

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 391 Transfer Fee Covenants
SPONSOR(S): McBurney
TIED BILLS: None IDEN./SIM. BILLS: SB 464

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR. Row 1: 1) Committee on Courts, Webb, Bond. Row 2: 2) Safety & Security Council. Row 3: 3). Row 4: 4). Row 5: 5).

SUMMARY ANALYSIS

The seller of real property may place conditions in the deed that act as restrictions binding upon future owners of the property. These conditions are known as covenants. A transfer fee covenant is a requirement that future owners pay a fee upon every future sale. Current law does not define or regulate transfer fee covenants.

This bill defines transfer fee covenants and provides that transfer fee covenants in general are void and unenforceable. The bill also provides exceptions whereby transfer fee covenants for related environmental groups and homeowners' associations are valid and enforceable.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill prohibits private transfer fee covenants on real property.

B. EFFECT OF PROPOSED CHANGES:

Background:

Covenants and Restrictions - In General

A grantor may create restrictions on real property in the form of covenants that run with the land and bind the grantee. For a covenant that binds future owners of the land to be valid, it must "run with the land."¹ A covenant runs with the land when it relates to the land and binds the successor grantees indefinitely. Under common law, covenants do not run with the title to real property unless the covenants "touch and concern the land."² In order for a covenant to "touch and concern the land," the covenant must somehow affect or be bound up in the use of the land.³

Under common law, restraints on alienation of property were disfavored and the owner of the property could generally dispose of property as he or she desired.⁴ Today, restraints on alienation of property are often found to be against public policy, unless they serve a legal and useful purpose. If an interest is found to be an unreasonable restraint on alienation, it is void and unenforceable under common law principles.⁵ Therefore, public policy favors the marketability and transferability of real property without restraints on alienation.

Covenants and Restrictions - Transfer Fee Covenants

Transfer fee covenants are a relatively new phenomenon that began in California and Texas. A transfer fee covenant requires the payment of a transfer fee every time the property is transferred to a new owner. The fee can be payable to any person or entity. Fees are often 1 to 2 percent of the purchase price.⁶ Private transfer fees are placed on new homes and constitute a private agreement between the homebuyer and either the homebuilder or the home owner and can theoretically fund anything. They are often filed in the form of a permanent lien on a home's title.⁷ The transfer fee covenant is a covenant that is binding on all future owners of the real property, it does not appear that such covenants may be removed under current law.⁸ Current statutory law does not specifically address transfer fee covenants.

Transfer fee covenants are used in many different ways. They are used to fund homeowners' associations, address environmental concerns associated with new housing developments, and help builders pay for parks, agricultural preservation, affordable housing and other benefits that are often required as conditions for projects approved by local governments.

¹ *Lanier v. Burnette*, 245 Ga. App. 566 (2000).

² *Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.*, 146 Wash. 2d 194, 43 (2002).

³ *Id.*

⁴ *Crosswell Enterprises, Inc. v. Arnold*, 309 S.C. 276 (Ct. App. 1992).

⁵ *Robbins v. HNG Oil Co.*, 878 S.W.2d 351 (Tex. App. Beaumont 1994).

⁶ Timm Herdt, *Realtors, Builders Battle over Property Transfer Fee*, Ventura County Star, May 9, 2007.

⁷ Kathy Robertson, Michael Shaw, & Celia Lamb, *Legislators Look at Restricting 'Private Transfer Tax' on Homes*; Silicon Valley/ San Jose Business Journal, March 30, 2007

⁸ *Id.*

Recently, private sellers of land have started to utilize transfer fee covenants as a means of additional future income for such sellers.⁹ It is alleged that homebuyers are often not aware of a transfer fee on their property until they appear at closing because the existence of the fee is listed in fine print in the covenants, conditions and restrictions.¹⁰ From an economic standpoint, transfer fee covenants reduce the future value of a homeowner's property because of the economic burden that such covenants place on future sales.¹¹

Florida appellate courts have not ruled on whether a private transfer fee covenant is an enforceable covenant running with the land or is an invalid restraint upon the alienation of real property.

Effect of Bill:

This bill creates s. 689.28, F.S., declaring that transfer fee covenants violate legislative intent and public policy for the marketability of real property. The bill provides that transfer fee covenants violate public policy by impairing the marketability and transfer of real property, causing unreasonable restraints on alienation, and do not touch and concern the land. This bill further provides that all transfer fee covenants that meet the definition provided in this section are void and unenforceable if entered into after July 1, 2008.

This bill defines transfer fee covenants as the payment of a transfer fee to the person declared in the covenant or their successors or assigns upon a transfer of interest in the real property. This bill lists nine circumstances where a fee is not considered a transfer fee covenant for purposes of this bill. It is not considered a transfer fee covenant under this bill when it is:

- An obligation between the grantor and grantee for payment of additional subsequent consideration.
- Any commission payable to a licensed real estate broker.
- Amounts payable by a borrower to a lender in connection with a loan secured by a mortgage on the real property, including assumption fees or fees for estoppels letters or certificates and any shared appreciation interest payable to the lender in connection with the loan.
- Any amounts payable by a lessee to a lessor under a lease including those for consenting to an assignment encumbrance or transfer of the lease.
- Any payments to the holder of an option to purchase.
- Any fees or other charges payable or imposed by a governmental authority.
- Fees or other charges payable to a homeowners' association or other property owners' association.
- Fees or dues payable under community association documents to nonprofit organizations for the benefit of the community.
- Any payments required pursuant to an environmental covenant.

This bill only applies to transfer fee covenants that are recorded by owners on or after the effective date of the bill. Since courts have not ruled in Florida whether or not existing transfer fee covenants are voidable under existing common law principles, this bill disclaims that existing transfer fee covenants are valid simply because they were recorded before the effective date of this bill.

C. SECTION DIRECTORY:

Section 1 creates s. 689.28, F.S., relating to a prohibition against transfer fee covenants.

⁹ William Jason, Homebuilders, *Realtors Differ on Transfer Fees*, North Bay Business Journal, July 30, 2007, at <http://www.busjrnl.com/article/20070730/BUSINESSJOURNAL/70729026/1209>.

¹⁰ Dinah Eng, *New Borrower, Buyer Protections in '08 - Greater disclosure about mortgage products and transfer fees are among laws about to take effect*, Los Angeles Times, December 30, 2007.

¹¹ *Id.*

Section 2 provides an effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may decrease the cost to future homebuyers by declaring transfer fee covenants invalid and unenforceable.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No Statement Submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

N/A