

PRIVATE TRANSFER FEE OBLIGATIONS BANNED IN NEW YORK

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On September 23, Governor Cuomo signed into law legislation adding new Article 15 (“Prohibition and Disclosure of Private Transfer Fee Obligations”) to the Real Property Law, the Article to be known and cited as the “Private Transfer Fee Obligations Act” (the “Act”).¹ A private transfer fee, also identified in the Act as a private transfer fee obligation, is typically a charge imposed by a real property developer of 1% of the sales price, payable to the developer or to its designee on each transfer of an interest in real property within the developer’s project, such as a private home. The obligation to pay this charge effects each transfer of an interest in the same property for as long as ninety-nine years, and the charge is due even when the property owner has no equity in the property.²

A developer’s designee may be a trustee. If so, the trustee, after retaining a portion of the charge for its expenses, distributes the balance of the fee to the developer, to a licensing company, and to any other persons who have purchased from the licensing company interests in an income stream arising from a securitized pool of private transfer fees on various projects.³

Instruments imposing a private transfer fee provide for a lien on the property to arise whenever the charge is due and unpaid.⁴ Presumably, the provision for a lien will subject the instrument providing for the private transfer fee to the payment of mortgage recording tax. How and when mortgage recording tax would be computed is uncertain, and interest and penalties will accrue for the non-payment or the late payment of the tax.

Under the Act, all private transfer fee obligations set forth in instruments entered into or recorded after the Act’s effective date are void and unenforceable.⁵ Private transfer fee obligations entered into prior to the effective date of the Act are limited, as discussed below.

The concept of private transfer fees has not had a favorable reception. For example, the Federal Housing Finance Agency, the regulator and conservator of Fannie Mae and Freddie Mac, and the regulator of the Federal Home Loan Banks issued a proposed rule that would prevent Fannie Mae, Freddie Mac and the Federal Home Loan Banks from investing in mortgages on any property burdened with a private transfer fee covenant.⁶ The Director of the Office of Single Family Program Development of the U.S. Department of Housing and Urban Development (“HUD”), in a letter to the President of ALTA (American Land Title Association), has stated the following: “HUD agrees that [private transfer fees] unnecessarily increases the cost of homeownership, and in most cases the homebuyer is unaware of its existence. Our General Counsel has confirmed that private transfer fees would clearly violate HUD’s regulations at 24

C.F.R. § 203.41, which prohibit ‘legal restrictions on conveyance’, defined to include limits on the amount of sales proceeds retainable by the seller.”⁷

The Real Property Law Section of the New York State Bar Association, in its Memorandum of Support of the legislation objected “to private transfer fee obligations as being adverse to the interests of consumers. A private transfer fee obligation causes additional, unnecessary closing expense without any benefit to property sellers and purchasers while depressing prices and complicating and delaying closings.”⁸ Other commentators have also asserted that these charges provide no benefit to homeowners or their property.⁹

New York is the 37th State to ban private transfer fees.¹⁰ The Legislature, in Section 471 of the Act, noting the public policy of New York supporting “the marketability of real property and the transferability of interests in real property free of title defects or unreasonable restraints on alienation,” declared “that private transfer fee obligations violate this public policy by impairing the marketability and transferability of real property and by constituting an unreasonable restraint on alienation”¹¹ Governor Cuomo, in his Approval Memorandum, concurred, stating that “private transfer fees are objectionable and contravene the public interest because they needlessly drive up the cost of real property, making it more difficult for a prospective purchaser to acquire such property.”¹²

DEFINITIONS

A private transfer fee is defined in Section 472 (“Definitions”) of the Act as “a fee, charge or any portion thereof, required by a private transfer fee obligation and payable, directly or indirectly, upon the transfer of an interest in real property, or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration given for the transfer.”¹³

A “private transfer fee obligation” is defined as “an obligation arising under a declaration or covenant recorded against the title to real property or under any other contractual agreement or promise, whether or not recorded, that requires or purports to require the payment of a private transfer fee to the declarant or other person specified in the declaration, covenant or agreement, or to their successors or assigns, upon a subsequent transfer of an interest in the real property.”¹⁴

A “transfer” is “the sale, gift, conveyance, assignment, inheritance, or other transfer of an ownership interest in real property located in this state.”¹⁵

PROHIBITION

Under Section 473 (“Prohibition”) of the Act, a private transfer fee obligation “recorded or entered into” in New York after the effective date of the Act is not binding or enforceable and does not run with the land.¹⁶ Under Section 474 (“Liability for violations”), “any person who

records or enters into an agreement imposing a private transfer fee obligation...after the effective date of this section shall be liable for (1) any and all damages resulting from the imposition of the transfer fee obligation on the transfer of an interest in real property...and (2) all attorneys' fees and costs incurred by a party to the transfer or mortgagee of the real property to recover any transfer fee paid or in connection with an action to quiet title.”¹⁷ An agent acting on behalf of a principal, such as a person engaged by a developer to record an instrument purporting to impose a private transfer fee obligation, has no liability.¹⁸

EXCLUDED TRANSACTIONS

Certain types of charges are expressly excluded in Section 472 from the definition of a private transfer fee. These include, for example: additional consideration payable by the transferee to his or her transferor after closing, such as consideration paid on a one time basis based upon any subsequent appreciation in the value of the property, a commission payable to a real estate broker, shared appreciation or profit participation payable to a lender, payments made for the release of a right of first refusal to purchase or of an option to purchase, amounts payable to or imposed by a governmental entity, amounts payable to a not-for-profit or charitable organization for activities benefitting the community that is subject to the payment, and amounts paid to purchase or transfer a club membership relating to the property.¹⁹

Private transfer fees also do not include cooperative and condominium flip taxes or similar charges. Excluded from the definition of a private transfer fee is “[a]ny fee, charge, assessment, fine, or other amount payable to a homeowners’ association, condominium cooperative, mobile home, or property owners’ association pursuant to a declaration or covenant or law applicable to such association” To prevent private transfer fees from being paid indirectly to a developer when a property being transferred is a part of any such community, the Act also provides that “[n]o amount shall be paid to a homeowners’, condominium, mobile home, or property owners’ association for the payment to the declarant of the condominium or the creator of the homeowners’, cooperative, mobile home or property owners’ association, or their designee.”²⁰

GRANDFATHERED PRIVATE TRANSFER FEES

Under Section 473 of the Act, private transfer fee obligations “recorded or entered into” prior the effective date of the Act are not prohibited. It is not clear from the text of the Act how a private transfer fee obligation entered into but not recorded before the effective date of the Act can be valid while instruments imposing such charges “recorded” after the effective date are unenforceable.²¹

In grandfathering any prior instrument imposing a private transfer fee obligation, the legislature at the suggestion of the Real Property Section took care to ensure that it did not validate an agreement that would otherwise be unlawful under New York’s common law.²² The courts may, for example, hold that an agreement imposing a private transfer fee is an invalid restraint on alienation or that it is unenforceable against future owners of a property since it does not “touch or concern” the land. Under Section 473, “this Article shall not validate any private transfer fee agreement that is contrary to the laws of this state.” Further, “[t]his section shall not be deemed

to require that a private transfer fee obligation recorded, filed or entered into in this state before the effective date of this section is presumed valid and enforceable.”²³

If there is an grandfathered agreement requiring the payment of a private transfer fee, the seller of an interest in real property which is subject to such an agreement (including presumably the seller of a cooperative unit) is required by Section 475 (“Disclosure”), prior to the buyer’s signing the contract of sale, to furnish the purchaser a written statement of the existence of the private transfer fee obligation, with a description of the obligation and a statement that it is subject to the prohibitions of the Act. ²⁴

For a private transfer fee obligation “imposed prior to the effective date of the Act, under Section 476 (“Notice requirements for existing private transfer fee obligations”) the so-called “receiver of the fee”, the person or entity to which the private transfer fee is to be paid, is required within six months of the Act’s effective date to file (that is, record) against the subject property in the county records an acknowledged document meeting certain requirements as to form, stating, among other things, the legal description of the burdened property and the name and contact information for the receiver of the fee.²⁵

If the receiver of the fee does not file the statement, the affected property may be transferred free and clear of the private transfer fee obligation.²⁶ If a notice of transfer fee is filed, but the receiver of the fee fails to provide within thirty days of the date of a written request sent to the address in the recorded notice of transfer fee a written statement of the amount payable, the transferor may convey the property free and clear of the private transfer fee obligation. To transfer the real property interest free and clear of the obligation, the transferor must record “prior to or simultaneously with” the conveyance an affidavit stating that a request for a written statement of the transfer fee payable was sent to the address set forth in the notice of transfer fee filed by the receiver of the fee, and the receiver of the fee failed to provide the statement requested within thirty days of the date on which the transferor sent its request. When recorded, the affidavit is deemed to be conclusive evidence of the facts stated therein.²⁷

It is believed that there will be few, if any, grandfathered private transfer fee obligations in New York due to the possible mortgage tax consequences of having recording such an agreement.²⁸ If, however, there are any grandfathered instruments, counsel for the parties to a transaction affected by such an instrument will need to follow the guidelines set forth in the Act and their title insurers will need to determine what affirmative insurance, if any, they can afford in title insurance policies to issue. Private transfer fee obligations recorded or entered into on or after the effective date of the Act are not enforceable.²⁹

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- 1 Ch. 522, § 470-76, 2011 N.Y. Laws, State of N.Y., 234th Sess., available at <http://open.nysenate.gov/legislation/bill/A7358-2011>
 - 2 See Memorandum of Sen. Libous on Bill S5203 (234th Sess.), available at <http://open.nysenate.gov/legislation/bill/S5203-2011>.
 - 3 See *id.*
 - 4 See *id.*
 - 5 See Ch. 522, § 473 *supra* note 1.
 - 6 Private Transfer Fees, 76 Fed. Reg. 6702-02, 6703 (Feb. 8, 2011) (to be codified at 12 C.F.R. pt. 1228).
 - 7 See Letter from Margaret E. Burns, Director of Office of Single Family Program Development, U.S. Department of Housing and Urban Development, (undated), http://www.alta.org/press/FHA_101510.pdf, pg. 47.
 - 8 Michael J. Berey, The Real Property Law Section Supports This Legislation, N.Y.S.B.A. (May 16, 2011), http://www.nysba.org/Content/ContentFolders/Legislation/LegislativeMemoranda20112012/RP_LS14.pdf; see also Berey *infra* note 11.
 - 9 See Private Transfer Fee Covenants and Their Consequences for Real Property, AM. LAND TITLE ASS'N (Feb. 2010), http://www.alta.org/advocacy/docs/ALTATransferFeeCovenant_Backgrounder.pdf; see also R. Wilson Freyermuth, Putting the Brakes on Private Transfer Fee Covenants, PROB. & PROP., July/Aug. 2010, available at http://www.americanbar.org/publications/probate_property_magazine_home/probate_2010_index/probate_july_aug_2010_index.html (stating that private transfer fees impede the sale of real estate and the transfer of land by imposing additional unwarranted transaction costs); Marjorie Ramseyer Bardwell & James Geoffrey Durham, Transfer Fee Rights- Is the Lure of Sharing in Future Appreciation a Flawed Concept?, PROB. & PROP., May/June 2007, at 28, available at http://www.americanbar.org/publications/probate_property_magazine_home/probate_2007_index/probate_may_june_2007_index.html (raising questions about the validity of private transfer fee covenants, and laying out several grounds for attacking a transfer fee device).
 - 10 See Press Release, AM. LAND TITLE ASS'N, (Sept. 26, 2011) (on file with author); see also Michael J. Berey, Current Developments: Special Edition, FIRST AM. TITLE INS. CO., (Sept. 27, 2011), http://www.firstamny.com/doc/Current_092711.pdf.
 - 11 Ch. 522, § 471, *supra* note 1.
 - 12 Governor's Approval Memorandum, ch. 522, no. 8 of 2011, (Sept. 23, 2011), available at <http://public.leginfo.state.ny.us/menugtf.cgi>. The memorandum may be accessed by inputting A7358 into the field for Bill No.
 - 13 Ch. 522, § 472(1) *supra* note 1.
 - 14 *Id.* § 472(3).
 - 15 *Id.* § 472(1).
 - 16 *Id.* § 473.
 - 17 *Id.* § 474.
 - 18 *Id.*
 - 19 Ch. 522, § 472 *supra* note 1.
 - 20 *Id.*

21 The Act merely states that “[t]his section shall not apply to a private transfer fee obligation recorded or entered into prior to the effective date of this section” without any explanation as to the mechanisms of recording of the private transfer fee obligations that were entered into prior to the enactment of the Act. See id. § 470-73.

22 The Real Property Law Section of the New York State Bar Association in its Memorandum in Support suggests that “[p]rivate transfer fee obligations may not be enforceable under New York’s common law.” Memorandum from Michael J. Berey, supra note 8.

23 Ch. 522, § 473 supra note 1.

24 See id. § 475.

25 See id. § 476.

26 See id.

27 See id.

28 Readers are requested to email mberey@firstam.com information as to any private transfer fee obligation in New York pre-dating the Act.

29 See Ch. 522, § 473 supra note 1.