

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Regulated Industries Committee

BILL: CS/SB 464

INTRODUCER: Judiciary Committee and Senator Aronberg

SUBJECT: Transfer Fee Covenants/Real Estate Conveyances

DATE: April 1, 2008

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Maclure	JU	Fav/CS
2.	Oxamendi	Imhof	RI	Favorable
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill creates a section of law to reflect legislative intent regarding Florida’s public policy against transfer fee covenants. It provides that Florida’s public policy favors the marketability of real property and the transferability of interests in real property free of title defects and unreasonable restraints on alienation.

The bill prohibits transfer fee covenants recorded on or after July 1, 2008. Transfer fee covenants are defined 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 real property. The bill also describes ten exceptions to the definition.

This bill amends sections 689.01 and 692.01, Florida Statutes. This bill creates section 689.28, Florida Statutes.

II. Present Situation:

Transfer Fee Covenants

This bill is a product of the Real Property, Probate, and Trust Law Section of the Florida Bar (RPPTL) in response to a “transfer fee rights” scenario described and analyzed in a May/June 2007 issue of *Probate and Property*, by the Real Property and Trust and Estate Law Section of the American Bar Association.¹ The scenario described allows property owners to reserve a future interest in the appreciation of the value of the real property. The scenario begins with an agreement that purports to attach to title to the land and burdens future owners for 99 years. Future sales of the property provide for 1 percent of the sale price to be divided among the original covenantor, the company that licensed the use of the system of transfer fee rights, and the real estate broker.² These scenarios are sometimes referred to as “transfer fee covenants.”

In a traditional real estate transaction, the seller contracts to deliver fee simple title to the buyer subject to any additional conditions of record that the buyer is willing to accept. These conditions are found in the declarations of covenants, conditions, and restrictions (CCRs) and include limitations on use and enjoyment of the property, access restrictions, or building setback requirements.

A covenant occurs when the seller of real property places a condition or conditions in the deed that act as restrictions binding upon future owners of the property. A covenant must “run with the land” to be valid and bind future owners.³ 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.”⁴ 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.⁵

A transfer fee right in a CCR is different than the traditional condition or restriction in a CCR because it provides for conditions on future sales after the initial sale. The future parties may be required to pay 1 percent of the future gross sales price back to the original holder of the transfer rights. One percent of the interest is split among the covenantor (60 percent), the licensor (30 percent), and the broker (10 percent) for the first 30 years and then for the remaining 69 years the licensor receives 90 percent and the broker receives 10 percent of the proceeds.⁶

¹ Real Property, Probate, and Trust Land Section, The Florida Bar, White Paper on *Transfer Fee Covenants* (on file with the Florida Senate Judiciary Committee).

² Marjorie Ramseyer Bardwell and James Geoffrey Durham, *Transfer Fee Rights – Is the Lure of Sharing in Future Appreciation a Flawed Concept?* *Probate and Property*, May/June 2007, available at www.abanet.org/rppt/publications/magazine/2007/mj/Bardwell-Durham.shtml (Last visited March 27, 2008).

³ *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 310 (Fla. 2d DCA 1966).

⁴ *Id.*

⁵ *Id.*

⁶ Bardwell, *supra* note 2, at 2.

Real Estate Conveyances by Corporations

Section 692.01, F.S., provides that a corporation may convey real property using a corporate seal and signature by its president or any vice president or chief executive officer. The intent of this statute:

is to allow third parties without knowledge of intracorporate disputes, fraud or misrepresentations, to enter into business transactions ... with confidence as to the transaction's validity and without the need to verify the actual authority of the officer executing the agreement.⁷

Corporations may also convey real property as described under the provisions s. 689.01, F.S., which requires that there be a written instrument signed in the presence of two subscribing witnesses by the party creating, making, granting, conveying, transferring, or releasing the estate.

III. Effect of Proposed Changes:

The bill creates s. 689.28, F.S., to prohibit transfer fee covenants in real estate transactions. The bill's intent language provides that Florida's public policy favors the marketability of real property and the transferability of interests in real property free of title defects or unreasonable restraints on alienation. The intent language also provides that transfer fee covenants violate public policy by impairing the marketability and transferability of real property, which results in an unreasonable restraint on alienation.

The bill defines transfer fee covenants as the payment of a transfer fee to the person declared in the covenant or that person's successors or assigns upon a transfer of interest in real property. The bill lists the following ten circumstances in which a fee is not considered a transfer fee for purposes of the bill:

- Monies paid to the seller by the buyer based on the appreciation, development, or sale of the property. An interest in real property may include a separate mineral estate and its appurtenant surface access rights.
- Real estate broker commissions paid by the seller or buyer based on an agreement. This includes any subsequent additional commissions based upon any subsequent appreciation, development, or sale of the property.
- Any monies paid to the lender by the borrower for a loan secured by a mortgage or any subsequent transactions with the loan on the real property.
- Any rent, reimbursement, charge, fee, or other amount payable by a lessee to a lessor under a lease.
- Any monies paid to the holder of purchase options in real property or a holder of a right of first refusal.
- Any tax, fee, charge, assessment, fine, or other amount payable to or imposed by a governmental authority.
- Any monies payable to a homeowners', condominium, cooperative, mobile home, or property owners' association pursuant to a declaration or covenant or law.

⁷ *Snead v. U.S. Trucking Corp.*, 380 So. 2d 1075, 1080 (Fla. 1st DCA 1980), *review denied*, 389 So. 2d. 1116 (Fla. 1980).

- Any monies paid for supporting cultural, education, charitable, recreational, environmental, conservation, or other similar activities benefiting the community that are subject to the declaration or covenant.
- Any monies involved in the purchase or transfer of a club membership relating to real property owned by the member.
- Any payment required by an environmental covenant.

The bill provides that transfer fee covenants recorded on or after July 1, 2008, may not run with the title to real property and are not binding on or enforceable in equity against subsequent owners, purchasers, or mortgagees of any interest in real property as an equitable servitude or otherwise. Liens securing payment of transfer fees are void and unenforceable.

The bill clarifies that the prohibition against transfer fee covenants does not mean that transfer fee covenants or liens recorded in this state before July 1, 2008 are presumed valid or invalid.

The bill amends s. 689.01, F.S., to clarify that corporations may execute real estate conveyance contracts using the corporation's lawfully authorized agent. The bill makes conforming changes to s. 692.01, F.S.

The bill provides a July 1, 2008 effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

By prohibiting transfer fee covenants, the bill may decrease the cost of real estate transactions to future homebuyers.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 18, 2008:

The committee substitute:

- Makes technical clarifications to the legislative intent language to remove archaic references to covenants that “touch and concern” the land.
- Exempts mineral estates and related rights of entry from the definition of “transfer fees.”
- Exempts private fee covenants used in club membership programs related to real property from the definition of “transfer fees.”
- Includes environmental, conservation, or other similar activities benefiting a community in the charitable activity exemption from the definition of “transfer fee.”
- Revises s. 689.01, F.S., to provide that corporations may execute real estate conveyance documents.
- Makes conforming changes to s. 692.01, F.S.

B. Amendments:

None.