
Judiciary Committee

HB 1214

Title: An act relating to private transfer fee obligations.

Brief Description: Concerning private transfer fee obligations.

Sponsors: Representatives Goodman and Rodne.

Brief Summary of Bill

- Makes private transfer fee obligations imposed on real estate transactions after the bill's effective date unenforceable.
- Requires contracts for the sale of real estate in existence before the bill's effective date that are subject to transfer fee obligations to disclose the fee and state that such obligations are subject to prohibitions. Makes contracts lacking such disclosures unenforceable.
- Requires people who receive money from transfer fee obligations already in effect to file documents with county recorders in order for the obligations to remain legally binding.

Hearing Date: 1/27/11

Staff: Parker Howell (786-5793), and Edie Adams (786-7180).

Background:

Transfer Fees in Real Estate Transactions.

A private transfer fee is a method through which the owner or developer of real property creates an ongoing stream of income by charging a fee on subsequent sales or other transfers of the property. Also called "capital recovery fees," transfer fees are largely applied to residential properties. Fees commonly are set as a percentage of the value of the property or purchase price at the time of transfer, or they may be fixed at a certain amount. For example, an agreement might call for a fee of 1 percent of the sales price per transfer during the first 99 years following the initial sale.

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A developer might impose a transfer fee on a parcel of land by encumbering the title through a type of covenant in which the initial property buyer promises that the developer will receive a certain fee before the real estate is transferred to another party. These covenants remain part of the title to the property even when future owners possess the land.

Either the seller or the buyer may be required to pay the transfer fee. If the parties do not pay upon transfer, a lien may be placed on the title until the fee and interest are paid. Properties generally are not marketable until liens are removed. Covenants requiring transfer fees may be discovered during a title record search or real estate closing.

In August 2010, the Federal Housing Finance Agency (FHFA) issued a proposed guidance that would bar Fannie Mae, Freddie Mac, and federal home-loan banks from investing in mortgages carrying private transfer fee covenants. According to the FHFA, fee covenants may: (1) increase the costs of homeownership; (2) make property transfers legally uncertain; (3) expose lenders and title companies to risks; (4) reduce transparency for consumers; and (5) have other adverse effects.

Transfer fees have been marketed as a way for developers to recoup capital improvement costs while selling properties, such as in a subdivision, for a lower initial cost. Under one patent-pending model, fees are payable to a trustee, who then splits the fees between the developer and a licensor. This model may offer investment banks the opportunity to develop financial securities based on the estimated value of future revenues to be generated by fee covenants in exchange for providing developers with an upfront payment for creating the underlying covenants.

Legal Doctrines in American Real Estate Law.

A fundamental concept in American property law is preservation of the "alienability" of land, or keeping the title to real estate free of legal restrictions imposed by past owners that would unreasonably impede the use of property by future owners. Under this doctrine, the conveyance of "fee simple" title (transfer of legal ownership of property without restrictions on future use) is preferable. Common-law legal doctrines that may apply to the enforceability of transfer fee covenants include:

- **"Touch and concern" test** - To be valid under Washington law, covenants generally must meet the "touch and concern" test, meaning that the party imposing the restriction receives the benefit of the covenant on his or her own land.
- **"Rule against perpetuities"** - The "rule against perpetuities" requires covenants to "vest" within the life of someone alive at the time the covenant is formed, plus 21 years.

Transfer Fee Laws in Other States.

Transfer fee covenants arose in California and Texas during the last decade, initially as a method to generate money for environmental protection. Since then, more than a dozen states have passed legislation curtailing or banning transfer fees. For example, Arizona prohibits transfer fee covenants, while California's law requires explicit disclosure of fee covenants to concerned parties through conspicuous documents in the public record.

Summary of Bill:

Intent.

The Legislature finds that transfer fee obligations violate state policy favoring marketability of real property and transferability of property free of title defects or unreasonable restraints on alienation. The Legislature declares that transfer fees may not bind later owners.

New transfer fee agreements prohibited.

Any transfer fee obligations recorded or entered into on or after the bill's effective date are nonbinding and unenforceable in the courts. If a party imposes a transfer fee on a parcel, he or she is liable for any damages resulting from the fee, including the amount of any fee paid by a party to a transfer, and all attorney fees, expenses, and costs incurred by a party in certain legal actions involving the fees. The requirements also apply to property transfers conducted in ways other than sales, such as gifts.

Requirements for existing fee agreements.

Transfer fee obligations existing before the bill's effective date are not presumed to be valid and enforceable. Such obligations must be interpreted and enforced following principles of real estate, servitude contract, and other laws, including restraints on alienation.

People who receive money from transfer fee obligations imposed before the bill takes effect, called "payees," must record a document in the office of the recorder of deeds for each county in which real estate subject to transfer fee obligations is located before December 31, 2011. The document, called a "Notice of Private Transfer Fee Obligation," must state: (1) how a given fee is calculated; (2) examples of the amount of the fee if the land contains a private home; (3) the expiration date of the fee, if any; (4) the purpose of the fee; and (5) a legal description of the property. If a payee fails to file the document, the person who owns the real estate may convey his or her interest in the property, is presumed to have acted in good faith, and is not subject to paying a transfer fee.

An owner of land subject to a transfer fee obligation may request a written statement of the fee payable. If the payee fails to provide the statement within 30 days, the owner may convey the property without paying the fee.

Owners may file affidavits that constitute prima facie evidence that a payee failed to comply with the act, either by failing to file the notice document or by failing to respond to a request for a statement within 30 days. Upon filing the affidavit, the owner may convey the property without paying the fee and is no longer bound by the transfer fee obligation.

Contracts for sale of real estate in existence before the bill's effective date that are subject to transfer fees must disclose the fee obligation and state that the fees are subject to state law prohibitions. Contracts that do not meet these or other disclosure requirements are unenforceable in court against the buyer, and the seller may need to return any deposits connected with the sale. Buyers may not agree to waive their rights under the act.

If a buyer discovers after closing a sale of property that the title is encumbered by a transfer fee, the buyer may recover damages resulting from the failure to disclose the fee, such as the fee amount or the loss of market value of the property caused by the fee obligation. The buyer also may be awarded attorney fees and legal costs.

Exceptions.

These provisions do not apply to: (1) commissions payable to licensed real estate brokers for transfer of property; (2) interests or charges payable by a borrower to a lender pursuant to a loan secured by a mortgage against property; (3) rent payable under a lease; (4) money payable to the holder of an option to purchase property or to the holder of a right of first refusal or first offer to purchase property for not exercising that right; (5) government taxes and fees; (6) fees payable to certain associations; (7) fees payable to certain non-profit corporations; (8) fees related to certain club memberships; and (9) fees for services performed by an association at the same time as the fee is charged.

Appropriation: None.

Fiscal Note: Requested on 1/26/2011.

Effective Date: The bill contains an emergency clause and takes effect immediately.