

## **BILL ANALYSIS**

C.S.H.B. 8  
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Business & Industry  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

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. C.S.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.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

C.S.H.B. 8 amends the Property Code to establish that a private transfer fee obligation is not binding or enforceable against a subsequent owner or subsequent purchaser of an interest in real property and is void. The bill establishes that for purposes of the bill's provisions, the following payments are not considered private transfer fee obligations:

- 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;
- 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 property interest is transferred to the purchaser;
- interest, a fee, a charge, or another type of payment to a lender under a loan secured by a mortgage on the property;
- 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;
- 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;
- a fee payable to or imposed by a governmental entity in connection with recording the

transfer of the property;

- 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 an association's records or an estoppel letter or certificate issued by such association or the person managing the association or the association's designated representative, 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, paid to an association belonging to any one of several types of associations specified under the bill's provisions;
- 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; or
- 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 certain provisions of the federal Internal Revenue Code of 1986, only if the organization uses the payments to directly benefit the encumbered property by supporting or maintaining only the encumbered property, constructing or repairing improvements only to the encumbered property, or providing activities or infrastructure to support quality of life, including cultural, educational, charitable, recreational, environmental, and conservation activities and infrastructure, that benefit only the encumbered property.

C.S.H.B. 8 authorizes the direct benefit to the encumbered property 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. The bill authorizes an organization to provide a direct benefit to the encumbered property if the organization provides activities or infrastructure to support the quality of life to the general public for a fee. The bill authorizes the organization to provide such activities and infrastructure to another organization exempt from federal taxation under certain provisions of the Internal Revenue Code of 1986, at no charge for de minimis usage without violating the requirements of the bill's provisions.

C.S.H.B. 8 requires a person who receives a private transfer fee under a private transfer fee obligation created before the bill's provisions take effect to file for record, on or before January 31, 2012, a "Notice of Private Transfer Fee Obligation" in the real property records of each county in which the property is located. The bill requires multiple payees of a single private transfer fee to designate one payee as the payee of record for the fee. The bill sets out form and content requirements for a notice of private transfer fee obligation. The bill requires a person required to file a notice of private transfer fee obligation to refile the notice on or before January 31 of each year in which a private transfer fee may be collected or received and to 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. The bill requires a person who amends a notice of private transfer fee obligation to include the recording information of the original notice filed and the legal description of the property subject to the obligation. The bill, if a person required to file a notice fails to comply with notice requirements, prohibits payment of the private transfer fee from being a requirement for the conveyance of an interest in the property to a purchaser and establishes that the property is not subject to further obligation under the private transfer fee obligation and that the obligation is void.

C.S.H.B. 8 requires the payee of record on the date a private transfer fee is paid under an obligation subject to the notice requirements to accept the payment on or before the 30th day after the date the payment is made. The bill, if the payee of record fails to accept the payment on or before the specified day, requires the payment to be returned to the purchaser; prohibits the payment of the private transfer fee from being a requirement for the conveyance of an interest in the property to a purchaser; establishes that the property is not subject to further obligation under the private transfer fee obligation; and makes void the private transfer fee obligation.

C.S.H.B. 8 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 the prohibition against certain private transfer fees and provisions for the preservation of private real property rights. The bill establishes that a provision that purports to waive a purchaser's rights under the bill's provisions is void.

C.S.H.B. 8 makes a person who imposes or enters into an agreement imposing a private transfer fee obligation in the person's favor in violation of the prohibition liable for damages resulting from the imposition of the obligation, including the amount of any private transfer fee paid and 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.

C.S.H.B. 8 authorizes the attorney general to institute an action for injunctive or declaratory relief to restrain a violation of the bill's provisions and, in addition, to institute an action for civil penalties against a payee for a violation of statutory provisions relating to conveyances in general. The bill caps such a civil penalty at an amount equal to two times the amount of the private transfer fee charged or collected by the payee in violation of the bill's provisions. The bill authorizes a court in which an action for civil penalties is pending to assess a civil penalty not to exceed \$250,000 if the court finds that a payee violated the bill's provisions with a frequency that constitutes a pattern or practice. The bill requires the comptroller of public accounts to deposit to the credit of the general revenue fund all money collected under these provisions.

C.S.H.B. 8 establishes that a person commits a false, misleading, or deceptive act or practice by violating the bill's provisions. The bill repeals a provision relating to a prohibition against a fee in certain deed restrictions or covenants for future conveyance of residential real property and a related lien.

C.S.H.B. 8 defines "encumbered property," "lender," "payee," "private transfer fee," "private transfer fee obligation," "subsequent owner," "subsequent purchaser," and "transfer."

C.S.H.B. 8 amends the Business & Commerce Code to add receiving a private transfer fee in violation of the prohibition against such fees to the list of activities included under the term "false, misleading, or deceptive acts or practices."

C.S.H.B. 8 repeals Section 5.017, Property Code.

### **EFFECTIVE DATE**

On passage, or, if the bill does not receive the necessary vote, September 1, 2011.

### **COMPARISON OF ORIGINAL AND SUBSTITUTE**

C.S.H.B. 8 contains a provision not included in the original defining "encumbered property."

C.S.H.B. 8 contains a provision not included in the original excluding a fee or charge paid to certain property owners' associations for a change of ownership entered in a property owners' association's records or for an estoppel letter or certificate from the types of payments considered private transfer fee obligations and specifying the types of property owners' associations to which such payments are made. The substitute omits a provision contained in the original excluding a fee or charge paid to a property owners' association as defined by the Property Code, including a fee or charge payable for an estoppel letter or certificate issued by the association or an authorized agent of the association, from the types of payments considered private transfer fee obligations.

C.S.H.B. 8 contains provisions not included in the original adding payments to an organization exempt from federal taxation to the list of payments not considered private transfer fee obligations if the organization uses the payments to directly benefit the encumbered property; allowing a collateral benefit to a community adjacent or in proximity to the encumbered property; authorizing an organization to provide a direct benefit to encumbered property if the organization provides activities or infrastructure to the general public for a fee; and authorizing the organization to provide certain activities and infrastructure to another organization exempt from federal taxation at no charge for de minimis usage.

C.S.H.B. 8 differs from the original by requiring a person who receives a private transfer fee to file for record a "Notice of Private Transfer Fee Obligation," whereas the original applies that filing requirement to a person who receives or collects such a fee.

C.S.H.B. 8 omits provisions included in the original authorizing a person to send a request to the payee of record requesting a copy of the most recently filed notice of private transfer fee obligation and a statement of the amount of the fee; requiring the payee to provide to the requesting party a copy of the notice and a statement of the private transfer fee amount; and establishing provisions relating to a payee's failure to comply with such requirement.

C.S.H.B. 8 differs from the original by requiring a seller of real property that may be subject to a private transfer fee obligation to provide written notice to a potential purchaser that the obligation may be governed by the prohibition against certain private transfer fees, whereas the original requires a contract for the sale of real property subject to an authorized private transfer fee obligation to describe the obligation and state that the obligation is governed by that same prohibition. The substitute omits a provision included in the original establishing the consequences of a failure by a contract subject to an authorized private transfer fee obligation to comply with the prohibition against certain private transfer fees.

C.S.H.B. 8 omits a provision included in the original authorizing the attorney general to recover reasonable attorney's fees, costs, and expenses incurred in obtaining injunctive relief or a civil penalty.

C.S.H.B. 8 contains a provision not included in the original establishing that a person commits a false, misleading, or deceptive act or practice by violating the prohibition against certain transfer fees.

C.S.H.B. 8 contains a provision not included in the original adding receipt of a private transfer fee in violation of the prohibition to the list of activities included under the term "false, misleading, or deceptive acts or practices."