

HOUSE BILL REPORT

SSB 5115

As Reported by House Committee On:
Judiciary

Title: An act relating to private transfer fee obligations.

Brief Description: Concerning private transfer fee obligations.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Harper, Pflug, Kline, Roach, Carrell and Kilmer).

Brief History:

Committee Activity:

Judiciary: 3/2/11, 3/10/11 [DP].

Brief Summary of Substitute Bill

- Makes private transfer fee obligations imposed on real property after the bill's effective date unenforceable.
- Makes a person who imposes a transfer fee obligation on real property after the bill's effective date liable for damages and reasonable attorneys' fees, expenses, and costs.
- Requires people who receive money from transfer fee obligations already in effect to file documents with county auditors in order for the obligations to remain legally binding.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 13 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Chandler, Eddy, Frockt, Kirby, Klippert, Nealey, Orwall, Rivers and Roberts.

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

Background:

Transfer Fees in Real Estate Transactions.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

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.

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.

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.

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. Common-law legal doctrines that may apply to the enforceability of transfer fee obligations include the following:

- "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.

More than a dozen states have passed legislation curtailing or banning transfer fees. For example, Arizona prohibits transfer fee obligations, while California's law requires explicit disclosure of fee obligations 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 attorneys' 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 and the touch and concern doctrine.

Before December 31, 2011, 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 county auditor for each county in which the real property subject to transfer fee obligations is located. The document, called a "Notice of Private Transfer Fee Obligation," must include: (1) the amount of the fee or percentage of the sales price constituting the cost of the fee; (2) the date or circumstances under which the fee obligation expires, if any; (3) the name and address of the payee; (4) the acknowledged signature of the payee; and (5) the legal description of the real property burdened by the fee obligation. If a payee fails to file the document, the transfer fee obligation is not enforceable by the payee.

Exceptions.

These provisions do not apply to: (1) one-time payments by a grantee to a grantor of real property as consideration for a deal; (2) commissions payable to licensed real estate brokers for services rendered; (3) interests or charges payable by a borrower to a lender pursuant to a loan secured by a mortgage against property; (4) rent payable under a lease; (5) 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; (6) government taxes and fees; (7) fees payable to certain associations; (8) fees payable to certain nonprofit corporations; (9) fees related to certain club memberships; and (10) fees for services performed by an association at the same time as the fee is charged.

Appropriation: None.

Fiscal Note: Not requested.

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

Staff Summary of Public Testimony:

(In support) This is a consumer protection bill. Private transfer fee obligations typically are covenants that require payment of what amounts to an onerous private tax on real property, generally for a period of 99 years. If not paid, an obligation may result in a foreclosable lien on property. The obligations do not add value to a homeowner or to the value of a property. Instead, such obligations rob homeowners of equity in their properties. The obligations are nontransparent documents that exploit the complexity of real estate transactions and constitute a trap for the unwary. The emergency clause is important to prevent private transfer fee obligations from being imposed before the bill takes effect. Washington hopefully will be one of about 20 states in the country prohibiting this type of practice. There is evidence that private transfer fee obligations are being imposed in Washington, although the practice is not as prevalent here as in Texas, Florida, and some southern states.

(Opposed) None.

Persons Testifying: Senator Harper, prime sponsor; Rush Riese, Washington Land Title Association; and Bob Mitchell, Washington Realtors.

Persons Signed In To Testify But Not Testifying: None.