

BILL ANALYSIS

Senate Research Center

H.B. 8
By: Darby et al. (Harris)
Business & Commerce
5/10/2011
Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The Texas Legislature, in a recent legislative session, enacted legislation to prohibit a real estate practice whereby a private entity could create a real estate transfer fee payable over a long period of time by placing a deed restriction on a property requiring such a fee in connection with a future transfer of the property. The current law includes certain exemptions, creating a situation that has resulted in substantial efforts by certain persons to circumvent the law through creative interpretation of the language. H.B. 8 seeks to close loopholes in current law by prohibiting future private transfer fees on real property, with certain exemptions, and providing clarity and notice requirements to properties with existing private transfer fees.

H.B. 8 amends current law relating to prohibiting certain private transfer fees and the preservation of private real property rights, and provides penalties.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 5, Property Code, by adding Subchapter G, as follows:

SUBCHAPTER G. CERTAIN PRIVATE TRANSFER FEES PROHIBITED; PRESERVATION OF PRIVATE REAL PROPERTY RIGHTS

Sec. 5.201. DEFINITIONS. Defines "encumbered property," "lender," "payee," "private transfer fee," "private transfer fee obligation," "subsequent owner," "subsequent purchaser," and "transfer" in this subchapter.

Sec. 5.202. CERTAIN PRIVATE TRANSFER FEE OBLIGATIONS VOID. (a) Provides that except as provided by this subchapter, a private transfer fee obligation created on or after the effective date of this subchapter is not binding or enforceable against a subsequent owner or subsequent purchaser of an interest in real property and is void.

(b) Provides that for purposes of this subchapter, the following payments are not considered private transfer fee obligations:

(1) consideration paid by a purchaser to a seller for an interest in real property transferred, including, as applicable, a mineral interest transferred, including additional consideration paid to a seller for the property's appreciation, development, or sale after the interest in the property has been transferred to the purchaser, if the additional consideration is paid only once and that payment does not bind successors in interest to the property to any private transfer fee obligation;

(2) a commission paid to a licensed real estate broker under a written agreement between a seller or purchaser and the broker, including an

additional commission for the property's appreciation, development, or sale after the interest in property is transferred to the purchaser;

(3) interest, a fee, a charge, or another type of payment to a lender under a loan secured by a mortgage on the property, including:

(A) a fee payable for the lender's consent to an assumption of the loan or transfer of the property subject to the mortgage;

(B) a fee or charge payable for an estoppel letter or certificate;

(C) a shared appreciation interest or profit participation; or

(D) other consideration payable in connection with the loan;

(4) rent, reimbursement, a fee, a charge, or another type of payment to a lessor under a lease, including a fee for consent to an assignment, sublease, encumbrance, or transfer of a lease;

(5) consideration paid to the holder of an option to purchase an interest in property, or to the holder of a right of first refusal or first offer to purchase an interest in property, for waiving, releasing, or not exercising the option or right when the property is transferred to another person;

(6) a fee payable to or imposed by a governmental entity in connection with recording the transfer of the property;

(7) dues, a fee, a charge, an assessment, a fine, a contribution, or another type of payment under a declaration or other covenant or under law, including a fee or charge payable for a change of ownership entered in the records of an association to which this subdivision applies or an estoppel letter or resale certificate issued under Section 207.003 (Delivery of Subdivision Information to Owner) by an association to which this subdivision applies or the person identified under Section 209.004(a)(6) (relating to the name and mailing address of the person managing the association), provided that no portion of the fee or charge is required to be passed through to a third party designated or identifiable in the declaration or other covenant or law or in a document referenced in the declaration or other covenant or law, unless paid to:

(A) an association as defined by Section 82.003 (Definitions) or 221.002 (Definitions) or the person or entity managing the association as provided by Section 82.116(a)(5) (relating to the name and mailing address of the person managing the association) or 221.032(b)(11) (relating to certain information regarding the managing entity), as applicable;

(B) a property owners' association as defined by Section 202.001 (Definitions) or 209.002 (Definitions) or the person or entity described by Section 209.004(a)(6); or

(C) a property owners' association as defined by Section 202.001 that does not require an owner of property governed by the association to be a member of the association or the person or entity described by Section 209.004(a)(6);

(8) dues, a fee, a charge, an assessment, a fine, a contribution, or another type of payment for the transfer of a club membership related to the property;

(9) dues, a fee, a charge, an assessment, a fine, a contribution, or another type of payment paid to an organization exempt from federal taxation under Section 501(c)(3) or 501(c)(4), Internal Revenue Code of 1986, only if the organization uses the payments to directly benefit the encumbered property by:

(A) supporting or maintaining only the encumbered property;

(B) constructing or repairing improvements only to the encumbered property; or

(C) providing activities or infrastructure to support quality of life, including cultural, educational, charitable, recreational, environmental, and conservation activities and infrastructure, that directly benefit the encumbered property; or

(10) a fee payable to or imposed by the Veterans' Land Board for consent to an assumption or transfer of a contract of sale and purchase.

(c) Authorizes the benefit described by Subsection (b)(9)(C) to collaterally benefit a community composed of property that is adjacent to the encumbered property, or property a boundary of which is not more than 1,000 yards from a boundary of the encumbered property.

(d) Authorizes an organization, notwithstanding Subsection (c), to provide a direct benefit under Subsection (b)(9) if:

(1) the organization provides to the general public activities or infrastructure described by Subsection (b)(9)(C);

(2) the provision of activities or infrastructure substantially benefits the encumbered property; and

(3) the governing body of the organization is controlled by owners of the encumbered property, and approves payments for activities or infrastructure at least annually.

(e) Authorizes an organization to provide activities and infrastructure described by Subsection (b)(9)(C) to another organization exempt from federal taxation under Section 501(c)(3) or 501(c)(4), Internal Revenue Code of 1986, at no charge for de minimis usage without violating the requirements of this section.

Sec. 5.203. NOTICE REQUIREMENTS FOR CONTINUATION OF EXISTING PRIVATE TRANSFER FEE OBLIGATIONS. (a) Requires a person who receives a private transfer fee under a private transfer fee obligation created before the effective date of this subchapter, on or before January 31, 2012, to file for record a "Notice of Private Transfer Fee Obligation" as provided by this section in the real property records of each county in which the property is located.

(b) Requires multiple payees of a single private transfer fee under a private transfer fee obligation to designate one payee as the payee of record for the fee.

(c) Requires that a notice under Subsection (a):

(1) be printed in at least 14-point boldface type;

(2) state the amount of the private transfer fee and the method of determination, if applicable;

- (3) state the date or any circumstance under which the private transfer fee obligation expires, if any;
- (4) state the purpose for which the money from the private transfer fee obligation will be used;
- (5) notwithstanding Subsection (b), state the name of each payee and each payee's contact information;
- (6) state the name and address of the payee of record to whom the payment of the fee must be sent;
- (7) include the acknowledged signature of each payee or authorized representative of each payee; and
- (8) state the legal description of the property subject to the private transfer fee obligation.

(d) Requires a person required to file a notice under this section to:

- (1) refile the notice described by this section not earlier than the 30th day before the third anniversary of the original filing date described by Subsection (a) and within a similar 30-day period every third year thereafter; and
- (2) amend the notice to reflect any change in the name or address of any payee included in the notice not later than the 30th day after the date the change occurs.

(e) Requires a person who amends a notice under Subsection (d)(2) to include:

- (1) the recording information of the original notice filed as required by this section; and
- (2) the legal description of the property subject to the private transfer fee obligation.

(f) Provides that if a person required to file a notice under this section fails to comply with this section:

- (1) payment of the private transfer fee is prohibited from being a requirement for the conveyance of an interest in the property to a purchaser;
- (2) the property is not subject to further obligation under the private transfer fee obligation; and
- (3) the private transfer fee obligation is void.

Sec. 5.204. ADDITIONAL COMPLIANCE REQUIREMENT: TIMELY ACCEPTANCE OF FEES PAID UNDER EXISTING PRIVATE TRANSFER FEE OBLIGATIONS. (a) Requires the payee of record on the date a private transfer fee is paid under a private transfer fee obligation subject to Section 5.203 to accept the payment on or before the 30th day after the date the payment is tendered to the payee.

(b) Provides that if the payee of record fails to comply with Subsection (a):

- (1) the payment is required to be returned to the remitter;

(2) payment of the private transfer fee is prohibited from being a requirement for the conveyance of an interest in the property to a purchaser;

(3) the property is not subject to further obligation under the private transfer fee obligation; and

(4) the private transfer fee obligation is void.

Sec. 5.205. DISCLOSURE OF EXISTING TRANSFER FEE OBLIGATION REQUIRED IN CONTRACT FOR SALE. Requires a seller of real property that may be subject to a private transfer fee obligation to provide written notice to a potential purchaser stating that the obligation may be governed by this subchapter.

Sec. 5.206. WAIVER VOID. Provides that a provision that purports to waive a purchaser's rights under this subchapter is void.

Sec. 5.207. LIABILITY FOR IMPOSING PRIVATE TRANSFER FEE OBLIGATION. Provides that a person who imposes or enters into an agreement imposing a private transfer fee obligation in the person's favor in violation of this subchapter is liable for:

(1) damages resulting from the imposition of the private transfer fee obligation, including the amount of any private transfer fee paid; and

(2) attorney's fees, expenses, and costs incurred in an action to recover the private transfer fee paid or to quiet title to the real property.

Sec. 5.208. INJUNCTIVE OR DECLARATORY RELIEF; PROVIDING PENALTIES.

(a) Authorizes the attorney general to institute an action for injunctive or declaratory relief to restrain a violation of this subchapter.

(b) Authorizes the attorney general, in addition to instituting an action for injunctive or declaratory relief under Subsection (a), to institute an action for civil penalties against a payee for a violation of this chapter. Prohibits a civil penalty assessed under this section, except as provided by Subsection (c), from exceeding an amount equal to two times the amount of the private transfer fee charged or collected by the payee in violation of this subchapter.

(c) Authorizes the court, if the court in which an action under Subsection (b) is pending finds that a payee violated this subchapter with a frequency that constitutes a pattern or practice, to assess a civil penalty not to exceed \$250,000.

(d) Requires the comptroller to deposit to the credit of the general revenue fund all money collected under this section.

Sec. 5.209. DECEPTIVE TRADE PRACTICE. Provides that a person commits a false, misleading, or deceptive act or practice within the meaning of Section 17.46 (Deceptive Trade Practices Unlawful), Business & Commerce Code, by violating this subchapter.

Sec. 5.210. PROPERTY OWNERS' ASSOCIATION COVENANTS RELATING TO PRIVATE TRANSFER FEE OBLIGATIONS. (a) Defines, in this section, "dedicatory instrument," "property owners' association," "restrictive covenant," and "development period."

(b) Provides that a restrictive covenant requiring a private transfer fee obligation is void, unless the covenant is amended in accordance with Subsections (c) and (d), if the covenant does not comply with a rule or regulation regarding qualification of subdivision property for an insured or guaranteed mortgage loan that is adopted by the United States Department of Housing and Urban Development, Consumer Financial Protection Bureau, Federal Housing Finance

Agency, United States Department of Veterans Affairs, Texas Veterans' Land Board, or other federal or state agency, as applicable.

(c) Authorizes a restrictive covenant requiring a private transfer fee obligation to be amended to comply with a rule or regulation described by Subsection (b) by a developer or builder during the development period, or the governing body of a property owners' association.

(d) Requires that an amendment under Subsection (c) specifically reference this section, indicate that the amendment is adopted under authority of this section, and be filed in the real property records of the county in which the property is located.

SECTION 2. Amends Section 17.46(b), Business and Commerce Code, to redefine the term "false, misleading, or deceptive acts or practices."

SECTION 3. Repealer: Section 5.017 (Fee for Future Conveyance of Residential Real Property and Related Lien Prohibited), Property Code.

SECTION 4. Makes application of Section 5.205, Property Code, as added by this Act, prospective to January 1, 2012.

SECTION 5. Effective date: upon passage or September 1, 2011.