have not owned a residential property within the past two years.[78] CommonWealth Builder adds an additional requirement that the buyer have less than $100,000 in assets, excluding qualified retirement plans.[79]

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[75] *See, e.g.*, Call Carolina, *supra* note 65, at 7.
[76] *Id.* at 1.
[77] *Id.* at 5.
[78] Sumner Hill, *supra* note 58, at 17.
[79] CommonWealth Builder Guidelines, *supra* note 10, at 3.

In sum, buyer qualifications are designed to ensure that homes are allocated to buyers within certain income brackets and have certain characteristics, such as first-time homebuyers or those with minimal assets. The specific tailoring of buyer qualifications can fine-tune the intended beneficiaries of an affordable ownership program; however, the resultant drawback is that the seller may experience higher transaction costs due to the need to find a qualified buyer. That said, given the long waiting lists and oversubscription for affordable homes, that difficulty is likely moot in a city like Boston.[80] In any case, however, the inability to transact freely is a key difference between deed-restricted and unencumbered ownership.

D. Resale Price

The most substantive provision is the limitation on resale price, which is determined formulaically, with five common models.[81]

1. A fixed appreciation formula allows the seller to receive their original purchase price plus a certain fixed percentage for every year of ownership. Most surveyed deed restrictions using this formula permit a five percent annual return, although Call Carolina allows for only three percent.[82] In comparison, Boston real estate appreciated an average of 6.36 percent annually between 2012 and 2022.[83]

2. An index formula is similar to fixed appreciation, except that the percentage per year is pegged to the consumer price index or similar metric. For example, Sumner Hill House pegs appreciation to the "change in the Consumer Price Index (CPI) for all urban consumers for the most local bureau of Labor Statistics from the date of purchase to the date of sale."[84] For comparison, the Urban Consumer CPI grew between 2013 and 2023 averaged 2.65 percent.[85]

3. An affordability formula allows the seller to receive a price that would be affordable to buyers at a predetermined AMI. For example, CommonWealth Builder does not permit homes to be sold at a price greater than that "affordable"

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[80] *See, e.g.*, Interview with Kathy Brown, *supra* note 54.
[81] Abromowitz, *supra* note 8.
[82] Call Carolina, *supra* note 65, at 7–8.
[83] *All-Transactions House Price Index for Boston*, FRED, fred.stlouisfed.org/series/ATNHPIUS14454Q (last visited May 4, 2023).
[84] Sumner Hill House, *supra* note 58, at 20.
[85] *Consumer Price Index Historical Tables for U.S. City Average*, U.S. BUREAU OF LAB. STAT., www.bls.gov/regions/mid-atlantic/data/consumerpriceindexhistorical_us_table.htm (last visited May 15, 2023).

to the predetermined AMI.[86] Generally, thirty percent of AMI is considered an "affordable" percentage of income to spend on housing.[87] For reference, Massachusetts real median income grew at an average of 1.25 percent per year over the past decade.[88]

4. An equity sharing formula generally imposes no maximum sales price, and permits the seller to receive their original purchase price plus a share of appreciation during ownership. For example, CommonWealth Builder allows for an unrestricted sales price after year fifteen but with fifty percent equity sharing.[89]

5. An appraisal formula is similar to the equity sharing formula, except that the value determination is through an appraiser. None of the surveyed deed restrictions exhibited this formula.

The first three formulas are most common, but they only control price *appreciation*. As such, the affordability of a deed-restricted property under those three formulas is also contingent on its previous transaction price. Naturally, the *initial* sales price is crucial, and is usually set by the developer and funder at a price affordable for the target AMI.[90] The initial sales price is thus critical in relation to establishing affordability, but is a factor that exists outside the deed restriction.

Beyond the main resale price formula, all surveyed deed restrictions adjust for various inputs. All allow owners to recoup their capital improvements to a certain extent, which will be discussed in the following section. Most also allow for recouping of documented realtor fees, ranging from three percent of the transaction price in Call Carolina[91] to six percent in Creighton Condos.[92]

One particularly complex formula incorporates multiple inputs, and is illustrative of the interplay among these models. In the CommonWealth Builder Guidelines, between years one through fifteen, the resale price is the lesser of: a) the price agreed to by the buyer; b) the initial purchase price *plus* five percent annual appreciation *plus* capital improvement credit; or c) the price affordable to

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[86] CommonWealth Builder Guidelines, *supra* note 10, at 7.
[87] Loftin, *supra* note 25.
[88] *Real Median Household Income in Massachusetts*, FRED, fred.stlouisfed.org/series/MEHOINUSMAA672N (last visited May 15, 2023).
[89] CommonWealth Builder Guidelines, *supra* note 10, at 7.
[90] *See, e.g.*, CommonWealth Builder Guidelines, *supra* note 10, at 7.
[91] Call Carolina, *supra* note 65, at 8.
[92] Creighton Condos, *supra* note 56, at 20.

buyers at the predetermined AMI tier.[93] Option a), the price agreed to by a buyer, will unlikely have much impact—as an indicator of consumer demand, it acts as a proxy for market price, which will almost never be realized given the high cost of market housing. Instead, the maximum price will be set by either option b), the fixed-appreciation formula, or option c), the affordability formula. Given that the *initial* property price is set so it will be affordable at the predetermined AMI tier, whether b) or c) does the work largely depends on whether AMI rises at a greater rate than five percent plus capital improvements. The tying of resale value to AMI is perhaps more prohibitive than any other resale formula, as it is highly predicated on neighborhood-specific trends. Between years sixteen through thirty, the CommonWealth Builder Guidelines' resale price is unlimited, but subject to fifty percent equity sharing by the public funder,[94] which allows for substantial capture of market appreciation, incentivizing long-term ownership. The CommonWealth Builder formula thus seeks to incorporate multiple inputs in determining its resale price, including neighborhood income levels, market forces, and cost of improvements.

It is evident that each of the surveyed formulas result in lower appreciation rates compared to market, which has averaged over six percent in the Boston area over the past decade.[95] The fixed appreciation formula permits at most five percent, and over the past decade the index appreciation formula would have allowed 2.65 percent[96] and the affordability formula 1.25 percent.[97] While resale formulas restrict *maximum* sales prices, given that deed-restricted property trade below market value, they control the transaction price, rather than buyer demand. Indeed, current listings on the Massachusetts affordable housing site include two-bedroom units in the Boston area selling for around $200,000,[98] far below comparable market-rate properties. Demand for deed-restricted homes exceed supply, as evidenced by long waitlists.[99] The resale price restriction thus represents an artificial price ceiling.

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[93] CommonWealth Builder Guidelines, *supra* note 10, at 7.
[94] *Id.*
[95] *All-Transactions House Price Index for Boston*, *supra* note 83.
[96] *Consumer Price Index Historical Tables for U.S. City Average, supra* note 85.
[97] *Real Median Household Income in Massachusetts*, *supra* note 88.
[98] *Find Your Home*, MY MASS HOME, https://www.mymasshome.org/find (last visited May 4, 2023).
[99] *See, e.g.*, Interview with Kathy Brown, *supra* note 54.

Furthermore, the surveyed resale formulas make little attempt to capture the true drivers of housing appreciation, such as interest rates, neighborhood demographics, and housing conditions. The only formula that considers the above is the appraisal method, which was notably absent from the surveyed deed restrictions. Instead, the controlling drivers are rough approximations that balance both affordability and return. As such, the resale price limitation represents perhaps the greatest missing "stick" from property ownership—the inability to freely transact at a price determined through negotiation.

E. Capital Improvements

All surveyed deed restrictions adjust for owner improvements in the resale price. First, all deed restrictions only credit improvements that are considered "capital" within the definition of the Internal Revenue Code, and costs must be documented to the satisfaction of the program manager, among other requirements.[100] Second, the owner's return on their improvement is limited as a percentage of the property's purchase price. The predominant model for assessing capital improvements is a percentage credit per year of ownership. For example, Call Carolina permits owners to recoup up to one percent of the acquisition price of the home per year spent on renovations;[101] as such, one who has owned a home for ten years can recoup up to ten percent of the initial acquisition price, regardless of when the improvement was made. The timing of the improvement still matters, however, because Call Carolina only credits the straight-line depreciated value of the improvement.[102] As such, an improvement made during the beginning of ownership will receive less credit than one made closer to time of sale. At the same time, a large improvement made during a short tenancy will also not be fully credited, because of the annual limitation.

This cap on their capital improvement credit may affect owner incentives to improve the property as it deviates from unencumbered ownership in two main ways. First, most homeowners make improvements for two reasons: to earn a return on their investment and personal enjoyment. Because deed restrictions do not permit the former, the incentive to improve is limited to the latter, which can disincentivize efficient improvements. Deed-restricted owners can never profit

[100] *See, e.g.*, Call Carolina, *supra* note 65, at 6.
[101] *Id.* at 7–8.
[102] *Id.*

from renovations—they recoup the *lesser* of their actual cost or one percent per year. This asymmetrical payoff makes it more likely that homeowners will make fewer-than-efficient improvements. Particularly as the home ages, costly renovations such as replacing a roof or furnace would represent expensive investments that do not pay off. Second, some improvements do not depreciate, but increase value regardless of their age, particularly structural changes such as the addition of bathrooms—even if the bathroom fixtures themselves age, the addition itself will still be of value.

Some deed restrictions, such as Back of the Hill, attempt to solve the above problems by separating improvements that do not depreciate and should be incentivized as truly boosting property value. Back of the Hill allows the owner to recoup the full undepreciated cost of bedrooms and bathrooms added to the property, but all other improvements are subject to a one percent cap plus depreciation.[103] While this model comes closer to unencumbered ownership with respect to structural additions, it still fails to account for large expenses such as roofing, façade, and HVAC replacements that may be under-incentivized under deed-restricted ownership.

F. Sale Process

While deed-restrictions are in theory self-enforcing, in reality there is substantial external involvement in connection with property transactions. All sales require the approval of the program manager, and the program manager has the right to repurchase the property upon certain conditions.

Call Carolina's sales process is illustrative of the common procedure.[104] Owners initiate the sales process by notifying the program manager of their intent to sell.[105] In response, the program manager will calculate the maximum sales price.[106] Then, the owner can search for a buyer, either via their own means such as with direct advertising or a broker, or list the property with various affordable housing websites maintained by the state.[107] Once a buyer is found, the seller must notify the program manager of the identity of the buyer as well as proof of their

[103] Back of the Hill Phase One, *supra* note 61, at 8.
[104] Call Carolina, *supra* note 65, at 8–9.
[105] *Id.*
[106] *Id.*
[107] *Id.*

income qualification.[108] If the program manager confirms that the buyer is income-qualified, the transaction can close; if the buyer is not income-qualified, the seller must withdraw the buyer and seek a new buyer.[109] If the seller does not withdraw the buyer within a certain period, the program manager has the right to purchase the home.[110] If at any point the owner sells to someone who is not income-qualified, the seller must make a penalty payment equal to the transaction price less their outstanding mortgage—effectively eliminating their financial return.[111] The buyer would still own the property, regardless of their income-qualification, but they would be subject to the terms of the deed.[112]

While all surveyed deed restrictions contemplate some assistance by the program manager, the ultimate responsibility to sell remains with the owner. The program manager generally also has the right to repurchase the property at time of sale—Call Carolina allows the program manager to exercise this option if the owner fails to find an income-qualified buyer,[113] but Creighton Condos allows the program manager to exercise whenever the owner intends to sell.[114]

While the involvement of the program manager and the seeking of approvals adds additional complexity, the sales process of a deed-restricted home likely will not affect owner incentives, because the substantive provisions—buyer qualifications and maximum resale process—create more impact compared to the procedure. The procedural hurdles are further ameliorated by the fact that affordable properties are highly oversubscribed, and finding a suitable buyer should not be difficult, given the existence of long waiting lists of buyers maintained by the state. The main caution for the seller is avoiding the penalty for selling to a non-qualified buyer, which may reduce their payoff to zero.

G. Occupancy Restrictions

Generally, deed-restricted homes must be used as a household's primary residence, which means the house cannot be rented out or left empty.[115] This

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[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] Creighton Condos, *supra* note 56, at 47.
[115] Interview with Kathy Brown, *supra* note 54.

compounds the risks of ownership: if one's job or personal situation requires relocation, the terms of the deed restriction would require one to sell. The prohibition against renting out the property adds a level of inflexibility that may reduce the average ownership length, and thus reduce the rate of return. Furthermore, violation of occupancy restrictions could result in the program manager exercising their right to buy the property.[116]

Some developments, such as Hyde Jackson Homes and Lamartine Homes, include ownership units that have separate units that may be rented out.[117] However, there are various restrictions on the rental terms, such as that the tenancy may not be shorter than one year, and must be made available at a rate affordable to tenants at 65 percent AMI.[118]

Overall, the inability to capitalize on the asset for the majority of deed restrictions is a major deviation from full property ownership, and compounds the risks, and limits the rewards, of home ownership.

H. Transferability

Another substantial departure from unencumbered ownership is the inability to transfer ownership of a deed-restricted home to family and heirs. All surveyed deed restrictions prohibit any form of transfer, except for CommonWealth Builder, which allows by-right transfer to immediate family who will be owner-occupants.[119] The ability to transfer property is a hallmark of traditional ownership. Even if the property can be sold at the resale price and the consideration paid to the heirs, this represents a lack of optionality for successors to continue to live there if they so choose.

I. Financing

All surveyed deed restrictions limited financing to 97 percent of the purchase price, and refinancing to 85 percent of the resale price.[120] Furthermore, the program manager must approve all financing.[121] While this represents an additional constraint on part of the homeowners, it has some beneficial effects by

[116] Abromowitz, *supra* note 8.
[117] Hyde Jackson Homes, *supra* note 59, at 4; Lamartine Homes, *supra* note 60, at 4.
[118] *Id.*
[119] CommonWealth Builder Guidelines, *supra* note 10, at 7.
[120] *See, e.g.*, Call Carolina, *supra* note 65, at 15–16.
[121] *Id.*

protecting homeowners from predatory lending—during the foreclosure crisis, not a single deed-restricted home in the Boston area was foreclosed.[122] The greatest risk to the public investment in affordable home ownership is a foreclosure: because all surveyed deed restrictions are subordinate to mortgages, the deed restriction ceases to exist upon foreclosure, and the public investment in the affordable home is lost forever.[123] Most deed restrictions also require that the foreclosing lender allow the program manager thirty days to cure a default.[124]

J. Enforcement

The primary enforcement mechanism of deed restrictions exists outside the contract—a buyer's incentive to check title and determine the existence of the deed restriction and the permitted resale price.[125] Because buyers have the responsibility to check title and it is in their interest to do so, deed-restricted transaction prices are generally self-enforcing.

However, while the incentive to follow the restricted price is in alignment, other provisions are not, and thus require external enforcement. Notably, the income-qualification and occupancy restrictions require external enforcement due to the lack of incentive for an owner to self-regulate. As such, all surveyed deed restriction provide for enforcement through the program manager's option to purchase the property, which is triggered by various events, such as putting forth a buyer that is not income-qualified, violating occupancy requirements, causing a foreclosure, or transferring in violation of the terms.[126] The program manager generally exercises their option to repurchase in one of three ways: 1) it may purchase the home directly, 2) find an eligible buyer to purchase the home, or 3) waive the option.[127] In Call Carolina, the option price is the lesser of 1) fair market value as determined by an appraiser, 2) maximum resale price, 3) purchase price agreed to by a buyer, or 4) a price deemed affordable earning a certain AMI.[128] While the option prices are largely similar to the resale price restriction, the addition

[122] Interview with Kathy Brown, *supra* note 54.
[123] Abromowitz, *supra* note 8.
[124] *See, e.g.*, Call Carolina, *supra* note 65, at 15–16.
[125] Abromowitz, *supra* note 8.
[126] *See, e.g.*, Call Carolina, *supra* note 65, at 9–13.
[127] *Id.* at 10.
[128] *Id.* at 11.

of alternative 4) has the potential to lower the sales price relative to selling to an individual buyer.

As such, the right to repurchase serves as a stick to ensure compliance with the substantive provisions. However, the differentiated level of enforcement—income-qualification is easy to enforce, whereas occupancy is not due to the challenge of surveillance—may lead to uneven adherence.[129]

IV. DISCUSSION

The following discusses three key findings from the surveyed deed restrictions: first, the incentives of owners of deed-restricted properties differ from those of unencumbered owners in ways beyond the resale price limitation; second, the conflicting policy goals of affordability and equity-building represent a zero-sum trade-off; and third, recent trends in Massachusetts reflect a movement towards a greater emphasis on equity-building compared to prior templates.

A. Homeowner Incentives

While the primary purpose of deed restrictions is to serve as an instrument to insulate subsidized properties from market forces, the numerous provisions contained within surveyed deed restrictions accomplish much more. This section will discuss three notable differences compared to unencumbered ownership *beyond* the maximum resale price.

The first difference is a decreased incentive to make property improvements. While traditional owners make improvements either 1) to boost property value, or 2) for personal enjoyment, owners of deed-restricted homes are limited to the latter. Because their maximum resale price only accounts for improvements up to a certain amount, owners can never profit, unlike unencumbered owners. Furthermore, the credit cap, which is generally a factor of how long the property has been owned, can disincentivize necessary and efficient improvements. Based on the one percent credit cap seen in most deed restrictions, this restriction is designed to handle small, aesthetic improvements, while large improvements, such as roofing, may not be recaptured, potentially leading to property damage and disrepair.

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[129] Abromowitz, *supra* note 8.

Secondly, none of the surveyed deed restrictions permitted transferability to family, except for CommonWealth Builder. This is another major departure from traditional ownership. The inability to transfer to family may inhibit satisfaction of the homeowner "psyche" as the property cannot be seen as a generational heirloom, but rather a life tenancy at best. As such, the incentive to maintain and improve the home may also be decreased, as well as the social and psychological benefits of home ownership discussed in Part II.

Finally, the inability to rent out the property also alters the incentives of homeowners. Capitalizing on the asset is a key feature of property ownership, and the renting of property can bridge a temporary relocation or generate cash flow. The inability to rent can lead to shortened tenancies and decreased return, given that inflexibility to respond to life changes may result in a premature need to sell.

B. Policy Tradeoffs

The two espoused goals of deed restrictions are to allow owners to build equity while maintaining long-term affordability. This fundamental duality does not permit both goals to be perfectly achieved: assuming the absence of ongoing subsidies, it is a zero-sum trade-off—any gain by the owner represents a higher cost to future buyers. The design of deed restrictions thus reflects the relative trade-off between these goals.

While the net effect of deed restrictions serve to balance these goals, the contractual complexity of the surveyed deed restrictions—the Call Carolina deed restriction runs 21 pages long, or 53 pages including all forms and appendixes—are primarily geared at maintaining affordability by attempting to eliminate ways by which owners can derive greater-than-expected equity-building.

For example, the length of deed restrictions is directed at achieving affordability not only by increasing the length of the term of price protection, but also compounding the difference to market value. The ability to restart the term upon ownership by the program manager in CommonWealth Builder further allows for potentially infinite length.[130] The resale price limitation, most obviously, is targeted at affordability by limiting annual return, and each surveyed formula permits less-than-market returns. Even adjustments allowing for capital improvement are usually limited to one percent per year, attempting to curb the

[130] CommonWealth Builder Guidelines, *supra* note 10, at 7.

incentive to elevate property values through costly renovations. The procedural aspects of transacting deed-restricted properties are also aimed at maintaining affordability. The sales process is heavily supervised by the program manager and enforced via the right to repurchase, which can be, upon the program manager's discretion, as low as the price deemed affordable to the targeted audience.[131] The occupancy requirements are policed in a similar way. Even the mortgage limitation in part serves to protect the public investment by preventing owners from taking on outsized mortgages and defaulting.

In comparison, the only major provision that addresses equity building is the resale price limitation, which attempts to build in some level of return for the owner. Some unique provisions, such as the rental units in Lamartine Homes[132] and the equity sharing in CommonWealth Builder,[133] also expand upon the owner's ability to earn return.

The provisions ensuring affordability directly inhibit equity building, resulting in a zero-sum trade-off. The maximum resale price, capital improvement limitation, restrictions on rentals, financing, and transferability, all—upon the pain of financial penalty—directly reduce the current owner's return in the hopes of ensuring that future owners can purchase the property at an affordable price.

C. Recent Trends

In evaluating the three "generations" of deed restrictions in Massachusetts over the past three decades, there is a recent trend towards more "lenient" deed restrictions. Passionate debate surrounds whether deed restrictions should be more "restrictive"—have longer lengths and lower maximum sales prices—or should be made less restrictive—shorter lengths and higher maximum sales prices.[134]

Given that deed restrictions are often required as a condition of public funding, the design of model deed restrictions is a contentious and sensitive matter. In Massachusetts, the CommonWealth Builder template is the most recent product of such debate. Governing all future state-funded affordable home ownership developments, its release in 2022 was the outcome of deliberation among

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[131] *See, e.g.*, Call Carolina, *supra* note 65, at 11.
[132] Lamartine Homes, supra note 60, at 4.
[133] CommonWealth Builder Guidelines, *supra* note 10, at 7.
[134] Interview with Kathy Brown, *supra* note 54.

stakeholders and advocates over its specific terms,[135] and the result is a trend towards relatively lenient deed restrictions, allowing greater potential for equity-building at the cost of affordability.

CommonWealth Builder exemplifies a move towards leniency in three major aspects. First, it demonstrates a trend towards shorter deed restrictions. From the fifty years in Hyde Jackson Homes,[136] towards the thirty years common to the remainder of the survey,[137] to the fifteen (during which prices are restricted) of CommonWealth Builder,[138] the movement towards briefer terms allows for owners to more quickly enjoy market prices. Second, CommonWealth Builder allows by-right transfers to immediate family, regardless of whether they are income-qualified,[139] a substantial departure from older deed restrictions. Finally, CommonWealth Builder allows for unrestricted sales prices after fifteen years, subject to equity-sharing.[140] This can represent substantial equity for owners, even if they only capture half of the return.

In effect, the debate over the "leniency" of provisions is a manifestation of the debate over affordability versus equity—proponents weighing in favor of affordability would argue for more "restrictive" covenants, those in favor of equity building in favor of more "lenient" covenants. The following outlines the arguments on both sides of the debate.

The argument in favor of "restrictive" covenants has two main thrusts. First, deed-restricted homes do build wealth, and even if they do not, they provide stabilizing benefits. Deed-restricted homeowners tend to move less than traditional homeowners.[141] For modestly priced homes, housing returns depend less on appreciation and more on the length of ownership, due to high transaction costs.[142] Furthermore, many owners go on to buy market-rate homes.[143] As such, the

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[135] *Id.*
[136] Hyde Jackson Homes, *supra* note 59, at 138.
[137] *See, e.g.*, Creighton Condos, *supra* note 56, at 54.
[138] CommonWealth Builder Guidelines, *supra* note 10, at 7.
[139] *Id.*
[140] *Id.*
[141] *Tracking Growth*, *supra* note 1, at 53.
[142] Miriam Axel-Lute, *Is the Housing Market the Answer to the Racial Wealth Gap?*, SHELTERFORCE (Oct. 29, 2018), shelterforce.org/2018/10/29/is-the-housing-market-the-answer-to-the-racial-wealth-gap.
[143] *Tracking Growth*, *supra* note 1, at 53.

stabilizing benefits of home ownership—as outlined in Part II—such as forced savings, lower costs, and predictability are realized even in deed-restricted homes, *and* for many owners, restricted ownership generates enough return to break into the private market.[144]

Second, deed-restricted homes allow for more efficient use of funds. Constructing housing and making it available at affordable prices requires substantial public investment. To allow the first owners to build equity unrestricted would be tantamount to winning the lottery, a price that would be paid by funders and by neighborhood residents in the form of rising housing prices and gentrification.[145] Deed-restricted homes allow for successive owners to reap the benefits of home ownership along with some return, as well as ensure neighborhood price stabilization.[146]

Justifications in favor of less restrictive covenants are outlined below. First, deed restrictions significantly curtail the ability to build equity without lowering the risks of home ownership. As discussed in Part III, all resale price formulas result in lowered appreciation compared to market returns. Small variations in appreciation make a significant impact: over thirty years, the difference between a five percent and six percent growth rate (the difference between the CommonWealth Builder's rate and Boston real estate appreciation over the past decade) on a $200,000 property is $864,388 compared to $1,148,698, or 33 percent less. At the same time, the risks associated with home ownership remain unchanged or even heightened. The prohibitions against renting and vacancy exacerbate the risks of home ownership by rendering residents less able to respond to unexpected job and life changes. Indeed, deed-restricted homes experienced negative returns during the foreclosure crisis.[147] By capping potential returns but exposing homeowners to arguably more risk than market rate homes through greater inflexibility, deed-restricted homeowners are subject to asymmetrical returns.

Second, concerns about neighborhood affordability can be addressed through other means, namely affordable rental property. Affordable rental properties allow for lengthier affordability terms, permit more households to

[144] Axel-Lute, *supra* note 142.
[145] Boston Tenant Coalition, *Why We Need Long-Term Deed Restrictions* (Dec. 9, 2021) (on file with author).
[146] Axel-Lute, *supra* note 142.
[147] *Tracking Growth*, *supra* note 1, at 52.

benefit, result in stabilization of housing payments, and do not contribute to gentrification. Affordable home ownership, on the other hand, is well-positioned to allow households to realize equity and break generational wealth cycles. As ownership and rental projects have the ability to serve aligned but distinct goals, merging the two together would represent a lost opportunity.

Third, along the lens of racial equity, homeowners of color are disproportionately affected by deed restrictions. Shared-equity home ownership models are increasingly serving Americans of color, with 43 percent of shared-equity owners being of color in 2018.[148] As discussed in Part II, a long list of intentional and unintentional practices have kept resulted in Americans of color having less home equity; to some, deed restrictions are just their modern-day incarnation.[149]

While a balance certainly needs to be struck—few would argue that subsidized homeowners should be allowed to build equity wholly unrestrained, and as such *some* level of control is necessary—the trend towards shorter and less restrictive deed restrictions, as evidenced by the CommonWealth Builder Guidelines, is a favorable outcome.

The fact that two affordable housing programs—rental and ownership—can work in tandem is a strong argument in favor of allowing home ownership programs to focus on what rental programs cannot do—jumpstart the home ownership process and break the cycle of renting. To do so requires homeowners to reap sufficient benefits of ownership—given the rapid rate of market appreciation in high-cost-of-living areas, strict deed restriction terms may inhibit owners from ever being able to afford private housing. The need to deliver benefits to a greater number of households is a genuine challenge given public funding limitations; however, this is part of a larger conversation surrounding the level—and form—of public investment into home ownership. Finally, it is impossible to ignore the reality that because a significant percentage of participants in shared-equity homes are Americans of color, the impact of deed restrictions falls disproportionately on people of color. From a conceptual standpoint, this can paint a discomforting

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[148] *Id.*
[149] Axel-Lute, *supra* note 142.

picture, and from a practical standpoint, this can fuel resentment, ostracization, and reluctance to participate in ownership programs.

However, specific provisions within deed restrictions can be tailored to create outcomes that bridge both the "restrictive" and "lenient" camps. For instance, pairing longer-duration deed restrictions with higher maximum sales prices allows for greater equity-building without completely abandoning the property to the free market. As outlined in this paper, even more minor provisions, such as the capital improvements credit, can have large implications, impacting incentives to maintain and improve property. As such, a more fine-tuned examination of specific provisions contained within deed restrictions, and how *each* of them affects equity-building and neighborhood affordability, is necessary to tailor provisions to specific sites and constituencies.

V. CONCLUSION

This paper provides an overview of deed restrictions in the context of affordable housing. Deed restrictions are a necessary instrument in subsidized home ownership programs to ensure that public funding does not benefit a singular owner. Deed restrictions attempt to accomplish two contradictory goals: allow households to build equity and maintain the home's affordability for subsequent households. The trade-off manifests in a deed restriction's specific terms, including its length, its resale formula, and its occupancy requirements. Presenting a survey of nine deed-restricted properties developed in Massachusetts over the past three decades, this paper outlines key provisions in deed restrictions and how various subsidized ownership programs have tailored their deed restrictions to balance the above two goals.

This paper finds that deed restrictions affect owner incentives beyond the resale price limitation, and the provisions of deed restrictions pervade into finer points of ownership, including the incentive to renovate, develop a family home, and respond to life changes. Deed-restricted housing thus represents an "ownership-lite" version of property ownership. The dueling goals of affordability and equity-building is a zero-sum trade-off, and the contractual complexities of surveyed deed restrictions are primarily geared towards accomplishing affordability. However, the most recent trends, as exemplified by the CommonWealth Builder Guidelines released in March 2022, demonstrate a movement towards more lenient provisions, and thus prioritize equity-building

relative to older deed restrictions. Overall, this is a salutary trend, as the promotion of equity-building is a feature unique to affordable ownership programs. At the same time, the careful tailoring of specific provisions within deed restrictions can strike a fine balance based on individual programs and sites, and the unique challenges and opportunities therein. Deed restrictions attempt to do the impossible—make property affordable and profitable at the same time. The academic study of deed restrictions warrants continued research and is an important addition to the broader conversation of housing policy in the United States.

APPENDIX

List of Surveyed Deed-Restricted Properties and Templates

CommonWealth Builder Guidelines
Released in March 2022
Template only

Call Carolina
Completed September 3, 2021
71 Call St., Boston MA
8 ownership units
Suffolk County Registry of Deeds, Book 66252, page 33

Creighton Condos
Completed May 8, 2009
21 Creighton St., Boston MA
16 ownership units
Suffolk County Registry of Deeds, Book 44909, page 40

Sumner Hill House
Completed June 30, 2008
70–80, 80–86 Elm St., Boston MA
75 ownership units
Suffolk County Registry of Deeds, Book 43768, page 15

Hyde Jackson Homes
Completed November 14, 2005
Scattered sites throughout Jamaica Plain, MA
11 ownership units; 2 contain rental units
Suffolk County Registry of Deeds, Book 38601, page 125

Lamartine Homes
Completed September 9, 2003
119 Lamartine St., Boston MA
8 ownership units; 2 contain rental units
Suffolk County Registry of Deeds, Book 32714, page 263

Back of the Hill Phase 3
Completed March 14, 2003
Scattered sites throughout Jamaica Plain, MA
16 ownership units
Suffolk County Registry of Deeds, Book 30854, page 224

Back of the Hill Phase 2
Completed November 30, 2000
Scattered sites throughout Jamaica Plain, MA
16 ownership units
Suffolk County Registry of Deeds, Book 25638, page 167

Back of the Hill Phase 1
Completed December 29, 1999
Scattered sites throughout Jamaica Plain, MA
16 ownership units
Suffolk County Registry of Deeds, Book 24674, page 209