

REQUEST FOR CONSIDERATION OF PROPOSED LEGISLATION

TO: S. Lester Tate III, Georgia Bar President
sltate3@mindspring.com

Judge Thomas E. Cauthorn, III, Chair, Advisory Committee on Legislation
tcauthorn@cauthornnohr.com

Tom Boller
tom@gacapitolpartners.com

FROM: Patrise Perkins Hooker, Chair, Executive Committee, Real Property Law Section
pperkinshooker@beltline.org

John E. Taylor, Co-Chair, Legislative Subcommittee,
Executive Committee, Real Property Law Section,
john@taylorlegal.net
770-587-9777

RE: Proposed Prohibition of Transfer Fee Covenants (copy attached)

DATE: August 30, 2010

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The Executive Committee, Real Property Law Section, submits this Request pursuant to Section 1.02 (a) (1) of Standing Board Policy 100, as follows:

(i) The specific legislation, if any, which is pending or proposed:

The attached proposed legislation would be an addition to the Georgia Code and reflected as new § 44-14-14.

(ii) A statement of the issues addressed by the legislation:

Senate Bill 494 submitted during the recently completed legislative session, if passed, would have prohibited so-called “transfer fee covenants”. The Executive Committee of the Real Property Law Section voted to support SB 494, with modifications, but the section’s request for consideration of a formal position could not be submitted to ACL for timely consideration. The Bill did not make cross-over to the House. The attached proposed legislation is an attempt to address the issues raised in SB 494.

Transfer fee covenants provide that, upon each sale of a parcel of property subject to the covenants (*e.g.*, each lot in a subdivision), a transfer fee (typically equal to 1% of the sales price) must be paid to a private third party (typically the property’s developer or its trustee), who otherwise has no connection to the property or the transaction. The

developer or other seller establishes the covenant by either recording a covenant in the local public record or including the covenant in the deed for the property or any portion of it. Typically, these covenants are in effect for 99 years and are applied to residential properties, although they are also of concern in regard to commercial properties.

The proposed bill, drafted in close consultation with attorneys who represent condominium and homeowner and property owner associations, exempts from its proposed prohibition legitimate fees and assessments payable to those associations, requiring, for example that any fees and assessments be utilized to pay the operating costs of the association and the affected property.

(iii) A summary of the existing law:

The status of these covenants under existing law is unclear. Proponents of the covenants argue that they constitute “covenants running with the land” and are therefore enforceable. Critics argue that they do not satisfy the requirements for “running with the land” and therefore do not bind successors in ownership. Since the use of these covenants is relatively new, to our knowledge dispositive case law does not exist. Eighteen states have restricted or prohibited transfer fees to prevent consumers from being exploited. Sixteen states ban them outright, while California and Texas impose restrictions. We understand that opponents of the covenants in Texas will push for a full ban next year.

(iv) Principal known proponents or opponents of the legislation and, if possible, a brief statement of the reasons for opposition or support by the other interests:

Proponents of these covenants, such as Freehold Capital Partners, argue that these transfer fees represent a future income stream that can be monetized, and perhaps eventually pooled together for securitization (just as mortgages have been), enabling land owners to sell their transfer fee interests in the securities markets and thus creating a source of capital that can be used to pay off mortgage loans, other debt, develop infrastructure and so on. Opponents, including the American Land Title Association (“ALTA”), counter that these covenants:

“force consumers to pay more to own property in a less secure land transfer system. These covenants require consumers to pay thousands of dollars to third parties that hold no ownership interest in the property for the right to buy or sell real estate. These covenants provide no benefit to consumers or the public, but rather cost consumers money, complicate the safe, efficient and legal transfer of real estate and depress home prices.”

(quoted from ALTA Private Transfer Fee Covenant One Pager). As noted above, the responses of the states that have considered the matter range from prohibiting the fee covenants outright to prescribing specified limitations and requiring certain disclosures.

(v) A listing of any other committees or sections which may have an interest in the legislation and a certification that any such committees have been provided a copy of the proposal simultaneous to its transmission to the Advisory Committee on Legislation:

We are unaware of any other committees or sections which may have an interest in the legislation.

(vi) The position which the committee, section or group recommends be adopted by the State Bar:

The Executive Committee of the Real Property Law Section voted on August 28, 2010, to introduce the proposed bill attached. The Committee believes that transfer fee covenants, if their use is not curbed by this bill or other legislation to prohibit or prescribe adequate limitations and requirements on their use, are likely to impose increased and unnecessary risk upon title examiners and title attorneys and to increase the cost and complexity of, and the time required to close, real estate transactions. In addition, these covenants are potential restraints on alienation which would impact the ability of subsequent sellers to sell the property unrestricted. They also create the opportunity for sellers to hide and camouflage fees to which they would ultimately be entitled for decades upon the subsequent resale of the same property.

A BILL TO BE ENTITLED

AN ACT

To amend Article 1 of Chapter 14 of Title 44 of the Official Code of Georgia Annotated, relating generally to mortgages, conveyances to secure debt and liens, so as to prohibit a fee for a future conveyance of real property except under limited circumstances; to provide a definition; to provide for related matters; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1.

Article 1 of Chapter 14 of Title 44 of the Official Code of Georgia Annotated, relating generally to mortgages, conveyances to secure debt and liens, is amended by adding a new Code section to read as follows:

“44-14-14

- (a) A restriction or covenant running with the land applicable to the conveyance of real property that requires a transferee or transferor of real property or the transferee’s or transferor’s heirs, successors, or assigns to pay a declarant or other person imposing the restriction or covenant on the property or a third-party designated by a transferor or transferee of the property, or a successor, assignee or designee of any thereof, a fee in connection with a future transfer of the property shall be prohibited. A restriction or covenant running with the land that violates this Code Section or a lien purporting to encumber the land to secure a right under a restriction or covenant running with the land that violates this Code Section is void and unenforceable. For purposes of this Code Section, a conveyance of real property includes a conveyance or other transfer of an interest or estate in real property.
- (b) This Code Section shall not apply to a restriction or covenant that requires a fee associated with the conveyance of property to be paid to:

- (1) A property owners' association, formed for the purpose of exercising the powers of the property owners association pursuant to the Georgia Property Owner's Association Act, or
- (2) An association formed for the purposes of exercising the powers of the association of any condominium created pursuant to the Georgia Condominium Act, or
- (3) A property owner's association, formed for the purposes of exercising the powers of an association of property owners that has not been formed pursuant to or which has not adopted the Georgia Property Owner's Association Act, provided that the declaration of covenants and association governing instruments provide for the assessment and collection of assessments and fees, on account of transfer or otherwise, and further provide that:

- i. all such fees shall be utilized and applied solely for payment of the common expenses for the operation of the association including the maintenance, repair, renovation, restoration, or replacement of any common elements,

- ii. any lot owner, mortgagee or holder of a deed to secure debt to a lot, person having executed a contract for the purchase of a lot, or lender considering the loan of funds to be secured by a lot shall be entitled upon request to a statement from the association or its management agent setting forth the amount of assessments or transfer fees payable to such association that are past due and unpaid together with late charges and interest applicable thereto against the lot. Such request shall be in writing, shall be delivered to the registered office of the association, and shall state an address to which the statement is to be directed. Failure on the part of the association, within five business days from the receipt of such request, to mail or otherwise furnish such statement regarding amounts due and payable shall cause any lien for assessments or transfer fees payable to such association to be extinguished and of no further force or effect as to the title

or interest acquired by the purchaser or lender; if any, as the case may be, and their respective successors and assigns, in the transaction contemplated in connection with such request. The information specified in such statement shall be binding upon the association and upon every lot owner. Payment of a fee not exceeding \$10.00 may be required as a prerequisite to the issuance of such a statement if the instrument so provides, and

iii. all sums lawfully assessed by the association against any lot owner or lot associated with the transfer or conveyance of title to the lot shall be subordinate to the following;

1. Liens for ad valorem taxes on the lot;
2. The lien of any first priority mortgage or deed to secure debt covering the lot and the lien of any mortgage or deed to secure debt recorded prior to the recording of any declaration creating or reserving the right to require payment of a transfer fee;
3. The lien of any secondary purchase money mortgage or deed to secure debt covering the lot provided that neither the grantee nor any successor grantee on the mortgage or deed to secure debt is the seller of the lot.

(c) Any valid fees imposed by an association described in (b)(1) or (b)(2) or (b)(3) in connection with the conveyance of an interest in property shall

- (1) be a sum lawfully assessed by the association and with respect to (b) (1) or (b) (2), subject to the same lien priority, restrictions, limitations and other provisions of § 44-3-232 or § 44-3-109, as applicable;
- (2) no longer be enforceable should the property become no longer subject to, in the case of (b)(1) and (b)(2) above, covenants made subject to § 44-3-222, et seq. or §44-3-71 et seq., as applicable, or in the case of (b)(3) above, those recorded covenants which are administered by a property owners association not subject to the Georgia Property Owners Association Act; and
- (3) no longer be a lien on the property four years after they first become due.

(d) A conveyance of an interest in real property by gift, devise, non-judicial or judicial foreclosure, deed in lieu of foreclosure, court order or operation of law shall be exempt from any permissible fees under this code section.

(e) This bill will be effective upon signature by the Governor.