

## **2008 LEGISLATIVE CONFERENCE PRIVATE TRANSFER FEES**

### **Question Presented:**

Should OAR initiate or support legislation that would restrict the ability to impose private transfer fees on real property transactions in Oregon?

### **Overview:**

Private transfer taxes, as they are commonly referred to, are most prevalent in California and have been in existence for a number of years. Although they look and act like a tax, this is not an accurate description in that only government retains the ability to tax. More appropriately, these costs should be referred to as a private transfer fee. At their most basic level, these private transfer fees are deed restrictions imposed by an owner of real property which requires a fee to be paid to a specified individual or organization every time the property is sold within the defined time period. Where these fees are being imposed they currently range from .05 percent to 1.75 percent of the purchase price. In addition, since this fee is part of a private transaction, there is no requirement that the proceeds of these fees be used to benefit the individual property or the neighborhood. There is no oversight to validate that these fees are being used for the purpose specified, and they are actually worse than a tax in that there is no vote on the application of these fees.

As mentioned, these private transfer fees are most common in the state of California but are beginning to crop up in other states as well. Historically, they began in California as a way for builders to reduce opposition from various interest groups to the development projects that they were seeking approval for from local governments. In exchange for these groups to pull their opposition, some developers agreed to fund the opposition group's pet projects with future revenue from the private transfer fees being imposed on properties within their proposed developments. The impact on new home sales within these developments has not been negative, largely because these fees are not assessed on the first sale but on subsequent transactions. In addition, the disclosure and explanation of these fees has been weak as well. While builders insist that they have the right to negotiate with buyers over the terms and conditions of a property's sale, in fact there has been no disclosure of this fee until the final closing documents when buyers have already signed a binding sales contract and put a substantial amount of cash down.

Most frequently, in the instances when private transfer fees are a part of new development, these fees have come about as a result of negotiations with affordable

housing advocates, environmentalists, and other interest groups. In fact, with this as a tool, builders can more easily agree to every sort of interest group demand in order to more easily obtain permits while passing on these costs to future consumers at the closing table. There are examples of builders using this revenue to pay for their “affordable housing” mandates, build hiking trails, and to fund a foundation that promotes “family farming and ranching”. These fees have been referred to as “a private solution to meet conditions often placed on local development approvals”.<sup>1</sup>

In addition, these private transfer fees have shown up in other transactions where the benefit is only to the individual as a source of “substantial passive income”.<sup>2</sup> This practice, commonly referred to as Freehold Licensing, is beginning to be promoted in a number of states through a unique “business method patent” called the GenEstate Legacy Covenant. This covenant is designed to run with the land for 99 or more years and is promoted as an asset that can be sold, bequeathed, donated and added to the asset side of an individual’s asset sheet with no off-setting liability. While this “business plan” is promoted to individuals as a benefit of ownership and improvement of real property, it is also designed for developers to address “environmental and housing pressures” by enabling developers and other property owners to better align the sale price of their real estate with current economic levels and reserving the right to additional compensation based on the values of those properties in the future.

As mentioned previously, private transfer fees on new development are most frequently not assessed on the first sale transaction. Historically, the disclosure and explanation of these fees have been weak and California in particular has worked to create a stand-alone document to explain this cost to future buyers. Only California explicitly requires specific disclosures related to private transfer fees.<sup>3</sup> As of January 1, 2008 the transferor must now provide an additional disclosure statement providing specified information regarding the fees. This disclosure form mandates information regarding: 1) that this transfer fee is required as a part of the transaction; 2) the percentage of the home price constituting the private transfer fee; 3) the duration of the payment obligation; and 4) the recipient of the private transfer fee payment.

Although there is now more transparency in California as a result of the 2007 legislation, the issue of the impact of private transfer fees to prospective home buyers is not resolved. There is no restriction on where or how the proceeds from these private transfer fees can be spent and no accountability or oversight of the recipients of these funds. In addition, there are no limits on how long a private transfer fee may be imposed as well as no limits on the amount of fees that can be imposed on prospective home buyers.

Texas is the only other state that has to date enacted legislation explicitly addressing private transfer fees. The legislation passed in their 2007 session prohibits these fees, with the exception of certain specified situations, such as those fees paid to the property

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<sup>1</sup> Quote taken from the building industry’s anti-SB670 fact sheet referenced in an article by Steven Greenhut for the Orange County Register on March 11, 2007. SB 670 was introduced by Sen. Lou Correa, D-Anaheim to outlaw the practice of private transfer fees in California.

<sup>2</sup> Referenced from the Freehold Licensing promotional material at [www.FreeholdLicensing.com](http://www.FreeholdLicensing.com)

<sup>3</sup> Referencing AB 980 signed in October 2007 and taking effect January 1, 2008.

owners association that manages or regulates the subdivision, the association's managing agent, charitable entities, or governmental entities. The law is silent in other jurisdictions but many have noted planned or existing private transfer fees in Arizona, Nevada, and Virginia. Other states limit similar fees in narrow contexts such as:

\*Alaska prohibits transfer fees in rental agreements between a mobile-home park owner and a mobile-home park tenant – no contract may require either a tenant selling his or her mobile home to another party or a party desiring to purchase a mobile home from a tenant to pay a transfer fee;

\*Minnesota law generally limits the term of any long-term private covenants; and

\*Pennsylvania law permits a condominium unit owners' association, a cooperative association, or a planned community unit owner's association to 'impose a capital improvement fee, but no other fees, on the resale or transfer of units.'<sup>4</sup>

Oregon law contains no state statutes or regulations specifically addressing the disclosure of private transfer fees, no limitations on the application of private transfer fees, nor any statutory definition of permitted private transfer fees. With respect to real estate licensee responsibility relating to private transfer fees, there are currently no specific provisions; however, general agency duties to 'deal honestly and in good faith' and to disclose known material facts that are 'not apparent or readily ascertainable' would apply.

## Conclusion

Proponents of private transfer fees maintain that the opposition from real estate practitioners is simply about preserving their commission. "REALTORS® never complain that a house is too expensive" and they stand to benefit from front-loading these costs into the price of a first home.<sup>5</sup> Opponents are concerned that without any oversight there are too many risks and no incentive to stop excessive fees from being charged. Additionally, there are concerns over disclosure and that, without oversight, the practice will become unruly with no centralized way to find out which properties have fees and where the funds are going.

Whether imposed by a developer or a private individual, private transfer fees create the same public policy issue for Oregon REALTORS® that public transfer taxes have historically. These additional costs continue to create barriers for homeownership without the opportunity for public input on the value of the purpose cited. Whether it is, as the building industry's fact sheet cited "...a private sector solution to meet the conditions often placed on local development approvals" or a "source of

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<sup>4</sup> Referencing the Annual Report Executive Summary from the National Association of REALTORS® February 2008.

<sup>5</sup> Quote from Kimberly Dellinger, legislative advocate for the California Building Industry Association in a REALTOR® article published 9/01/2007.

SUBSTANTIAL PASSIVE INCOME” as Freehold Licensing.com claims, private transfer fees can risk further burdening and reducing homeownership opportunities in Oregon.